STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1761

Elizabeth Howell,
Appellant,

vs.

City of Minneapolis,
Respondent.

Filed April 22, 2013
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Hennepin County District Court
File No. 27CV1122208

Kristin B. Rowell, Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota (for appellant)

Susan L. Segal, Minneapolis City Attorney, Darla J. Boggs, Lee C. Wolf, Robin H. Hennessy, Assistant City Attorneys, Minneapolis, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Stoneburner, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant homeowner challenges dismissal of her lawsuit against respondent city (1) seeking a declaratory judgment that homeowner is not responsible for repair of a retaining wall located near her property; (2) asserting a claim of abuse of process; and

(3) seeking an award of attorney fees. Because a material fact question exists with regard to responsibility for repair of the wall, we reverse the grant of summary judgment dismissing appellant's request for a declaratory judgment that (1) appellant is not responsible for the retaining wall; (2) appellant need not repair the retaining wall; (3) respondent must repair or replace the retaining wall; and (4) respondent cannot charge appellant for repair or replacement of the wall. Because the district court did not err in granting summary judgment on appellant's abuse-of-process claim and because the request for attorney fees is dependent on that claim, we affirm summary judgment on those claims.

FACTS

Appellant Elizabeth Howell owns a home in respondent City of Minneapolis (city) located at 4753 Drew Avenue South, on the corner of Drew Avenue South and West 48th Street. The legal description of Howell's property is "Lot 14, Block 11, Kensington, Hennepin County, Minn., according to the recorded plat thereof." The original plat map of the Kensington Addition, dated May 1887, states that the original owners of the land "donate and dedicate to the public use forever all streets as shown on the accompanying plat." As platted, 80 feet (40 feet on each side of the center line) is designated as West 48th Street, and the south side of Howell's property ends where the area designated for the street begins.

Currently, the paved portion of West 48th Street is 36 feet wide with an eight-foot-wide boulevard, six-foot-wide sidewalk, and eight-foot strip of land on both sides of the street. A substantial retaining wall runs along the south side of Howell's property,

between a portion of the strip of right-of-way that is adjacent to the property and the sidewalk. The wall turns 90 degrees north, running perpendicular to the sidewalk and along Howell's driveway and ends at her garage, which appears to be dug into the hillside. The record does not contain the dimensions of the wall, but photographs show that the portion adjacent to Howell's driveway is nearly as tall as her garage. The wall provides support to the soil north of the sidewalk and west of Howell's driveway.

In August 2008, the city inspected the retaining wall and determined that it violated the Minneapolis Code of Ordinances (MCO). The city asked Howell to "[r]epair or replace the retaining wall at this property in a professional manner" and cited MCO § 244.1590 as the support for its position. Between September 2008 and November 2011, Howell had more than ten interactions with the city in which the city continuously insisted that it was her responsibility to repair the wall and Howell continuously asked for the legal authority supporting that position, which was never fully provided by the city.

In November 2011, Howell sued the city seeking a declaratory judgment regarding responsibility for the retaining wall, asserting a claim of abuse of process, and seeking attorney fees. Specifically, Howell sought a declaratory judgment:

> 1. Declaring that: Howell does not own the property on which the retaining wall sits at the southwest corner of 48th Street and Drew Avenue South, there is no right-of-way with respect to Howell's [p]roperty and the retaining wall, Howell is not an abutting property owner to the retaining wall, Howell is not an adjacent property owner to the retaining wall, and Howell's [p]roperty does not benefit from the retaining wall.
> 2. Declaring that: Howell is not responsible financially or otherwise for any repairs made to the retaining wall located at the southwest corner of 48th Street and Drew Avenue South, the [c]ity's issuance of the administrative citations to Howell

> was improper, the [c]ity's threat to attach baseless unpaid administrative fees to her taxes was improper, and the [c]ity pursued Howell as responsible for the retaining wall without a proper basis in law or fact.

The parties made cross-motions for summary judgment. After the hearing on the motions, the district court granted the city's motion for summary judgment on all claims and dismissed Howell's claims with prejudice. This appeal followed.

DECISION

I. Summary judgment standard of review

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). When the facts are not in dispute, we review the district court's application of law de novo. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact for trial exists where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

II. Declaratory judgment on responsibility for repair of retaining wall

MCO § 244.1590 (2013) requires that "[e]very fence and retaining wall on or adjacent to residential property shall be kept well mended and in good repair, consistent with the design thereof." Because the ordinance is drafted in the passive voice, it does

not identify who is responsible for repair, but both parties and the district court construe the ordinance to place the responsibility for repair on the owner of the residential property to which a retaining wall is adjacent. But Howell argues that because the retaining wall is located in the right-of-way dedicated exclusively to the city, eight feet away from her property line, the retaining wall is neither on nor adjacent to her property and the ordinance does not make her responsible for repairs. She argues that the district court misconstrued the ordinance to conclude that the wall is on and adjacent to her property, making her responsible for repairs.

A. Construction of ordinances

"The rules governing statutory interpretation are applicable to the interpretation of city ordinances." *Cannon v. Minneapolis Police Dept.*, 783 N.W.2d 182, 192-93 (Minn. App. 2010) (citing *Yeh v. County of Cass*, 696 N.W.2d 115, 128 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005)). As those rules are applied to the interpretation of city ordinances, "words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning . . . are construed according to such special meaning or their definition." Minn. Stat. § 645.08(1) (2012). And as this concept specifically applies to the MCO, "[w]ords and phrases used in [the MCO] shall be construed in their plain, ordinary and usual sense, except that technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." MCO § 3.10 (2013).

B. Definition of "adjacent to"

Howell argues that construing "adjacent to" to refer to a wall that is eight feet from her property line is contrary to the rule of construction that the city is presumed to intend that the entire ordinance be effective as written and that it does not intend an unreasonable or absurd result. *See* Minn. Stat. § 645.17(1), (2) (2012) (as applied to city ordinances through Minn. Stat. § 645.08(1), courts may presume that the city council "does not intend a result that is absurd, impossible of execution, or unreasonable" and that it does "intend[] the entire statute to be effective and certain"). Howell argues that the district court should have defined "adjacent to" in MCO § 244.1590 as it is used in MCO § 244.1600 (2013), which applies to fences "adjacent to" property lines: "Every fence hereafter erected *within five (5) feet of a property line* shall be erected in the following manner . . . ." (Emphasis added). We disagree.

Neither party asserts that "adjacent to" is a technical term, therefore we apply the common and approved usage of the word. *See* Minn. Stat. § 645.08(1). *Black's Law Dictionary* defines "adjacent" as "[l]ying near or close to, but not necessarily touching." *Black's Law Dictionary* 46 (9th ed. 2009). The *American Heritage Dictionary* defines "adjacent" as "1. Close to; lying near . . . . 2. Next to; adjoining." *American Heritage Dictionary* 22 (3rd ed. 1992). MCO § 244.1600 regulates future fences that will be built "adjacent to" (within five feet of) a property line. It is clear from the language of MCO § 244.1600 that the city has some specific interest in regulating new fences built within five feet of a property line, but nothing in the ordinances indicates that the city intends

the "within five feet" provision in this ordinance to limit the definition of "adjacent to" in all other ordinances.

The supreme court has stated that "[a]djacent does not necessarily mean adjoining or contiguous or abutting" and that "[t]he word is not inconsistent with the idea of something intervening; those tracts are adjacent which are not widely separated." *Booth v. City of Minneapolis*, 163 Minn. 223, 224-25, 203 N.W. 625, 625-26 (1925). There is no dispute that the wall lies outside Howell's deeded property line by approximately eight feet. Because the proximity of the wall to Howell's property falls within the common definition of "adjacent," the district court did not err by concluding that Howell is not entitled to judgment declaring that the retaining wall is not adjacent to Howell's property.

C. Fee ownership of land on which wall is located

One of the city's explanations for Howell's responsibility for the wall is that Howell

> hold[s] fee title interest in the streets abutting [her] property, up to the centerline of each street. . . . The retaining wall, together with the soil and grass that it supports, serve[s her] property. The fact that the wall does not lie within the legal boundaries of [her] established lot have no bearing on the foregoing analysis; rather, it suggests that [her] yard and retaining wall are encroaching on the city's right of way easement. Such encroachments are commonly allowed to exist; however the [c]ity bears no legal responsibility for the same.

But Howell has consistently argued that she does not hold fee title to the land under the city's right-of-way. The district court rejected Howell's arguments, noting that "it has

long been the law in Minnesota that the owner of property abutting a platted street holds the fee interest in the land that lies between the lot line of the property as platted to the center of the abutting street." We agree with the district court. *See Rich v. City of Minneapolis*, 37 Minn. 423, 424, 35 N.W. 2, 3 (1887) ("If the plaintiff owned the land abutting on the street, he presumably owned the fee in the street, such being the established presumption of the common law."); *see also Town of Rost v. O'Connor*, 145 Minn. 81, 83, 176 N.W. 166, 167 (1920) ("In [Minnesota] the title of the owner of land extends to the center of a street or highway abutting thereon, . . . subject to the general public right to take and use any thereof as may be necessary in the improvement of the highway for public use.").

When determining whether property abuts the right-of-way, the relevant demarcation is the land as platted, not the land as constructed or paved. *See Kooreny v. Dampier-Baird Mortuary, Inc.*, 207 Minn. 367, 369-70, 291 N.W. 611, 612 (1940) (holding that when the platted street was 66 feet wide but the public only utilized 60 feet of the right-of-way, the landowner owned the unused portion of the dedicated land until "taken by the public for its appropriate use"). The district court noted that the original plat map shows that Howell's property line abuts West 48th Street as platted, even if that roadway as paved does not abut the property line. The common-law rule does apply, and Howell has fee ownership of the land from her platted property line to the center of West 48th Street. The wall is about eight feet from her platted property line, within the public easement over which she holds a fee interest.

D. Howell has not established that the city acquired fee interest in the right-of-way based on language of the original grantors

As a general rule, the owner of the land at the time it was platted becomes "entirely disassociated" with the land's title and has no interest in the fee to the street when the land passes to a subsequent owner. *White v. Jefferson*, 110 Minn. 276, 283, 124 N.W. 373, 374-75 (1910). This rule is subject to an exception when the express written intent of the grantor is that the fee not belong to subsequent owners of abutting lots. *See Drake v. Chicago, Rock Island & Pac. Ry.*, 136 Minn. 366, 367–68, 162 N.W. 453, 454 (1917).

Howell submitted the affidavit of expert witness Rick Little, the former Examiner of Titles for Hennepin County, who opined that the city, not Howell, owns fee title to the land underlying the right-of-way. Little's opinion is based in part on the relevant statute in effect at the time the plat was created, providing that:

> every donation . . . to the public . . . noted [on the plat] shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcels of land . . . ; and the land intended to be for the streets, alleys, ways, commons, or other public uses in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust for the uses and purposes set forth and expressed or intended.

Minn. Gen. Stat. ch. 29 § 5 (1878). Little asserts that because the streets in Kensington are "donated and dedicated" to the public use forever, fee title passed to the city by virtue of the statute. The city submitted the affidavit of expert witness William Brown, Hennepin County Surveyor since 2003. Brown opined that the dedication language in the plat means that park land was *donated* while the streets, alleys, and avenues were

dedicated as easements to the public. Brown explains that the 1878 statute defines the nature of two different property rights, one involving donated parcels of land and one involving land dedicated for streets, alleys, ways, commons, or other public uses. Brown states:

> In 2006 the Minnesota Society of Professional Surveyors, the Minnesota Association of County Surveyors, and the Real Property Section of the Minnesota Bar, collaborated to amend Minn. Stat. § 505.01, clarifying the long standing ambiguity of this issue.[1]

Brown opines that the city "never held a fee title interest in the public right-of-way areas noted" on the relevant plats. Noting the general principle of law that "where a street has been dedicated by the owner who platted the property, the fee title in the street rests in the ownership of the adjoining property," Brown opined that Howell has fee title to the dedicated streets that adjoin her property.

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[1] The amended statute currently provides in relevant part:

> Plats of land may be made in accordance with the provisions of this chapter, and, when so made and recorded, every donation of a park to the public shall operate to convey the fee of all land so donated, for the uses and purposes named or intended, with the same effect, upon the donor and the donor's heirs, and in favor of the donee, as though such land were conveyed by warranty deed. Land donated for any public use in any municipality shall be held in the corporate name in trust for the purposes set forth or intended. A street, road, alley, trail, and other public way dedicated or donated on a plat shall convey an easement only. Easements dedicated or donated on a plat shall convey an easement only.

Minn. Stat. § 505.01, subd. 1 (2012).

The district court rejected Howell's argument, relying on the supreme court's consistent interpretation from the inception of the statutory provision for land donated in plats that dedications and donations of land for purposes of streets, roads, and other public ways convey an easement only. *See Schurmeier v. St. Paul & Pac. R.R.*, 10 Minn. 82, 104, 10 Gil. 59, 78 (1865) ("[A]s to the lands intended for streets and alleys, the language is not that a fee-simple shall pass, but that it 'shall be held in the corporate name in trust to and for the uses and purposes expressed or intended.'"); *see also Betcher v. Chicago, Milwaukee, and St. Paul Ry.*, 110 Minn. 228, 234, 124 N.W. 1096, 1099 (1910) ("This statute, without substantial change of language, has been in force in this state ever since the organization of the territory of Minnesota."). We too are bound by the supreme court's interpretation of the law, and the district court did not err by concluding that Howell owns the fee title interest in the land to the center of West 48th Street subject to the city's right-of-way easement. The district court therefore did not err by concluding that Howell failed to establish that she is entitled to a declaratory judgment on three issues: (1) that she is not an abutting property owner to the retaining wall; (2) that she does not have fee title interest to the middle of the street; and (3) that there is no right-of-way easement in favor of the city over Howell's property.

F. City's obligation on right-of-way

On appeal, Howell asserts that the district court erred by failing to analyze the impact the city's right-of-way has on any obligation she has to repair the wall. She argues that the city's charter and multiple ordinances create an obligation for the city to maintain the land in its right-of-way. The city admits that it has a right-of-way easement

over the property on which the wall is located, but does not address Howell's argument on the effect of the easement on the duty to repair the wall. But Howell did not argue to the district court that it must analyze the impact of the city's right-of-way on its argument that she is responsible for repairing the wall. In fact, the only real mention of the city's right-of-way appears in her memorandum opposing the city's motion for summary judgment where Howell argues that "there is no right-of-way easement" over the land, arguing instead that the city owns the property outright. Issues not argued to and considered by the district court are waived on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We therefore decline to address this issue.

G. Lateral support

"It is settled law that every person has the right to the lateral support of the land adjoining his and is entitled to damages for its removal. This rule is based on the proposition that in a state of nature all land is held together and supported by adjacent lands through operation of forces of nature." *Brewitz v. City of St. Paul*, 256 Minn. 525, 531, 99 N.W.2d 456, 461 (1959).

> The right to the lateral support of adjacent soil is fully recognized in this state as an absolute right, so that, if the owner of such adjacent soil remove the support, he is liable without any question of negligence, for whatever injury ensues to the soil of his neighbor. . . .[I]n respect to this right, a municipal corporation, in its title to streets, (where the right to remove such support has not been acquired by condemnation,) stands on the same footing as an individual owner.

McCullough v. St. Paul, Minneapolis & Manitoba Ry., 52 Minn. 12, 15-16, 53 N.W. 802, 803 (1892). "The city may not divest the land-owner of what he is entitled to enjoy as a

natural right, and then tax upon him the cost of replacing what has been thus taken away." *Armstrong v. City of St. Paul*, 30 Minn. 299, 300, 15 N.W. 174, 174 (1883).

Howell argued to the district court that because the city owes a nondelegable duty of lateral support, the city cannot shift responsibility for maintenance of the retaining wall, which provides lateral support to her property, to Howell. The city's only response to this argument is to deny that the city took any action to deprive Howell's property of lateral support. And the district court failed to address the issue of the city's lateral support obligation other than to state, in a footnote, that regardless of fee ownership of the land on which the wall is located, the city has the authority under Minn. Stat. § 429.051 (2012) to assess the cost of repairs to Howell because her property is "undeniably benefited by any such repairs."[2] On appeal, Howell asserts that the district court erred by declining to analyze the city's lateral support obligation. We agree and conclude that the need for such analysis demonstrates the existence of a material fact question that precludes summary judgment on Howell's declaratory judgment action.

Both parties agree that there is no conclusive evidence about who constructed the wall or the purpose of the wall. As the district court noted, the wall adjacent to the sidewalk plainly benefits Howell's property: it provides lateral support for her property. The city, noting a portion of the wall abuts Howell's garage, argues that because 1924 construction permits for Howell's home show that the garage was constructed at the same

[2] The city has never sought to assess Howell for repairs to the wall under Minn. Stat. § 429.051 (2012) (the assessment statute), but if the city owes a duty of lateral support, it is doubtful that the city would be able to rely on this statute to shift responsibility for the wall to Howell.

time that the house was built, "it is reasonable to infer that the [w]all was also built at that time." The city describes the wall as "provid[ing] support to the soil along both [Howell's] driveway and along the south side of [Howell's] [p]roperty . . . and prevents soil from obstructing [Howell's] driveway and the adjoining sidewalk." But the city's argument merely supports Howell's argument that the wall provides lateral support and does not answer the question about the circumstances under which the need for lateral support arose.[3] This is a fact question that is not appropriately resolved by the city's assertion of reasonable inference. It is equally reasonable to infer that Howell's predecessors were not responsible for the grade of the street and sidewalk that the city placed on its right-of-way, which is considerably lower than Howell's adjacent lot, giving rise to an obligation of lateral support from the city. In order for the district court to determine whether the city has an obligation of lateral support there must first be a factual determination of who or what created the need for lateral support.

Because a material question of fact exists concerning the city's lateral support obligation, the district court erred by granting summary judgment to the city on Howell's request for judgment declaring that (1) Howell is not responsible for the retaining wall; (2) Howell need not repair the retaining wall; (3) the city must repair and/or replace the retaining wall; and (4) the city cannot charge Howell for repair or replacement of the wall.

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[3] The city appears to focus on who built the wall, but the real issue is who created the need for lateral support. There is nothing in the existing record to conclusively show that Howell's predecessors created that need.

III. Summary judgment on abuse-of-process claim

"The essential elements for a cause of action for abuse of process are the existence of an ulterior purpose and the act of using the process to accomplish a result not within the scope of the proceedings in which it was issued, whether such result might otherwise be lawfully obtained or not." *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997) (citing *Hoppe v. Klapperich*, 224 Minn. 224, 231, 28 N.W.2d 780, 786 (1947)), *review denied* (Minn. Oct. 31, 1997). The district court granted summary judgment to the city on Howell's abuse-of-process claim, concluding that "the record is devoid of any evidence of improper motive on the part of the [c]ity during its repeated efforts to enforce its legal right to compel [Howell] to pay for the repairs to the [w]all."

On appeal, Howell argues that her statement in an affidavit that "the [c]ity stated to [her] during a visit to inspect the retaining wall, 'Well, you know, money is pretty tight right now at the [c]ity'" is sufficient evidence to avoid summary judgment on this claim. We disagree.

In Howell's affidavit, she actually said: "during one of the visits at [her] house by a [c]ity inspector, the inspector stated to [her] something to the effect of, 'Well, you know, money is pretty tight right now at the [c]ity.'" There is no evidence in the record that the inspector who allegedly made this statement had any actual knowledge of the city's motivation for its actions, and the statement itself does not demonstrate that the city was acting with any improper motive. In her brief on appeal, Howell argues that the city should have proceeded under Minn. Stat. §§ 429.021, subd. 1(10), .051 (2012) (authorizing the city to maintain restraining walls and assess the cost on property

benefitted by such maintenance). She engages in extensive speculation regarding the city's reasons for "chasing [her] down," and asserts as a conclusion not supported by evidence that "[t]he [c]ity had no interest in figuring out the legal issues or using the proper procedure." No genuine issue for trial exists where, as here, "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH Inc.*, 566 N.W.2d at 69 (quotation omitted).

IV. Attorney fees

Howell asserts that the district court erred by granting summary judgment to the city on her claim for attorney fees. "The general rule in Minnesota is that attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008) (quotation omitted). There is no contract between the parties, and Howell does not point to any statute giving her the right to recover attorney's fees in this matter. Howell argues that attorney's fees are recoverable for abuse of process that does not otherwise result in a statutory award of sanctions.[4] But because the district court did not err by dismissing Howell's abuse-of-process claim, the district court did not err by dismissing her claim for attorney's fees.

Affirmed in part, reversed in part, and remanded.

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[4] Howell cites several unpublished, federal, and/or foreign cases supporting this proposition. We note that "[u]npublished opinions of the Court of Appeals are not precedential," Minn. Stat. § 480A.08, subd. 3(c) (2012), and "federal court interpretations of state law are not binding on state courts." *State ex rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002), *review denied* (Minn. Aug. 6, 2002).

256 Minn. 525
Supreme Court of Minnesota.

Fred G. BREWITZ, Respondent,
v.
CITY OF SAINT PAUL, Appellant.

No. 37687.
|
Nov. 13, 1959.

Synopsis

Action by property owner for damages caused by lowering grade of street adjoining property by city which had taken an easement by condemnation in and through property for purpose of constructing a slope from street base upward and onto owner's property. The District Court, Ramsey County, James C. Otis, J., rendered judgment for property owner, and city appealed. The Supreme Court, Nelson, J., held that where city lowered grade of street, property owner who contended that, after slope had been constructed and even though it had been constructed, land continued to wash, erode or fall away leaving gullies along slope and bank, had right to bring action against city for destruction of right of lateral support of his land by adjoining soil.

Affirmed.

West Headnotes (11)

[1] **Appeal and Error**
⇦ Jury as factfinder below in general

Reviewing court will view evidence in aspect most favorable to jury's verdict and where evidence is ambiguous, it must be construed in favor of party for whom verdict is rendered.

1 Cases that cite this headnote

[2] **Adjoining Landowners**
⇦ Land in natural state

Every person has right to lateral support of land adjoining his and is entitled to damages for its removal.

3 Cases that cite this headnote

[3] **Eminent Domain**
⇦ Weight and sufficiency

In action against city for damage to property caused by lowering grade of adjoining street, evidence sustained finding that purpose of city in original condemnation to obtain an easement for slopes was to minimize damage from removing lateral support occurring from lowering of grade and any consequent erosion or sliding of soil and that loss of lateral support resulted from lowering of grade and not from taking of easement for slopes. M.S.A.Const. art. 1, § 13.

1 Cases that cite this headnote

[4] **Adjoining Landowners**
⇦ Excavations, embankments, and structures affecting adjoining land

Where one digging on his own land causes adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall and the measure of damages is the diminution of the value of land by reason of falling of the soil, and it is immaterial whether this falling be called caving or washing, provided it is the natural and proximate result of removing the lateral support. M.S.A.Const. art. 1, § 13.

Cases that cite this headnote

[5] **Eminent Domain**
⇦ Recovery of damages

Damages are recoverable by an abutting landowner in action at law for consequential damages resulting from acts of municipality in lawfully changing an established grade or

otherwise altering its streets. M.S.A.Const. art. 1, § 13.

Cases that cite this headnote

[6] **Eminent Domain**
⇦ Compelling proceedings to assess compensation

Property owner whose property was damaged by removal of lateral support in grading of street could not decide for city what it was necessary for city to take and property owner was in no position to compel city to proceed under condemnation provisions of city charter as to lateral support. M.S.A.Const. art. 1, § 13.

Cases that cite this headnote

[7] **Eminent Domain**
⇦ Recovery of damages

Where city lowered grade of street at place that adjoined private property and took an easement by condemnation for purpose of constructing a slope from street base upward and onto property, property owner, who contended that, after slope had been constructed and even though it had been constructed, his land continued to wash, erode or fall away leaving gullies along the slope and bank, had right to bring action against city for destruction of right of lateral support of adjoining soil to land which he owned. M.S.A.Const. art. 1, § 13.

1 Cases that cite this headnote

[8] **Eminent Domain**
⇦ Matters concluded

Judgment in condemnation proceeding by city which had lowered grade of street where it adjoined private property and had taken an easement by condemnation in and through such property for purpose of constructing a slope from street base upward and onto property was not res judicata of property owner's claim for loss of lateral support resulting from lowering of street grade. M.S.A.Const. art. 1, § 13.

Cases that cite this headnote

[9] **Eminent Domain**
⇦ Damages

In action by property owner for damage to lot caused by lowering grade of adjoining street in connection with project in which city had also condemned an easement through lot for purpose of constructing a slope from street base upward and onto lot, evidence of cost of a retaining wall was proper to show whether damage could have been repaired, and lot preserved at a reasonable cost. M.S.A.Const. art. 1, § 13.

Cases that cite this headnote

[10] **Eminent Domain**
⇦ Matters concluded

Parties and their privies are only concluded by judgment in a condemnation proceeding as to all matters which were or could be put in issue in that proceeding. M.S.A.Const. art. 1, § 13.

Cases that cite this headnote

[11] **New Trial**
⇦ Conflicting evidence

A new trial should not be granted upon conflicting evidence unless verdict is so manifestly contrary to preponderance of evidence as to warrant inference that jury failed to consider all evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of dispassionately and honestly exercising their judgment upon all the evidence.

3 Cases that cite this headnote

**457 Syllabus by the Court.

*525 1. Every person has the right to the lateral support of the land adjoining his and is entitled to damages for its removal.

2. The measure of damages is the diminution of the value of the land by reason of the falling of the soil and it is immaterial whether this falling be called 'caving' or 'washing,' provided it is the natural and proximate result of removing the lateral support.

3. After the adoption in 1896 of the amendment to Minn.Const. art. 1, s 13, this court adopted the rule that damages were recoverable by an abutting owner in an action at law for consequential damages resulting from acts of a municipality in lawfully changing an established grade or otherwise altering its streets.

4. Plaintiff property owner could not decide for defendant city what it was necessary for the city to take and was in no position to compel defendant city to proceed under condemnation provisions of the charter as to lateral support.

5. Evidence of the cost of a retaining wall was proper to show whether or not the damage could have been repaired and the lot preserved at any reasonable cost.

6. Parties and their provies are only concluded by the judgment in a condemnation proceeding as to all matters which were or could be put in issue in that proceeding.

*526 7. A new trial should not be granted upon conflicting evidence unless the verdict is so manifestly contrary to the preponderance of the evidence as to warrant the inference that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling, or caprice, instead of dispassionately and honestly exercising their judgment upon all the evidence.

Attorneys and Law Firms

Louis P. Sheahan, Corp. Counsel, Robert E. O'Connell, Sp. Asst. Corp. Counsel, St. Paul, for appellant.

Thomas Malone, St. Paul, for respondent.

Opinion

**458 NELSON, Justice.

This case is brought by a property owner to recover for damage to his property caused by lowering the grade of an adjoining street. Plaintiff has occupied, improved, and maintained his property since November 1949. It is located in St. Paul and has a frontage of 297 feet on the east side of Clarence Street, which street runs in a northerly and southerly direction. Plaintiff makes the claim that as a result of street grading by the city of St. Paul his property has been damaged through interference with access respecting two driveways opening onto Clarence Street and that the grading also necessitated changes in the private sidewalk which runs to the front entrance of plaintiff's home in order to afford adequate access by foot. The city does not dispute these items of damage claimed by plaintiff nor the jury's findings on that issue. Plaintiff, however, was permitted, over objection by the city, to claim as damages loss of lateral support resulting from the grading and lowering of Clarence Street and in connection therewith to claim the need for a retaining wall to arrest continuing damage. The latter issues are before this court.

*527 The defendant city conducted two separate and distinct procedures relating to plaintiff's property. It lowered the grade of Clarence Street where it adjoins plaintiff's property and it then took an easement by condemnation in and through plaintiff's property for the purpose of constructing a slope from the street base upward and onto plaintiff's property.

The grading, between the years 1954 and 1956, resulted in a straight cut at the westerly edge of plaintiff's property removing the lateral support which plaintiff's property enjoyed from abutting Clarence Street. Prior to 1954, plaintiff's property sloped gradually to the west from his home to the point where it adjoined the easterly edge of Clarence Street. The grading resulted in a straight cut at the property line of 4.9 feet and 3.5 feet at the

center of Clarence Street. The defendant city based its figures on a survey taken by its engineers in the year 1955 which purported to show the natural level of Clarence Street prior to any excavation by the city, but the city had reduced the natural level of the ground prior to the survey while undertaking sewer and other improvements. One of plaintiff's witnesses, a Mr. Noyes from whom the plaintiff purchased his property, testified that the cut was approximately 10 feet in depth. Nevertheless the fact is established that it resulted in an unsupported sheer wall at the westerly edge of plaintiff's property. Plaintiff claims that it was at this stage that the lateral support was taken away from his property.

There is no evidence in the record that plaintiff has been compensated for this loss of lateral support. No mention is made of lateral support in the proceeding for condemnation of an easement. It is also clear that the sole object of the condemnation proceeding to acquire a slope easement extending back from the property line some 10.6 feet was to protect Clarence Street from collapsing soil entering the street excavation and to modify the cave-in and eroding effect which might in all probability become destructive to plaintiff's property. The testimony is quite convincing that the easement slopes which the city constructed did not eliminate the damages caused by the removal of the lateral support through the lowering of the street grade.

The condemnation proceeding was taken pursuant to St. Paul City *528 Charter, c. 14, entitled 'Local Improvements and Assessments Therefor.' As to general powers thereunder, see s 233, which reads in part:
'The municipal corporation of the City of St. Paul, by and through its council, is hereby vested with and authorized and empowered to exercise the following powers:

'(1) From time to time, to acquire for present or future public use by purchase, **459 gift, devise or condemnation any and all lands or easements therein for the following public uses and purposes:

'(c) For easements for the construction of slopes, retaining walls, for cuts and fills upon real property on any street, boulevard, parkway or other public street, thoroughfare or highway, or for any other public use or purpose.

'(2) To change the grade, to grade, to pave, with any kind of material or pavement, to curb, to boulevard, to wall, to bridge, any street, alley, lane, parkway, boulevard or other public thoroughfare or highway; * * *.'

Other pertinent provisions are: Inauguration of public improvements and procedure, ss 239 to 242; preliminary assessment for local improvements, s 244; final assessment, s 245; judicial confirmation, s 246; hearing —jurisdictional defects, s 247; inaugurations—awards in condemnations, s 269; confirmation of awards, s 270; appeals—notice pleadings—jurisdiction of court, s 271.

The defendant contends that plaintiff is foreclosed from asserting any claim for damages by reason of the aforesaid condemnation proceeding. It asserts that the proceeding was conclusive on the plaintiff regarding removal of lateral support and furthermore that since the plaintiff has taken no appeal from the condemnation proceeding he is precluded from presently raising the question.

Plaintiff takes the view that the sloping which was done by the city to stop the cave-ins, washouts, and soil erosion failed in its purpose and that as a result it has become incumbent on the city to take an easement for and to construct some type of retaining wall to alleviate the situation. Plaintiff therefore contends that the condemnation proceeding *529 to obtain an easement for slopes did not involve the removal of lateral support nor has he been compensated therefor.

Plaintiff further contends that the situation presented is somewhat analogous to that which came before the court in McCullough v. St. Paul, M. & M. Ry. Co., 52 Minn. 12, 15, 53 N.W. 802, 803, where:

> '* * * The company, in constructing its road in the usual manner, excavated to a depth of 18 or 20 feet, on the strip so acquired by it, up to, or very nearly to, the line dividing that strip from the plaintiff's lots. It endeavored, successfully at first, to sustain the soil at the side of the excavation by driving piles; but finally, from some cause, the piles gave way, and all support on that side to the soil of plaintiff's lots being

removed, a large part of the surface of the lots slid into the excavation.'

This court in the McCullough case, in respect to the right to the lateral support of adjacent soil, which it termed an absolute right, said that a municipal corporation, in its title to streets (where the right to remove such support has not been acquired by condemnation), stands on the same footing as an individual owner. To justify its removal of the lateral support to the soil of an adjacent owner it must show a right to do so acquired either by purchase or condemnation. The court further said that as there was no purchase of the right in that case the only question was, did the company acquire it by the condemnation proceeding. While the trial judge in the court below directed the jury to return a verdict for the defendant, this court on appeal reversed. Also see, Dyer v. City of St. Paul, 27 Minn. 457, 8 N.W. 272; Nichols v. City of Duluth, 40 Minn. 389, 42 N.W. 84; Wallenberg v. City of Minneapolis, 111 Minn. 471, 127 N.W. 422, 856; Hirsch v. City of St. Paul, 117 Minn. 476, 136 N.W. 269.

In the case at bar the jury returned a verdict in plaintiff's favor in the total sum of $1,750, $400 thereof being on account **460 of the grading's adversely affecting access from plaintiff's property to Clarence Street and $1,350 on account of the grading's adversely affecting lateral support of plaintiff's property.

[1] The defendant city thereupon moved the trial court for judgment in its behalf notwithstanding the verdict or for a new trial. This being *530 denied, defendant city appeals. The plaintiff is entitled to the benefit of the rule that the reviewing court will view the evidence in the aspect most favorable to the jury's verdict. Likewise, where the evidence is ambiguous, and some of it appears to be in the case at bar, it must be construed in favor of the party for whom the verdict is rendered. 14 Dunnell, Dig. (3 ed.) ss 7142, 7159.

A careful reading of the court's charge clearly indicates that the court limited and restricted the issues submitted to the jury to removal and loss of lateral support and resulting damages, if any, growing out of the regrading of Clarence Street and the excavating involved. The question of damages for loss of dirt, trees, hedge, etc., which had been encompassed within the slopes condemnation, was entirely bypassed as was any damage due to construction of the slope. Any damages which might be awarded by the jury were restricted to the lowering of the grade of the street and such other damages as stand admitted by the city. The court gave the following instructions to the jury: 'It is essential that you remove from your minds all consideration of the particular damage if any, resulting from the City's taking the easement for slopes, including the taking not only of the soil, but any shrubs or trees in the area included in the easement.

'The references which will be made to lateral support constitute the lateral support beyond the boundaries of the easement. The questions involved in taking the easement for slopes are the subject of another separate proceeding and are not before this jury. However, this does not take from you the question of whether or not the lateral support beyond the boundary of the easement has been affected by reason of the grading or the question of whether the trees now on the property have been damaged by the grading.

'* * * So the single issue here involved is the question of whether or not the property was damaged because of the lowering of the street grade below the natural ground level.

'Under the law of Minnesota private property may not be taken, destroyed or damaged for public use without just compensation. Just compensation as it is used in our law means an amount equivalent *531 to the difference between the fair market value of the property before, and the fair market value of the property after the grading was completed unless the cost of restoring the property to its natural state is less than the difference in value in which case the cost of restoration is the measure of damages. [1]

'Mr. Brewitz also claims damages for removal of the lateral support of his property along his west boundary line and beyond the line of the easement for slopes by reason of the grading. Under the law of this state a property owner has the right to have his land supported by the land of his neighbors and if the removal of such support results in damage to the property the owner is entitled to compensation. As I have said, in the

consideration **461 of this claim you will not under any circumstances make any award for removal of soil, shrubs or trees along the west line under the City's easement for slopes, since this matter was the subject of a separate proceeding. You will only decide whether the remaining property has had the lateral support removed by the grading and if so, whether damage resulted.'

[2] 1. It is settled law that every person has the right to the lateral support of the land adjoining his and is entitled to damages for its removal. This rule is based on the proposition that in a state of nature all land is held together and supported by adjacent lands through operation of forces of nature. Sime v. Jensen, 213 Minn. 476, 7 N.W.2d 325.

[3] We are thus confronted with the question whether the plaintiff is entitled to damages from the defendant city, upon the record herein, for removal of lateral support from his land due to lowering the street grade; whether he is barred from recovering his damages for loss of lateral support because the defendant city has condemned a portion of his property for an easement to construct a slope which has failed to accomplish its purpose of stopping owner's land from caving in; and *532 whether the reasonable cost of constructing a retaining wall, if rendered necessary because of the city's removal of lateral support, is a proper element for the jury's consideration in determining damages.

It is important to ascertain what the parties in fact contemplated at the time the original condemnation was instituted for obtaining the slope easement. Clearly no condemnation for lowering and grading the street is included in the proceeding. Had the city proved condemnation for removal of lateral support or compensation therefor under the original condemnation proceedings, then he would be entitled to no more. However, there were no condemnation proceedings required for the grading since the city had acquired the right to use the street and to occupy the width of the property graded to the extent of 60 feet. The condemnation ordinances as we read them do not spell out a taking in the present easement condemnation as to lateral support. It is to be observed that a common-law action such as the one commenced by the plaintiff in the instant case is one authorized by constitutional amendment, for damages resulting to adjacent property for the taking away of lateral support, not for the taking of the property itself. [2]

We think the trial court in its memorandum disposed of the issue clearly in the following words:
'The purpose of taking an easement for slopes is to minimize damage for removing the lateral support to the remainder of the property occurring from the lowering of the grade and any consequent erosion or sliding of the soil. If in fact the easement for slopes was insufficient to prevent damage for removing the lateral support in the grading operation, there is no logical reason or authority for preventing the owner from recovering damages if they are limited to those occasioned by the lowering of the grade and not those occasioned by work done pursuant to the easement. * * *

'* * * it is the opinion of the Court that removal of lateral support *533 for which the jury awarded damages, occurred from lowering the grade and not from taking an easement for slopes under the Court's instructions. To sustain its position the City must in effect claim that the easement designed to prevent the loss of lateral support in fact aggravated the loss of lateral support. **462 There was evidence from which the jury could find damage for loss of lateral support from lowering of the grade, and no evidence was submitted by the City to show that such damage in fact occurred from taking of the easement for slopes.'

In an early Minnesota case, Nichols v. City of Duluth, 40 Minn. 389, 42 N.W. 84, Mr. Justice Mitchell speaking for the court said:
'A land-owner has a right to the lateral support of the soil in the adjoining street, and a city is liable for any damage occasioned by removing this lateral support in grading the street. Following Dyer v. City of St. Paul, 27 Minn. 457, 8 N.W. 272.

'It is no defense that the act was necessary for the purpose of grading. If the city desires to excavate the soil of the street which naturally renders lateral support to adjoining property, it must acquire the right to do so by the exercise of eminent domain, or else substitute other lateral support

in place of the soil removed. This right of the lateral support of the adjoining soil, being a natural one, is absolute, and independent of any question of negligence.'

[4] 2. Again in Schultz v. Bower, 57 Minn. 493, 496, 59 N.W. 631, Mr. Justice Mitchell, speaking for the court, although granting a new trial because of error in the court's instructions to the jury, said that the following suggestions as to the law of such cases might well be made use of in view of a second trial:

> '* * * The right of lateral support from the adjacent soil is an absolute right of property; and, as a consequence of this principle, it follows that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy against the party by whom the mischief has been done. This does not depend upon negligence, but upon the violation of the right of property. (Cases cited.) This unqualified or absolute right of lateral support applies only to the land itself, and not to the buildings or other artificial structures. Where *534 one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall. Sedg.Dam. s 925. Hence the measure of damages is the diminution of the value of the land by reason of the falling of the soil; and it is immaterial whether this falling be called 'caving' or 'washing,' provided it is the natural and proximate result of removing the lateral support.'

[5] 3. In Collins v. Village of Richfield, 238 Minn. 87, 55 N.W.2d 628, 629, it was pointed out that prior to the adoption in 1896 of the amendment to Minn.Const. art. 1, s 13, which inserted the words 'destroyed or damaged' into the section, damages for injury to private property caused by a change of grade of a street were not recoverable against a municipality except in those cases where adjoining property was in fact invaded or the work of improvement had been negligently performed. This court then held that after the amendment had been adopted damages were recoverable by an abutting owner in an action at law for consequential damages resulting from acts of a municipality in lawfully changing an established grade or otherwise altering its streets, citing numerous cases, among them Wallenberg v. City of Minneapolis, supra. It was concluded that there could be no question, therefore, that an action for damages for consequential injuries from change of grade existed.

[6] 4. We think there is merit in plaintiff's contention that the lateral support was removed from his property when the defendant city reduced the grade and was at no time taken in the slope easement proceeding. Plaintiff's testimony is clear and unequivocal that after the slope had **463 been constructed and even though it had been constructed, his land continued to wash, erode, or fall away leaving gullies along the sloping bank. Defendant appears to rely on Hirsch v. City of St. Paul, 117 Minn. 476, 136 N.W. 269, as controlling in this litigation by distinguishing the facts. Using the Hirsch case and attempting to distinguish the facts does not alter the present situation. Plaintiff contends that he has no quarrel with the Hirsch case which was cited in support of defendant's position and is willing to concede that it is controlling in so far as the facts in the Hirsch case are in harmony with *535 the facts in the instant case. While the condemnation provisions of the city's charter, s 269, et seq., provided a remedy whereby the property owner may be compensated, the fact is that in the instant case the city has not proceeded under the condemnation provisions in the grading proceeding. The plaintiff could not decide for the city what it was necessary for the city to take. The plaintiff was in no position to compel the city to proceed under condemnation provisions of the charter as to lateral support.

[7] In Collins v. Village of Richfield, supra, it was held that where a municipality caused a change of grade to be made without instituting an action for condemnation of the abutting property the owner of such property was not entitled to a writ of mandamus compelling the municipality to institute condemnation proceedings to fix

the amount of damages suffered since he had a plain, speedy, and adequate remedy at law. We think the plaintiff herein has pursued what is properly and clearly available to him, a speedy and adequate remedy at law involving the destruction of a natural and absolute right, namely, the right of lateral support of the adjoining soil to the land which he owns. His right in that respect is reinforced by the fact that there were two separate proceedings and that in neither was reference made to include lateral support under the ordinance provisions.

[8] Section 269 of the city's charter requires that in all condemnation proceedings the commissioner of public works shall prepare and deliver to the council a sketch, plan, or profile showing all property to be taken or condemned. In Culver Contracting Corp. v. Humphrey, 268 N.W. 26, 35, 196 N.E. 627, 629, that court in a similar situation pointed out that:

> 'In the case at bar * * * maps, plans and memoranda were prepared and annexed to the petition for condemnation. The property which suffered the physical damage, however, as distinguished from property rights acquired, is not mapped or described, nor is there any provision for the condemnation of easements of lateral support. On the contrary, the petitioner expressly excepts such easements. The city has the right to determine what property it wishes to condemn. It has decided to condemn the fee of the street and certain temporary and *536 permanent easements. It has failed to condemn the property herein involved or the easement of lateral support appurtenant to it.'

Had plaintiff claimed herein that he was entitled to damages for dirt, trees, and hedge taken in the slope condemnation, the city's claim of res judicata might concededly have merit, but we think not when it is sought to apply it to plaintiff's claim for his loss of lateral support.

[9] 5. The trial court has cited Casassa v. City of Seattle, 66 Wash. 146, 119 P. 13, as supporting authority for plaintiff's claim that he is entitled to recover for loss of lateral support. The city takes the position that the Casassa case differs entirely from the case at bar since in that case the city of Seattle went beyond the area covered in its condemnation plan. The plaintiff contends that the slopes which the city constructed did not eliminate the damages caused by the taking of lateral support contending that the city, rather than constructing the slope to prevent the washing away **464 of plaintiff's soil, should have taken an easement for the construction of a retaining wall as provided by s 233(1)(c) of defendant's charter on the theory that in all probability the construction of a retaining wall would have restored the lateral support which had been taken. Apparently the jury found this to be a fact based upon the testimony of plaintiff and one of his witnesses, a masonry contractor. See Kopp v. Northern Pac. R. Co., 41 Minn. 310, 43 N.W. 73, wherein this court held that evidence of the cost of a retaining wall was proper to show whether or not the damage could have been repaired, and the lot preserved, at any reasonable cost.

[10] 6. The Casassa case involved an action brought to recover damages caused by the regrading of streets in the city of Seattle. Plaintiff's abutting property had been improved prior to the regrading by erecting two frame buildings thereon. The lots were level with the streets. The city by ordinance determined to regrade which involved making a cut in front of the lots of from 55 to 58 feet in depth, the city's plan being to make a one-to-one slope from the street onto the lots, by which means it planned to cut down the front part of the lots at an angle of 45 degrees. The ordinance provided for the ascertainment and payment of compensation for property taken or damaged in the change of grade. The city awarded the owner $1,000, which was paid. *537 Thereupon the city's contractor proceeded as required under its contract to make the cut and slope. While excavation was in progress the soil of plaintiff's lots, by its own weight, slid beyond the slope into the excavation in the streets, causing destruction of the houses on the property and leaving plaintiff's lots in an irregular and uneven condition. Plainly, what developed was that the 45-degree slope did not protect the streets or provide lateral support for the remainder of the lot. The Supreme Court of Washington proceeded on the

theory that parties and their privies are only concluded by the judgment in a condemnation proceeding as to all matters which were or could be put in issue in that proceeding. The trial court had ruled, after plaintiff's evidence had been introduced, that the defendant city and contractor were not liable, discharging the jury and dismissing the action. The supreme court held on appeal that since the city's determination to take only sufficient land to make a slope of 45 degrees was conclusive on the owner the damages fixed by the award were for the part so taken, and no more, and for injury to the remainder on account of the part actually taken; hence the judgment awarding damages was not res judicata of plaintiff's right to recover such additional damages sustained by reason of the further caving of their property and the destruction of their buildings. The judgment of the court below was reversed as to the city and the cause remanded for a new trial. In that case the city had proceeded by action in condemnation against the owners to acquire the right to make the grade and slope as hereinabove stated. It is clear from the opinion that the court on appeal proceeded on the theory that it would be unreasonable to hold that the city, having taken a parcel of land definitely located, might take as much more as subsequently proved necessary, even to the destruction of the buildings upon the land outside of the part taken, without being liable for additional damages.

We think the later case of Davis v. City of Seattle, 134 Wash. 1, 235 P. 4, 44 A.L.R. 1490, which makes reference to the Casassa case, is helpful in considering the issues in the case at bar. The Washington Supreme Court said in that case (134 Wash. 3, 235 P. 4):

'* * * This action is based on the ground that the appellant had *538 removed the lateral support of respondent's lots. That question was not involved in the condemnation suit. There the city undertook to acquire nothing more than the right to lower the grades of the streets and make a **465 one-to-one slope on respondent's property. It did not undertake to obtain the right to remove the lateral support of respondent's property, nor was she compensated for any damage because thereof. It is conceded that at the time of the bringing of the condemnation suit, and at the time the regrade work was actually done, no person knew that there would be any slides as a result thereof, nor indeed, did any person at that time anticipate such slides. It is doubtless true that the city there might have acquired the right to remove the lateral support, but it did not. We deem it unnecessary to discuss this question further, because we have had it before us previously and the matter has been fully reviewed. (Cases cited.)

'The appellant makes an elaborate argument forcefully but courteously criticizing a number of our decisions on these regrade cases where we have said that the property owners' rights were protected and controlled by our constitutional provision that '* * * no private property shall be taken or damaged for private or public use without just compensation having been first made or paid into court for the owner.' Section 16, art. 1. Its argument appears to be that the constitutional provision has nothing to do with this kind of action, but that it is controlled entirely by the common law on the subject. An engaging argument has been made, but we refuse to be here drawn into the intricacies of the subject, because we are wholly unable to see that the rights of the parties to this particular case would be any different under the common-law rules than under the doctrine of our cases holding that the rights of the parties are controlled by the above constitutional provision.'

[11] 7. As we view the record, different persons might reasonably draw different conclusions from the evidence. If this be true the verdict should not be disturbed since a new trial should be granted only in case of manifest injustice. It should not be granted upon conflicting evidence unless the verdict is so manifestly contrary to the preponderance of the evidence as to warrant the inference that the jury failed to *539 consider all the evidence or acted under some mistake or from some improper motive, bias, feeling, or caprice, instead of dispassionately and honestly exercising their judgment upon all the evidence. 14 Dunnell, Dig. (3 ed.) s 7142, and cases cited.

The verdict has been approved by the trial judge who heard the witnesses and the evidence and had an opportunity to consider the condition of plaintiff's property during the progress of the trial. We see no basis after a full consideration of the record for concluding either that the court abused its discretion or committed prejudicial error throughout the trial. The order of the

trial court denying defendant's motion for judgment notwithstanding the verdict or for a new trial must be affirmed.

Affirmed.

All Citations

256 Minn. 525, 99 N.W.2d 456

Footnotes

1 See Berg v. Village of Chisholm, 143 Minn. 267, 173 N.W. 423, on measure of damages to abutting owner involving change of street grade. The court's charge in the case at bar on the measure of damages to abutting owner was in harmony with the rule laid down in the Berg case.

2 Minn.Const. art. 1, s 13, as amended, M.S.A., provides: 'Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.'

52 Minn. 12
Supreme Court of Minnesota.

MCCULLOUGH ET AL.
v
ST. PAUL, M. & M. RY. CO. ET AL.

Dec. 17, 1892.

**802 *(Syllabus by the Court.)*

1. *12 The removal, by excavating, by a railroad company in constructing its road, of the lateral support to the soil adjoining its right of way, is a taking, and the right to remove it can be acquired only by purchase or condemnation.

2. In proceedings for taking for right of way a defined strip, the petition and order appointing commissioners not showing an intent to acquire the right to remove lateral support, it is presumed the commissioners did not allow damages for so doing, and the right to do it does not pass by the proceedings.

Synopsis

Appeal from district court, Hennepin county; HICKS, Judge.

Action by Theodore McCullough and others against the St. Paul, Minneapolis & Manitoba Railway Company and others for damages caused by removing the lateral support of lands of plaintiffs. Judgment for defendants. Plaintiffs appeal. Reversed.

West Headnotes (4)

[1] **Adjoining Landowners**
⇦ Land in Natural State

Eminent Domain
⇦ Nature of Injury to Property Not Taken

Eminent Domain
⇦ Elements of Compensation for Injuries to Property Not Taken

The removal, by excavating, by a railroad company in constructing its road, of the lateral support to the soil adjoining its right of way, is a taking, and the right to remove it can be acquired only by purchase or condemnation.

3 Cases that cite this headnote

[2] **Adjoining Landowners**
⇦ Land in Natural State

The right to lateral support is an absolute right.

1 Cases that cite this headnote

[3] **Adjoining Landowners**
⇦ Land in Natural State

An adjoining landowner who removes lateral support is liable, without any question of negligence, for whatever injury ensues.

1 Cases that cite this headnote

[4] **Eminent Domain**
⇦ Extent of Right to Use of Property

In proceedings to condemn a definite strip of land for a railroad right of way, where the petition and order appointing commissioners do not show an intent to acquire the right to remove the lateral support of the adjacent soil, it will be presumed that the commissioners did not allow damages for so doing, and the right does not pass by the proceedings.

3 Cases that cite this headnote

Attorneys and Law Firms

*13 Robert D. Russell, for appellants.

*14 Benton, Roberts & Brown, for respondents.

Opinion

GILFILLAN, C. J.

The predecessor in interest of this defendant filed its petition for the appointment of commissioners to determine the compensation to be paid to John C. Oswald and other owners for *15 the taking of the land necessary for the construction of its railway, and they were accordingly appointed. The petition, and the order appointing them, are not set forth in the record; but the award of the commissioners, (which must be presumed to follow the petition and the order,) so far as affects the land involved in this action, is set forth as follows: "That the said commissioners, after such examination and hearing, determined, appraised, and awarded, and hereby do determine, appraise, and award, to the owners of such land and property, and of any right proposed to be taken or injuriously affected by the prosecution of the petitioner's enterprise, the following amount of damages, as compensation arising to them, respectively, by reason thereof, to wit: For the taking of a strip of land 100 feet wide, being 50 feet on each side of the center line of the petitioner's road, as now located and in course of construction across that part of lots 1 and 6, section 28, in town 29, range 24, in Hennepin county, lying south of Bassett's creek, and west of the land of the Monitor Plow Works, except that part thereof belonging to Julius Leber; and for injuriously affecting the remainder of said lots, the sum of $15,000, which we award to John C. Oswald, the owner thereof." Oswald afterwards **803 platted his part of said lot 1, not so taken, into city lots, and the plaintiff is the owner, deriving title through him, of two of such lots abutting on the 100-foot strip so taken by the railway company. The company, in constructing its road in the usual manner, excavated to a depth of 18 or 20 feet, on the strip so acquired by it, up to, or very nearly to, the line dividing that strip from the plaintiff's lots. It endeavored, successfully at first, to sustain the soil at the side of the excavation by driving piles; but finally, from some cause, the piles gave way, and all support on that side to the soil of plaintiff's lots being removed, a large part of the surface of the lots slid into the excavation. To recover damages for this, the action is brought.

The right to the lateral support of adjacent soil is fully recognized in this state as an absolute right, so that, if the owner of such adjacent soil remove the support, he is liable, without any question of negligence, for whatever injury ensues to the soil of his neighbor. *16 Dyer v. City of St. Paul, 27 Minn. 457, 8 N. W. Rep. 272; Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. Rep. 84. Those cases hold also that, in respect to this right, a municipal corporation, in its title to streets, (where the right to remove such support has not been acquired by condemnation,) stands on the same footing as an individual owner. A railroad corporation stands on the same footing. To justify its removal of the lateral support to the soil of an adjacent owner, it must show a right to do so acquired either by purchase or condemnation. As there was no purchase of the right in this case, the only question is, did the company acquire it by the condemnation proceeding shown. We have stated the purpose of the petition, and set forth that part of the award relating to Oswald's land, to show that no interest in the soil outside of the 100-foot strip was expressly sought to be condemned, or was by the award expressly condemned. The right to remove the soil of another, whether by taking away the natural lateral support, or otherwise, is an interest in such soil. Upon the condemnation proceedings that right could be held to pass to the company only, by holding that damages which might ensue from the exercise of such a right were included in the sum awarded. In collateral proceedings it is to be conclusively presumed that the commissioners passed upon and allowed all legitimate items or elements of damage to the landowner, and no other. In respect to such damage, the landowner has no remedy but in the condemnation proceedings.

It is not presumed, however, that the commissioners have assumed that the company will be guilty of any wrongful or negligent act, or that it will take any more than is set forth in the petition and order. They would have no authority to assume either, or to assess the damages upon such assumption. The description in the petition and order of the property sought to be taken is the limit of their authority to assess damages for taking. Had the petition and order in this case shown that the company was to acquire, not only the strip described for a right of way, but the right, by excavating, to remove the lateral support to the adjoining land, the award would be held to cover all damages to the owner by depriving him of the right,

and the right to remove the lateral support would pass by the *17 proceedings to the company. But the petition and order were for ascertaining the damages to be paid for taking the strip 100 feet wide out of the tract of which it was a part, for the purpose of constructing and maintaining a railroad upon it, and the damages caused to the remainder of the tract by putting the strip to that use. To justify itself, the company must stand on this proposition,-no other will suffice: That, having acquired the right to a strip 100 feet wide on which to construct and maintain its railroad, it may, wherever excavating may be, or at any time may become, necessary or expedient and prudent in constructing its road, measure the 100 feet at the bottom of the excavation, instead of on the original surface of the ground, and may maintain the slopes on the adjoining land instead of on its own strip, unless the owner shall see fit to build a retaining wall to keep his land in place. The proposition would apply as well to fills and embankments where necessary, expedient, or prudent, and, if sound, would justify the company in claiming that it might measure the 100 feet at the top of the embankment, leaving its slopes to rest on the soil of the adjoining owner, unless he should build a wall to prevent it. In either case it would be constructing and maintaining the railroad, not on the strip taken for the purpose, but in part, at least, on the adjoining land, and that would be a taking requiring compensation to justify it. Weaver v. Boom Co., 28 Minn. 534, 11 N. W. Rep. 114. It is easy to conceive a case where the cost of the wall would exceed the value of the adjoining lot, and where the slope would occupy the whole lot, or so much of it as to leave the remainder valueless, and in such a case the whole of the lot would be practically taken. The commissioners were bound to assume that the company or its engineers had ascertained how much land was necessary to construct and maintain the railroad, and had framed the petition accordingly, and were not at liberty to speculate on whether it might be necessary to encroach on adjoining land. Their only function was to assess the damages for taking the land so described out of the tract of which it was a part, and the damages to the remainder of the tract incident *18 to constructing and maintaining a railroad on that land. It is to be assumed they allowed no other damages. Order reversed.

All Citations

52 Minn. 12, 53 N.W. 802

End of Document

30 Minn. 299
Supreme Court of Minnesota.

ARMSTRONG
v
CITY OF ST. PAUL AND ANOTHER.

Filed March 9, 1883.

West Headnotes (4)

[1] **Municipal Corporations**
Retaining Walls

A city, in grading a street having made an excavation in front of plaintiff's property, erected a retaining wall there, necessary for the purpose of lateral support after the removal of the natural soil of the street. Held, that the cost of the wall could not be assessed upon the property in front of which it was erected.

3 Cases that cite this headnote

[2] **Municipal Corporations**
Mode of Assessment in General

The grading of parts of two streets in the city of St. Paul under one contract, without apportionment of the price of the distinct parts, and the assessment of the gross cost of the whole on the property deemed to be benefited, is not authorized by Sp. Laws 1874, relating to local improvements and special assessments in that city; no such authority being expressly given by the act, and its general tenor and the language used seeming to contemplate but one improvement being prosecuted in a single proceeding. And the amendment of the act by Sp. Laws 1875, c. 1, enacting that "two or more streets may be ordered to be graded at the same time, so that the material taken from one street may be used in filling others," only authorizes the grading of two or more streets as one improvement, under the conditions stated therein.

1 Cases that cite this headnote

[3] **Municipal Corporations**
Conclusiveness

An assessment in a proceeding not authorized by the statute, and where there was no authority to make any assessment, is not conclusive.

Cases that cite this headnote

[4] **Quieting Title**
Taxes and Assessments

An assessment which is really invalid, but apparently authorized and regular, so that proof aliunde must be made to obtain relief, may be set aside as a cloud on title.

Cases that cite this headnote

**174 Appeal from order of district court, county of Ramsey, overrulingdemurrer, etc.

Attorneys and Law Firms

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W. P. Murray, for appellants.

Opinion

DICKINSON, J.

This case presents the same questions as were involved in Mayall v. City of St. Paul, ante, 170, and that decision controls the present case. One additional fact exists in this case not presented in the Mayall Case. In grading Mount Airy street the city made an excavation in front of plaintiff's property and of an adjoining lot, and erected a retaining wall along the front of the property to supply the lateral support thereto, which became necessary by reason of the removal of the natural support of the soil. The cost of the wall was assessed upon the property in front of which it was erected. This assessment was not authorized.

Armstrong v. City of St. Paul, 30 Minn. 299 (1883)

15 N.W. 174

In Dyer v. City of St. Paul, 27 Minn. 457, [S. C. 8 N. W. REP. 272,] it was decided that a land-owner upon a public street has a right to the lateral support of the soil within the street, and may recover damages from a municipality for the removal of such natural support. The city may not divest the land-owner of what he is entitled to enjoy as a natural right, and then tax upon him the cost of replacing what has been thus taken away.

The order overruling the demurrer is affirmed.

GILFILLAN, C. J., on account of illness, took no part in the decision of this case.

All Citations

30 Minn. 299, 15 N.W. 174

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