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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0461**

State of Minnesota,
by its Commissioner of Transportation, petitioner,
Respondent,

vs.

B & F Properties, LLC, et al.,
Appellants,
City of Rochester, et al.,
Respondents Below.

**Filed December 2, 2013
Affirmed
Stauber, Judge**

Olmsted County District Court
File No. 55C402004695

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Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

In this condemnation dispute, the appellant-landowners argue that the district court erred by not awarding them (1) interest on their condemnation award in an amount exceeding the statutory interest rate that would reflect a reasonable rate of return on the funds and (2) all their requested expert appraisal fees and costs. On its cross-appeal, respondent argues that the district court erred by considering evidence outside the record on a motion to amend, and by awarding appellants compound interest on their award. We affirm.

FACTS

Appellants B & F Properties, Franklin P. Kottschade, Bonnie R. Kottschade, and SJC Properties LLC (collectively “appellants”) owned vacant property located in the southwest quadrant of Highway 63 and 40th Street SW in the City of Rochester. Respondent Commissioner of Transportation (MnDOT) took portions of appellants’ property, identified as Parcels 9, 10, and 11, by eminent domain for a roadway improvement project. On March 27, 2003, the date of the taking, MnDOT deposited payment with the Olmstead County Court Administrator pursuant to the “quick-take” statute. *See* Minn. Stat. § 117.042 (2002). In December 2006, a commissioners’ meeting was held pursuant to Minn. Stat. § 117.075, subd. 2 (2006), to determine the amount of damages owed for the taking. In February 2007, the commissioners filed an award of \$3,265,846. Both appellants and MnDOT appealed the award to the district court. And on March 28, 2007, MnDOT made an additional payment, which, together with the

earlier quick-take deposit constituted its three-fourths payment pursuant to Minn. Stat. § 117.155 (2006).

Following a two-week trial, the jury returned a verdict awarding appellants \$7,845,385. Appellants filed a post-trial motion seeking costs and interest on their judgment. Appellants submitted the affidavit of Christopher Glasoe, a financial consultant who opined that a reasonable interest rate would be 6.85%. MnDOT submitted the affidavit of Howard J. Bicker, the Executive Director of the Minnesota State Board of Investment (MSBI), who criticized Glasoe's investment proposal as impractical and risky, and concluded that the statutory rate of 4% was higher than what an investment likely would have earned between 2003 and 2011. The district court was persuaded by Bicker, and in its April 16, 2012 decision, ordered statutory simple interest on appellants' judgment. The district court also ordered costs for appellants' court fees and expert fees, but revised appellants' appraisers' fees down to reflect "Rochester-based" rates. At \$200 per hour instead of the \$375 and \$410 per hour requested rate, appellants were awarded \$62,287.50 for one appraiser and \$35,435 for a second appraiser.

Appellants moved to amend the district court's determination of interest and costs pursuant to Minn. R. Civ. P. 52.02. In support of their motion, appellants submitted the affidavit of Thomas W. Hamilton, a commercial real estate and finance professor at the University of St. Thomas. Hamilton concluded that by investing in 20-year U.S. Treasury bonds, an investor could have earned a 6.48% rate of return between 2003 and 2012. But the district court was not persuaded, concluding that such long-term

investments are not relevant to the facts of this case. The court was persuaded, however, by appellants' argument for compound rather than simple interest. Concluding that, had appellants been paid the damage award in March of 2003 when the taking occurred, appellants "could have earned money with that money," "compound interest would have been available to the reasonable and prudent investor." And the court revised the number of hours one of appellants' appraisers was compensated for, but declined to increase the rate.

This appeal, and MnDOT's cross-appeal, followed.

D E C I S I O N

I. New evidence on a rule 52.02 motion

In its cross-appeal, MnDOT argues that the district court erred by considering Hamilton's affidavit because new evidence cannot be considered on a motion to amend. We agree, but conclude that the error was harmless.

After the court ordered interest at the statutory rate, appellants filed a motion to amend under Minn. R. Civ. P. 52.02. To that motion, appellants attached Hamilton's affidavit. The district court considered this new evidence, although it noted MnDOT's objection to the evidence as impermissible on a rule 52.02 motion. The district court acknowledged the general rule that new evidence may not be considered on a rule 52.02 motion, but concluded that the evidence was nevertheless admissible:

The determinations the court makes here . . . regarding interest rate, compounding . . . were not at issue at trial. These are post-trial matters and thus the rule upon which [MnDOT] relies does not seem applicable here. . . . In general, so long as the Court's procedures result in no

unfairness to a party, the Court prefers more information as a basis for decision-making to less. The State has not been unfairly prejudiced by the Court's consideration of Mr. Hamilton's analysis

On a 52.02 motion to amend, the district court "must apply the evidence as submitted during the trial of the case and may neither go outside the record, nor consider new evidence." *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Nov. 14, 2006). Appellants could have combined their 52.02 motion to amend with a 59.01 motion for a new trial. *See Chin v. Zoet*, 418 N.W.2d 191, 195 n.2 (Minn. App. 1988) (concluding that the district court erred by not considering additional affidavits on a motion to amend because the movant had combined the motion with a rule 59.01 motion for a new trial); *see also* Minn. R. Civ. P. 59.01 ("On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.").

Even so, MnDOT must show that it was prejudiced by the district court's consideration of Hamilton's affidavit. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) (concluding that evidence that was erroneously admitted was not grounds for remand because appellant failed to show prejudice caused by the admission of the evidence). Because the district court considered the affidavit, but concluded that it was not persuaded by Hamilton's assertion that a reasonably prudent investor could have

achieved a 6.48% rate of return, we conclude that MnDOT was not prejudiced by the admission of this new evidence.

II. Rate of interest

Appellants contend that the district court erred by applying interest to their judgment at the statutory rate, rather than the rates advocated by Glasoe and Hamilton. Minnesota law requires that damages from a taking pursuant to eminent domain powers bear interest at a rate determined by Minn. Stat § 549.09 (2012). Minn. Stat. § 117.195, subd. 1 (2012). Section 549.09 provides for a statutory rate of interest, based on the one-year U.S. Treasury Bill rate; or, if that rate is too low, the law sets a floor of 4%. Minn. Stat. § 549.09, subd. 1(c) (2012). Between 2003 and 2012 the interest rate for damages awarded in condemnation proceedings was 4%, except for in 2007 when it was 5%.

2013 Interest Rates on State Court Judgments and Arbitration Awards,

<http://www.mncourts.gov/?page=1641> (last visited Oct. 30, 2013).

But the Minnesota Supreme Court has determined that the rate of return owed a landowner is a “judicial decision,” and that the proper rate “may be more, less, or equal to the return allowed by statute.” *State by Spannaus v. Carney*, 309 N.W.2d 775, 776 (Minn. 1981). “[A] reasonable rate is what a reasonable and prudent investor would earn while investing so as to maximize the rate of return over the relevant period of time, yet guarantee the safety of principal.” *State by Humphrey v. Jim Lupient Oldsmobile Co.*, 509 N.W.2d 361, 363 (Minn. 1993). “[T]he [district] court should presume that the statutory rate is reasonable and, therefore, meets the requirements of just compensation and should order judgment at that rate unless the condemnee rebuts this presumption and

affirmatively shows that another rate is reasonable and affords just compensation.” *Id.* at 364. The appropriate rate of interest is a mixed question of fact and law. *Id.* at 365 (Simmonett, J., concurring); *see also id.* at 364 (remanding to the district court to determine the appropriate interest rate). “When reviewing mixed questions of law and fact, [this court] correct[s] erroneous applications of law, but accord[s] the [district] court discretion in its ultimate conclusions and review[s] such conclusions under an abuse of discretion standard.”¹ *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002) (quotations omitted), *review denied* (Minn. June 26, 2002).

Appellants argue that the investment proposals devised by their financial experts succeeded in rebutting the presumption of statutory interest. But the district court considered these arguments and rejected them, concluding that the investment plans proposed by appellants did not adequately protect the principal, and involved numerous sales on secondary markets at key moments in time that a reasonable prudent investor could not have foreseen given the volatility of the market. The supreme court has stated

¹ Appellants urge this court to adopt a de novo standard when reviewing the district court’s award of interest. However, Minnesota caselaw generally holds that we give deference to the district court’s factual determinations when reviewing a mixed question of fact and law. *See State v. Prtine*, 799 N.W.2d 594, 599 (Minn. 2011) (“[T]he factual elements of this legal question related to the underlying facts and circumstances of the cases are reviewed for clear error.”). We conclude that determining the appropriate interest rate on appellants’ award does not raise an issue requiring the “greater scrutiny” afforded pure questions of law. *See Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 805-06 (Minn. 2013) (applying de novo review to work-place sex discrimination case involving mixed questions of fact and law). Appellants’ reliance on a Ninth Circuit Court of Appeals case is unpersuasive. *Mahowald v. Minn. Gas. Co.*, 344 N.W.2d 856, 861 (Minn. 1984) (concluding that foreign caselaw is not binding precedent).

that the “types of investment to which a [district] court should look as evidence of a reasonable rate must be those which have a very low risk.” *Lupient*, 509 N.W.2d at 364.

For example, the following would qualify as very low risk investments to which a [district] court might look for evidence of a reasonable rate: certificates of deposit from federally insured banks, United States Treasury Bills with maturities within the relevant time period, other government bonds, and long term corporate bonds from AAA rated companies with maturities within the relevant time period. This list is not intended to be exclusive and [district] courts may look to other investments so long as they are very low risk.

Id. at 364 n.3. Under Glasoe’s proposal, the investor would purchase CDs, but first there was a period of 53 days in which there was no investment, and a statutory rate was presumed; then, the investor would have to sell the CDs on an assumed secondary market, and then buy new CDs. But FDIC insurance only covers CDs up to \$100,000,² whereas U.S. Treasury Bills have no default risk. And under Hamilton’s proposal, the investor would buy 20-year U.S. Treasury Bills, but these bills do not have “maturities within the relevant time period.” *Lupient*, 509 N.W.2d at 364 n.3. Appellants argue that they need only present “possible” or “hypothetical” investment proposals to rebut the presumption of statutory interest; but appellants cite no authority for this assertion. Because these investments do not satisfy the *Lupient* criteria, the district court did not err by concluding that appellants failed to overcome the presumption of statutory interest.

² Hamilton notes that this limit could be overcome by setting up 100 LLCs, each taking out its own investment at the maximum amount the FDIC would cover. While not impossible, such an undertaking would clearly add to the expense of the investment.

Appellants advance other arguments that they were entitled to more than statutory interest. First, they argue that the state's own investments were earning an average rate of 7%; but this is based on information contained in a report from the MSBI, which was not part of the district court record, and therefore we do not consider it. *See* Minn. R. Civ. App. P. 110.01 (stating that “[t]he papers filed in the trial court . . . shall constitute the record on appeal”). And Bicker's affidavit states that the MSBI Treasurer's Cash Pool earned an average of 2.83%, and that “this is a type of investment which can be said to guarantee principal.” The state may have other investments with higher yields that are not “very low risk” as required by *Lupient*, but that fact does not rebut the presumption of statutory interest.

Second, appellants argue that the district court previously awarded 7.5% interest for a taking of a different portion of appellant's property several years earlier. But the district court judge explained his reasoning, stating that he declined to order greater-than-statutory interest in this case because previously he “had not yet seen the worst economic recession of [his] lifetime.”

Third, appellants argue that they are paying interest on loans related to their development properties at a rate of 7.11%, and therefore an award of statutory interest is unfair. But just compensation requires a “rate of interest . . . to give the landowner the market value of the property at the time of taking [as if] contemporaneously paid in money.” *Carney*, 309 N.W.2d 776 (quotations omitted). The fact that appellants owe a debt against the property that is accruing interest is not relevant to the reasonable rate under *Lupient*.

Fourth, appellants argue that the 2009 amendment to Minn. Stat. § 549.09 increasing the statutory rate to 10% for judgments against persons or entities other than the government militates in favor of a higher interest rate. *See* 2009 Minn. Laws. ch. 83, art. 2, § 35, at 1054-55; 2010 Minn. Laws. ch. 249, § 1, at 412-14. Appellants assert that low interest rates on judgments were causing litigants to file frivolous appeals to delay judgment payments so that their money can earn more in the market. But the legislature clearly exempted judgments against the state and left the statutory rate floor untouched at 4%. The legislature may have intended to encourage non-governmental litigants to satisfy their judgment creditors by offering a higher rate of interest, but if so that rate must be higher than the market rate and therefore is not evidence of the actual market rate.

III. Simple or compound interest

MnDOT contends that the district court erred by amending its findings to conclude that appellants were owed compound interest rather than simple interest. The statutory interest rate provides for simple interest. Minn. Stat. § 549.09, subd. 1(c)(1) (2012). But this court has held that “[i]f reasonable and prudent investments would have allowed [the landowner] to earn compound interest, the interest award should include the interest that would have been earned.” *State by Humphrey v. Briggs*, 488 N.W.2d 811, 816 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992). In *Briggs*, this court stated in strong terms that, even though the statute provides for simple interest, compound interest better complies with the requirements of just compensation.

The return available to a landowner who is timely paid and makes reasonable and prudent investments can be greatly affected by the ability to earn compound interest. If, at the time of taking, Briggs had been paid the market value of the property in money, this money would have been available to him for investment from that time forward. . . .

Because just compensation requires a judicial determination of the return on reasonable and prudent investments, the requirement in Minn. Stat. § 549.09, subd. 1(c) that interest shall be computed as simple interest cannot apply to condemnation awards.

Id.

The district court relied on *Briggs* for its decision to award compound interest. Although the district court initially concluded that simple interest was appropriate given that “the statutory interest rate is probably on the high side,” the court subsequently concluded that “I am quite certain that had [appellants] been paid the full \$7.8 million value of this property on March 27, 2003, they could have earned money with that money.”

MnDOT contends that the district court erred by “commingling” statutory interest and “*Lupient*” interest, arguing that the district court was permitted to choose one or the other, but not both. But this is contrary to the rule that the question of interest is one for judicial interpretation, and courts are not beholden to the statute. *See Lupient*, 509 N.W.2d at 363 (citing *Carney*, 309 N.W.2d at 776.). In *Briggs*, this court recognized that it was not necessary to determine “whether the legislature intended to apply both the simple interest requirement and the interest rate determined under Minn. Stat. § 549.09 to

condemnation awards,” since “the determination of the rate of interest on condemnation awards is a judicial decision.” *Briggs*, 488 N.W.2d at 816.

MnDOT also argues that *Briggs*, which was decided prior to *Lupient*, was subsumed by *Lupient*, and that an award of compound interest must conform to the requirement that the presumption of simple interest be rebutted by a realistic, low-risk investment. MnDOT further argues that compounded interest gives appellants too much because the statutory rate of four percent is already too high compared to the actual yield of the one-year Treasury Bill (2.36%), and because it assumes “cost-free, commission-free, and tax-free investment growth” which does not exist in the real world. But the district court considered these factors, and concluded that taxes and fees would not likely deter a reasonable investor from reinvesting his millions, and that compound interest was particularly warranted in this case because the delay between the time of the taking and the time of judgment was so long—about nine years. We agree. Given the grossly deficient initial payment made to appellants for the taking of their property, and the significant time that has since transpired, compound interest provides a reasonable rate of return consistent with *Lupient*.

IV. Appraisal fees

Finally, appellants argue that the district court erred by awarding less than their entire appraisal fees. “The allowance of costs is discretionary; the district court’s award should not be reversed unless there was a clear abuse of discretion.” *In re Condemnation by Minneapolis Cmty. Dev. Agency*, 447 N.W.2d 891, 895 (Minn. App. 1989), review denied (Minn. Jan. 12, 1990); see also Minn. Stat. § 117.175, subd. 2 (2012) (“The court

may, in its discretion, after a verdict has been rendered on the trial of an appeal, allow as taxable costs reasonable expert witness and appraisal fees of the owner, together with the owner's reasonable costs and disbursements.”).

The district court concluded that appellants' appraisal fees were excessive for the region, and that the rates “contrast[ed] sharply with those of the Rochester-based appraisers employed by the State.”³ Therefore, the district court reduced the fee rates from \$375 and \$410 per hour to \$175 and \$200 per hour. The district court relied upon Minn. R. Gen. Pract. 127, which provides that “[t]he amount allowed [for expert witness fees] shall be in such amount as is deemed reasonable for such services in the community where the trial occurred and in the field of endeavor in which the witness has qualified as an expert.” The district court also concluded that “if a verdict largely adopting [the analyses of appellants' appraisers] had demonstrated the jury's clear judgment as to who knew what they were talking about and who did not—I might have come to a different conclusion as to the reasonableness of these hourly rates.” Here, appellants' appraisers suggested that the value of the property was between \$17 and \$18 million dollars, far higher than the jury's award of roughly \$7 million.

Appellants argue that because MnDOT also employed a Twin Cities-based appraiser who charged rates similar to appellants' appraisers' rates, appellants were entitled to recoup all their fees. But this argument bolsters the district court's conclusion that rates outside the Rochester community are in fact higher, and based on Minn. R. Gen. Pract. 127, such rates are not reasonable for the community in which the trial took

³ The local appraisers employed by the state were reportedly paid \$175 per hour.

place. Therefore, the district court did not abuse its discretion when it reduced appellants' award of appraisal fees.

Affirmed.