SUMMARY
November 16, 2017

2017COA142

No. 16CA1198, *Sos v. Roaring Fork* — Regional Transportation Authority — Eminent Domain — Inverse Condemnation — Damages

In this inverse condemnation proceeding, a division of the court of appeals considers whether the district court erred in determining that the Roaring Fork Transportation Authority (RFTA) possesses the power of eminent domain. The division concludes that section 43-4-604, C.R.S. 2017 grants regional transportation authorities created under section 43-4-603, C.R.S. 2017 — including RFTA — the power of eminent domain by clear implication.

The division also concludes that the district court properly determined that RFTA caused compensable damage — within the meaning of Article II, Section 15 of the Colorado Constitution — to

the plaintiff's property by constructing a bus station wall adjacent to and imposing lateral force on the plaintiff's property.

Further, the division rejects RFTA's assertions concerning the trial court's decision to award restoration damages, rather than damages equivalent to any diminution in value.

Accordingly, the division affirms the judgment.

COLORADO COURT OF APPEALS **2017COA142**

Court of Appeals No. 16CA1198
Garfield County District Court No. 13CV30159
Honorable John F. Neiley, Judge

Michael J. Sos,

Plaintiff-Appellee,

v.

Roaring Fork Transportation Authority, a statutory regional transportation authority,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE FOX
J. Jones and Freyre, JJ., concur

Announced November 16, 2017

Worrell Durrett Gavrell, Stephen J. Worrell, Robert C. Gavrell, Lucas F. Van Arsdale, Benjamin M. Johnston, Glenwood Springs, Colorado, for Plaintiff-Appellee

Murray Dahl Kuechenmeister & Renaud LLP, Malcom Murray, Joseph Rivera, Jesse D. McLain, Lakewood, Colorado; Paul J. Taddune, P.C., Paul J. Taddune, Aspen, Colorado, for Defendant-Appellant

¶ 1 Plaintiff, Michael J. Sos, brought an inverse condemnation claim against the Roaring Fork Transportation Authority (RFTA) after RFTA built a bus station on the property north of and adjacent to his property. RFTA appeals the district court's order granting partial summary judgment in favor of Sos, the final judgment in favor of Sos, and the damages award. Because we conclude that section 43-4-604, C.R.S. 2017 grants regional transportation authorities created under section 43-4-603, C.R.S. 2017 — including RFTA — the power of eminent domain by clear implication, we affirm.

I. Background

¶ 2 Sos owns property in Glenwood Springs, Colorado, on which he owns and operates a tire business. In 2011, as part of its efforts to build and operate a rapid-transit project (VelociRFTA), RFTA's board of directors authorized eminent domain proceedings to acquire property and easements for the project. RFTA later sent Sos a notice explaining that RFTA required a temporary easement on Sos' property to construct the VelociRFTA facilities and general information about property acquisition and eminent domain proceedings.

¶ 3 In March 2012, RFTA purchased the property north of and adjacent to Sos' property, intending to build a bus station as part of VelociRFTA. Both properties slope downward to the west. The following image shows Sos' property to the south (bottom) and the property to the north (top) before RFTA constructed the bus station.

Sos and RFTA properties

¶ 4 Before RFTA began construction, an earthen embankment, sloping downward to the south, rested on the property line between Sos' and RFTA's properties. Sos regularly stored tires and other items on this embankment (shown below) and, with the previous owner's permission, on the northern property before RFTA's purchase.

Tire storage on Sos' property

¶ 5 As part of its construction, RFTA built a wall — which sits completely on RFTA's property — along the property line shared with Sos' property. Part of Sos' embankment was removed during the wall's construction, but the embankment was restored — allegedly to its "original contours" — using a land survey, as shown below.

Sos' embankment after RFTA's construction

¶ 6 After RFTA finished building the bus station in September 2013, Sos continued to store tires and other items on the embankment. As Sos' usage requirements for the embankment area increased, Sos wished to remove the embankment to facilitate the following uses: accessing the bays on the northeast corner of his property, storing tires and equipment, and plowing snow. In examining his options for removing the embankment, Sos learned that removing the embankment without constructing an engineered stability measure would cause the bus station wall to "fail" because the wall relies on Sos' property for lateral support.

¶ 7 Sos brought an inverse condemnation claim against RFTA because the bus station wall relies on Sos' property for its structural stability. Sos and RFTA retained engineering experts, who generally agreed[1] that the bus station wall depended on the embankment's support and that a retaining wall built on Sos' property — as part of removing the embankment — would require an engineered solution.

¶ 8 RFTA moved for summary judgment, and Sos moved for partial summary judgment, regarding whether a compensable taking or damaging had occurred. In July 2015, the district court denied RFTA's motion and granted Sos' motion. The district court determined that it was undisputed that (1) the bus station wall "imposes some lateral force onto the Sos [p]roperty that exceeds the lateral forces that existed" before its construction and (2) if Sos excavated the embankment, additional measures to maintain the

[1] One RFTA expert submitted a conclusory affidavit stating, without reasoning or evidence, that the bus station wall does not depend on the embankment for support. The district court rejected the affidavit in its July 2015 order, and relied instead on other experts. In 2014, while this case was pending, the General Assembly enacted sections 30-20-1401 to -1417, C.R.S. 2017 (concerning tire recycling), and Sos' need to use the embankment area again increased.

bus station wall's stability would be needed. Thus, according to the district court, the only factual disputes concerned the degree of force imposed on Sos' property and the additional cost of Sos' desired improvements. The district court determined that the force the bus station wall permanently imposed on the embankment constituted compensable damage under article II, section 15 of the Colorado Constitution. Colo. Const. art. II, § 15 ("Private property shall not be taken or damaged, for public or private use, without just compensation."). Moreover, the district court determined that RFTA was "expressly given the power of eminent domain" in section 38-1-202(1)(f)(XXXIX), C.R.S. 2017, and section 43-4-604(1)(a)(IV), and that the proper measure of damages was restoration damages, rather than diminution in value.

¶ 9 The damages portion of the case proceeded to a trial before three commissioners. One of RFTA's witnesses, a real estate appraiser, testified that there had been no change in the value of Sos' property before and after RFTA built the bus station. Based on designs produced by Sos' engineering expert, Robert Pattillo, Sos alleged that the difference in cost between excavating the embankment before and after RFTA's construction was about

$75,000. Pattillo's first design was a hypothetical retaining wall on Sos' property before RFTA's construction (pre-construction wall). The second design was a soil-nail wall, which would stabilize the bus station wall and reclaim approximately as much flat land as the pre-construction wall. Both designs assumed that Sos could obtain a construction easement from RFTA. The third design was a step-back retaining wall, which would stabilize the bus station wall without relying on any easements or agreements with RFTA, but would reclaim less of Sos' land and would cost more than the soil-nail wall. Pattillo compared the costs of the first and second designs to generate the $75,000 figure.

¶ 10 RFTA objected to evidence of the first and second designs because they were "premised on [the] legal impossibility" that Sos could obtain the required construction easements. In overruling the objection, the district court concluded that the issue "goes to the weight, not to the admissibility" of the evidence.

¶ 11 RFTA later proposed four instructions on diminution in value as the proper measure of damages, which the district court excluded because it had previously ruled that restoration damages were appropriate.

¶ 12 After the commissioners submitted a certificate of ascertainment and assessment,[2] the district court entered judgment in favor of Sos — awarding him $75,000 in damages.

II. RFTA Holds the Power of Eminent Domain

¶ 13 RFTA argues that the district court erred in determining that RFTA possesses the power of eminent domain because the General Assembly has not granted RFTA this power expressly or by clear implication. According to RFTA, because it does not possess the power of eminent domain, Sos cannot establish an inverse condemnation claim against it. We disagree.

A. Preservation, Standard of Review, and Applicable Law

¶ 14 The parties agree that this issue was properly preserved.

¶ 15 We review a district court's interpretation of a statute de novo. *Anderson v. Vail Corp.*, 251 P.3d 1125, 1127-28 (Colo. App. 2010). In construing legislation, we look first to the plain language of the

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[2] The commissioners' certificate of ascertainment and assessment is akin to a jury verdict. *See Aldrich v. Dist. Court*, 714 P.2d 1321, 1324 (Colo. 1986). Inverse condemnation cases are tried as eminent domain proceedings. *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo. 1993). In an eminent domain proceeding, unless the property owner requests a jury, the court-appointed commissioners determine just compensation. § 38-1-105(1)-(2), C.R.S. 2017.

statute, reading it as a whole. *Young v. Brighton Sch. Dist. 27J*, 2014 CO 32, ¶ 11. Then, if the language is ambiguous, we "construe the statute in light of the General Assembly's objective," presuming "that the legislature intended a consistent, harmonious, and sensible effect." *Anderson*, 251 P.3d at 1127-28. "[W]e presume that the General Assembly understands the legal import of the words it uses and does not use language idly, but rather intends that meaning should be given to each word." *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 943 (Colo. 2004). "[I]n determining the meaning of any one statutory section, we may look to the legislative scheme as a whole in order to give effect to the General Assembly's intent." *Id.*

¶ 16 Eminent domain proceedings are a creature of statute, and the General Assembly must confer such power expressly or by clear implication; "it can never be implied from doubtful language." *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519, 522 (Colo. 1982); *see also Dep't of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127, 129 (Colo. 2010).

B. Analysis

¶ 17 RFTA is a regional transportation authority created under and governed by sections 43-4-601 to -621, C.R.S. 2017. Section 43-4-604(1)(a)(IV) states, "All powers, privileges, and duties vested in or imposed upon the authority shall be exercised and performed by and through the board [of directors]. . . . [T]he board shall not delegate . . . [i]nstituting an eminent domain action, which may be at a public hearing or in executive session[.]" The next section of the statute lists the powers regional transportation authorities have "[i]n addition to any other powers granted . . . pursuant to this part 6," but it does not explicitly include the power of eminent domain. § 43-4-605(1), C.R.S. 2017.

¶ 18 Pursuant to the statute's plain language, RFTA has the power of eminent domain. That power resides with RFTA's board and may not be delegated; the board may institute an eminent domain action at a public hearing or in executive session. *See Coquina Oil Corp.*, 643 P.2d at 522. RFTA's proffered interpretation of the statute, by contrast, would render the statute's language meaningless. Indeed, it would be absurd for RFTA to be expressly prohibited from

delegating a power that it does not possess. *See Stapleton*, 97 P.3d at 943; *Anderson*, 251 P.3d at 1127-28.

¶ 19 But, we disagree with the district court's conclusion that, pursuant to section "38-1-202(1), C.R.S. [2017,] regional transportation authorities, such as RFTA, are expressly given the power of eminent domain." Section 38-1-202(1)(f)(XXXIX) provides, "The following governmental entities . . . [as] specified in *the applicable authorizing statute*, may exercise the power of eminent domain: . . . A regional transportation authority created pursuant to section 43-4-603, C.R.S., *as authorized in* section 43-4-604(1)(a)(IV)[.]" (Emphasis added.) Section 38-1-202 simply lists the entities given eminent domain power in other statutes. Significantly, section 38-1-201(2)(e)(I)-(II), C.R.S. 2017, states that, in "enacting this part 2, it is not the intent of the [G]eneral [A]ssembly to . . . [r]epeal, limit, or otherwise modify the [eminent domain] authority of any governmental entity [or g]rant new eminent domain authority[.]" By its plain language, section 38-1-202 *alone* does not authorize RFTA to exercise the power of eminent domain; the statute's language, however, supports our conclusion that the General Assembly conferred eminent domain

authority on RFTA by clear implication in section 43-4-604. *See Stapleton*, 97 P.3d at 943.

III. Damage Occurred

¶ 20 RFTA next asserts that the district court erred in concluding that RFTA's bus station wall caused compensable damage because the wall's construction did not substantially diminish the value of Sos' property or substantially change Sos' use of his property. We are not persuaded.

A. Preservation, Standard of Review, and Applicable Law

¶ 21 The parties agree that this issue was properly preserved.

¶ 22 Whether a taking or damaging pursuant to the Colorado Constitution has occurred is a question of law that we review de novo. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). To the extent such a determination turns on a district court's factual findings, we will not disturb such findings unless they are clearly erroneous; factual findings are clearly erroneous only if there is nothing in the record to support them. *Farm Credit of S. Colo., ACA v. Mason*, 2017 COA 42, ¶ 40 (*cert. granted* Oct. 2, 2017).

¶ 23 Article II, section 15 of the Colorado Constitution provides, in relevant part, that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation." By including the word "damaged," the Colorado Constitution "grant[s] relief to property owners who ha[ve] been substantially damaged by . . . public improvements abutting their lands, but whose land ha[s] not been physically taken by the government." *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993); *see also Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 63 (Colo. 2001).

¶ 24 An action for inverse condemnation is allowed where a governmental or public entity with the power of eminent domain takes action that "substantially depriv[es] the property owner of the use and enjoyment of the property, but the [entity] has not formally brought condemnation proceedings." *Kobobel v. Colo. Dep't of Nat. Res.*, 249 P.3d 1127, 1133 (Colo. 2011). A "taking can be effected by a legal interference with the physical use, possession, enjoyment, or disposition of property, or by acts which translate to an exercise of dominion and control by a governmental entity." *Grynberg*, 846 P.2d at 182.

¶ 25 To recover on an inverse condemnation claim alleging that property has been "damaged," a plaintiff must establish: (1) that there has been damage to a property interest; (2) for a public purpose without just compensation; (3) by a governmental or public entity possessing the power of eminent domain that has refused to exercise it. *Kobobel*, 249 P.3d at 1133; *Van Wyk*, 27 P.3d at 386-87. To establish the damage to a property interest element, the plaintiff must prove that he has suffered a unique or special injury different in kind from any injury suffered by the general public as a result of the damage. *Grynberg*, 846 P.2d at 179 ("The damage must be to the property or its appurtenances, or it must affect some right or interest . . . enjoy[ed] in connection with the property and which is not shared with or enjoyed by the public generally."). *But see La Plata Elec. Ass'n, Inc. v. Cummins*, 728 P.2d 696, 701-03 (Colo. 1986) (noting, in a partial takings case, that damages to the residue need not be unique to be compensable).

B. Analysis

¶ 26 The district court's determinations regarding the second element of Sos' inverse condemnation claim are unchallenged. And, for the reasons stated above, we agree with the district court's

conclusion regarding the third element. Thus, we need only examine the first element to determine whether there was damage to a property interest resulting in a unique or special injury.

¶ 27 First, we agree with the district court that this case involves damage to property, not a physical taking. The bus station wall is entirely on RFTA's property, notwithstanding the force it imposes on Sos' embankment. *Grynberg* and subsequent case law explain that the damage clause of the Colorado Constitution grants relief to "property owners who had been substantially damaged by the making of such public improvements abutting their lands, but whose land had not been physically taken by the government." 846 P.2d at 179; *see also* Colo. Const. art. II, § 15.

¶ 28 The district court found, with record support, that RFTA authorized the building of the bus station wall and that RFTA incorporated the embankment's support into the bus station wall's design and construction. *See Farm Credit*, ¶ 40. The court, therefore, properly determined that the imposition of force on Sos' embankment was the natural consequence of RFTA's intentional construction of the bus station wall. *See Scott v. Cty. of Custer*, 178 P.3d 1240, 1244 (Colo. App. 2007) (reasoning that a plaintiff may

establish an inverse condemnation claim by showing that that the defendant intended to "do an act which has the natural consequence of taking the property") (citation omitted).

¶ 29 Further, the record — including RFTA's own expert opinions — supports the district court's finding that the bus station wall imposes a new force on Sos' embankment to such a degree that an engineered remedy is now required before the embankment can be excavated. Deferring to these findings, *see Farm Credit*, ¶ 40, we agree with Sos that the bus station wall burdens his property by imposing new lateral forces that make it dependent on the embankment area for structural support. Both parties' expert's opinions support a finding that the bus station wall imposed a force on Sos' property greater than what was there previously. RFTA is not legally entitled to the embankment's gratis support of the bus station wall. *See Vikell Inv'rs Pac., Inc. v. Hampden, Ltd.*, 946 P.2d 589, 594 (Colo. App. 1997) (noting that a property owner owes a general duty of lateral support to adjacent properties in their natural state, but the owner owes no increased duty of lateral support to support his neighbor's new improvements on the land); *see also Fowler Irrevocable Tr. 1992-1 v. City of Boulder*, 17 P.3d

797, 805 (Colo. 2001) (applying tort principles to an inverse condemnation case because the tort discussion "aids the just compensation inquiry in a temporary taking case involving physical damage to the property").[3]

¶ 30 RFTA's construction placed a new and substantial limit on Sos' ability to use and enjoy his property. In building the bus station wall as designed, RFTA exercised "dominion and control" over the embankment, thereby limiting Sos' dominion over his property. *See Grynberg*, 846 P.2d at 182; *G & A Land, LLC v. City of Brighton*, 233 P.3d 701, 709-10 (Colo. App. 2010). The case at issue is distinguishable from *Troiano v. Colorado Department of Highways*, which involved an inverse condemnation claim brought by an owner of a motel adjacent to a street over which an interstate highway viaduct was built. 170 Colo. 484, 487-89, 463 P.2d 448, 449 (1969). Unlike the plaintiff in that case, Sos did not claim

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[3] Although *Fowler* — addressing a temporary taking involving physical damage to property severe enough to remove it from the one-hundred-year floodplain and lift protections from development on the land — applied tort principles to an inverse condemnation case involving different facts, we are not precluded from applying relevant legal principles to this case, regardless of whether the principles arose from a taking, property damage, or a tort. *See Fowler Irrevocable Tr. 1992-1 v. City of Boulder*, 17 P.3d 797, 799 (Colo. 2001).

damage resulting from any impairment of access to his property from a public street. *See id.* at 489-90, 463 P.2d at 450. Nor did Sos claim that an adjacent public improvement had made accessing the property from a public road less convenient, thereby diminishing the value of the property. *See id.* at 497, 463 P.2d at 454 ("[T]he effect of the diversion would be no different than if I-70 had been located several miles to the north or south of the subject property, and in such case, . . . the diversion of traffic is generally held to be [d]amnum absque injuria."). Rather, Sos claimed that damage from RFTA's construction, which directly relied on his property for lateral support, substantially increased the cost of excavating the embankment. RFTA, thus, substantially deprived Sos of the use and enjoyment of his property.

¶ 31 The record also demonstrates that the bus station wall burdens Sos' ability to excavate the embankment to facilitate his use of the northeast corner of his property; Sos' proffered uses relate to his tire business and snow maintenance. It is undisputed that the general public does not share the right to excavate the embankment or to use Sos' property in these ways. Under Colorado law, Sos is merely required to show a special injury "to the property

or its appurtenances, or [an injury] affect[ing] *some* right or interest which the owner enjoys in connection with the property and which is not shared with or enjoyed by the public generally"; the injury must be to *some* right or interest relating to the property, not a specifically non-personal or non-business use. *Grynberg*, 846 P.2d at 179 (emphasis added). The *Grynberg* court elaborated that "[i]n no case has mere depreciation in value been grounds to award just compensation for a damaging of property." *Id.* For the reasons stated below, the district court did not err in concluding that the cost of restoration, not diminution in value, was the proper measure of damages. Thus, any showing of diminution in value is not dispositive of whether a plaintiff has suffered a special injury. We therefore agree with the district court that Sos sufficiently demonstrated a special injury.

¶ 32 Accordingly, we conclude that the district court properly determined that RFTA "damaged" Sos' property within the meaning of article II, section 15 of the Colorado Constitution. *See Kobobel*, 249 P.3d at 1133.

IV. Measure of Damages

¶ 33 RFTA next contends that the district court's ruling that restoration costs, rather than diminution of value, was the proper measure of damages was not supported by law or evidence and, thus, was erroneous. We discern no error.

A. Preservation, Standard of Review, and Applicable Law

¶ 34 The parties agree that this issue was properly preserved.

¶ 35 The district court "has the sole prerogative to assess the amount of damages, and its award will not be set aside unless it is manifestly and clearly erroneous." *Lawry v. Palm*, 192 P.3d 550, 565 (Colo. App. 2008).

¶ 36 It is within the district court's discretion to determine the appropriate measure of damages, taking "the goal of reimbursement of the plaintiff for losses actually suffered" as its principal guidance. *Heritage Vill. Owners Ass'n, Inc. v. Golden Heritage Inv'rs, Ltd.*, 89 P.3d 513, 516 (Colo. App. 2004); *see also Scott*, 178 P.3d at 1248 ("[T]he court has broad discretion" when determining the standard of compensation.).

¶ 37 Whether the district court misapplied the law when determining the measure of damages presents a question of law

that we review de novo. *See Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 894 (Colo. 2008); *see also Antero Res. Corp. v. Strudley*, 2015 CO 26, ¶ 14.

¶ 38 "Generally, the proper measure of compensation for injury to real property is the diminution of market value." *Scott*, 178 P.3d at 1248. However, the district court "has discretion to apply the cost of restoration as the measure of compensation in an appropriate case." *Id.*; *see also Fowler*, 17 P.3d at 805.

¶ 39 There is no fixed set of factors to consider when deciding whether to depart from the diminution of value measure and award restoration costs. *Fowler*, 17 P.3d at 805 (having a fixed set of factors "would forfeit the flexibility trial courts need to achieve fair results"). Courts may consider the factors detailed in comment b to section 929 of the Restatement (Second) of Torts (Am. Law Inst. 1979), which states,

> *Even in the absence of value arising from personal use*, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. . . . If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, *unless there is a reason personal to the owner for restoring the original condition*,

> damages are measured only by the difference between the value of the land before and after the harm. . . . [For example], if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, *even though this might be greater than the entire value of the building*.

(Emphasis added.); *see also Fowler*, 17 P.3d at 805 (upholding an award of restoration costs in an inverse condemnation case).

¶ 40 In sum, a court considers "the nature of the owner's use and of the injury," having the ultimate goal of reimbursing the plaintiff for "losses actually suffered." *Scott*, 178 P.3d at 1248 (citation omitted). The goal is compensation, not punishment. *Id.* (A district court must "be vigilant not to award damages that exceed the goal of compensation and inflict punishment on the defendant or encourage economically wasteful remedial expenditures by the plaintiff.") (citation omitted).

B. Analysis

¶ 41 The district court's July 2015 order properly stated that a plaintiff who establishes an inverse condemnation claim is entitled to just compensation — meaning a plaintiff is entitled to compensation for losses actually suffered so that the plaintiff is

placed in the same pecuniary position as though the taking or damage had not occurred. *See Fowler*, 17 P.3d at 805-06. The record shows that the diminution in value, if any, of Sos' land after RFTA built the bus station was de minimis. But, RFTA's construction substantially limited Sos' dominion over, and use and enjoyment of, the embankment area.

¶ 42 Thus, the district court properly reasoned that awarding Sos damages under the presumptive measure of diminution in value would be insufficient to justly compensate Sos for his actual loss. *See id.* at 807 (rejecting the defendant's argument that diminution of value was the proper measure of damages where "the land would remain in the disturbed condition [the defendant] caused, unless the landowner paid the restoration costs"); *Grynberg*, 846 P.2d at 179 ("In no case has mere depreciation in value been grounds to award just compensation for a damaging of property.").

¶ 43 The record evidences that measuring Sos' damages by the restoration cost, derived from engineering expert opinions, would allow Sos to excavate the embankment at a cost unaffected by the bus station wall's lateral forces. The district court's challenged ruling, therefore, was to directly compensate Sos for his actual loss,

not to punish RFTA. Additionally, Sos derived the $75,000 from comparing Pattillo's first and second designs; the third design was not used as a basis to calculate damages because it was more expensive and less effective at reclaiming level property. Thus, the requested restoration damages were not economically wasteful. *See Scott*, 178 P.3d at 1248.

¶ 44 Further, in making its determination, the district court considered the nature of Sos' use of his property and of his injury, taking care to avoid awarding damages as punishment or to encourage economically wasteful remedial measures. *See id.* Sos' reasons for restoring the property at issue were personal to him: he wished to excavate the embankment to facilitate use of the property to meet his needs without paying increased costs resulting from the new lateral forces imposed by RFTA's construction. *See* Restatement (Second) of Torts § 929 cmt. b (where the cost of restoring the land to its original condition is disproportionate to the difference in value before and after the harm, the difference in value is the measure of damages "unless there is a reason personal to the owner for restoring the original condition").

¶ 45 Accordingly, the district court properly exercised its discretion to determine Sos' damages under the measure of restoration costs. *See Bd. of Cty. Comm'rs v. DPG Farms, LLC*, 2017 COA 83, ¶ 34 ("An abuse of discretion occurs where the trial court's ruling was manifestly arbitrary, unreasonable, or unfair, or was based on a misunderstanding or misapplication of the law."); *Scott*, 178 P.3d at 1248.

V. Evidence of Damages

¶ 46 The district court erred, according to RFTA, in allowing evidence of Sos' personal and business uses for his property because such interests are non-compensable in condemnation cases. RFTA also asserts that the district court erred in allowing evidence of Pattillo's designs and Pattillo's testimony regarding the costs of excavating the embankment and building a retaining wall because Pattillo assumed that Sos would be able to obtain the construction easements necessary to build his designs. Therefore, RFTA argues, Sos presented no admissible evidence regarding restoration costs or supporting the damages award. We disagree.

A. Preservation, Standard of Review, and Applicable Law

¶ 47 The parties agree that this issue was properly preserved.

¶ 48 We review a district court's evidentiary rulings for an abuse of discretion. *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 458 (Colo. App. 2003). A district court abuses its discretion where its decision is manifestly arbitrary, unreasonable, or unfair, or contrary to law. *DPG Farms, LLC*, ¶ 34. Whether the district court misapplied the law in making an evidentiary ruling is reviewed de novo. *Id.*

¶ 49 We will not disturb the district court's damages award unless it is clearly erroneous — that is, unless there is nothing in the record to support it. *Farm Credit*, ¶ 40; *Lawry*, 192 P.3d at 565.

B. Analysis

¶ 50 First, for the reasons discussed above, the district court rightly decided that the proper measure of damages was restoration costs. Sos' alleged injury concerned his dominion over, and ability to use and enjoy, his land for property access, equipment storage, and snow maintenance; it did not concern lost profits or any other injury not independently compensable. *See DPG Farms, LLC*, ¶ 40 (reasoning that lost earnings alone are not a proper measure of damages, but are generally admissible as a factor to "inform" the ultimate damages determination). The fact that Sos has not yet

excavated the embankment does not prohibit the award of restoration costs to compensate Sos for his loss of the use and enjoyment of the embankment area. *See Airborne, Inc. v. Denver Air Ctr., Inc.*, 832 P.2d 1086, 1092 (Colo. App. 1992).[4] The district court, therefore, did not err in allowing the challenged evidence merely because it concerned Sos' personal and business use of his property. *DPG Farms, LLC*, ¶ 34.

¶ 51 Nor was it error to allow evidence of Pattillo's designs merely because they assumed that Sos would be able to acquire the necessary construction easements. The first design was a hypothetical retaining wall built before RFTA's construction, intended — with the goals of cost efficiency and maximizing Sos' useable property — to measure the increase in cost of excavating the embankment after RFTA's construction. The pre-construction wall required only a temporary construction easement. The record shows that Sos, with the previous owner's permission, regularly used the portion of RFTA's property near the shared property line

[4] The decision in *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086, 1092 (Colo. App. 1992), was later criticized by another division on other grounds in *PurCo Fleet Services, Inc. v. Koenig*, 240 P.3d 435, 444 (Colo. App. 2010), *aff'd*, 2012 CO 56.

until RFTA's purchase. While RFTA objected to the challenged evidence because of this assumption, RFTA offered no evidence to show that the previous owner would have denied the required easements. A fact finder could thus reasonably infer that Sos could have obtained the needed easement for the first design from the previous owner.

¶ 52 The record also shows that Pattillo's second design was a soil-nail wall requiring only an easement underneath the surface of RFTA's property for the placement of soil nails. The soil-nail wall is more effective and less expensive than Pattillo's third design of a step-back retaining wall, which does not require a construction easement on RFTA's property. RFTA provided no evidence showing that it would not grant the easement the soil-nail wall requires. There is no indication that Sos actually requested such an easement from RFTA or that RFTA refused. On this record, a fact finder could reasonably infer that RFTA would prefer to grant the required subterranean easement for the soil-nail wall in order to pay less, rather than deny the easement and pay more for the step-back retaining wall. *See* § 38-1-114(1), C.R.S. 2017 ("[A]ny amount of compensation determined initially *shall remain subject to*

adjustment for one year after the date of the initial determination to provide for additional damages or benefits not reasonably foreseeable at the time of the initial determination.") (emphasis added); *see also Akin v. Four Corners Encampment*, 179 P.3d 139, 144 (Colo. App. 2007) (discussing easements in private condemnation actions).

¶ 53 An expert opinion based on "factual premises that are contrary to the undisputed evidence" or "an unreliable, unsupported assumption" is not competent evidence. *Farrar v. Total Petroleum, Inc.*, 799 P.2d 463, 467 (Colo. App. 1990). Pattillo's designs and testimony, by contrast, were not inconsistent with the undisputed evidence, nor was the assumption that Sos could obtain the required easements unsupported by evidence or law. Accordingly, the district court did not err in allowing the challenged evidence. *See DPG Farms, LLC*, ¶ 34.

¶ 54 Consequently, we conclude that the district court's damages award is supported by competent record evidence, and we will not disturb it. *See Farm Credit*, ¶ 40.

VI. Proposed Instructions

¶ 55 RFTA argues that the district court erred in rejecting his proposed instructions regarding diminution of value being the proper measure of damages. We are not persuaded.

¶ 56 The parties agree that this issue was properly preserved.

¶ 57 "Trial courts have a duty to correctly instruct . . . on matters of law." *Bedor v. Johnson*, 2013 CO 4, ¶ 8. When assessing a claim that the district court erroneously instructed on a matter of law, we review whether the instruction at issue correctly states the law. *Id.* If it does, we then review the district court's decision on whether to give a particular instruction for an abuse of discretion. *Vititoe v. Rocky Mountain Pavement Maint., Inc.*, 2015 COA 82, ¶ 67. A district court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair; contrary to law; or "the instruction is unsupported by competent evidence in the record." *Id.*; *see also DPG Farms, LLC*, ¶ 34.

¶ 58 For the reasons stated above, the district court properly (1) concluded that restoration damages was the appropriate measure of damages in the underlying case and (2) allowed evidence of Pattillo's designs and Pattillo's testimony showing the cost difference in

excavating the embankment before and after RFTA's construction. The district court's decision to reject RFTA's instructions regarding the inapplicable diminution of value measure of damages, therefore, did not cause the commissioners to be inaccurately instructed on the law and was supported by competent evidence. So we conclude that the district court did not err in rejecting the instructions at issue. *See DPG Farms, LLC*, ¶ 34; *Vititoe*, ¶ 67.

VII. Appellate Fees and Costs

¶ 59 Sos makes the following request for appellate fees and costs:

> Sos requests judgment against RFTA for his appellate fees and costs as the prevailing party in this action pursuant to C.R.C.P. 54(d) & 121 § 1-22; C.R.S. §§ 5-12-102(4)(b), 13-16-104, 13-16-122, 24-56-116 & 38-1-116; and C.A.R. 39(a)(2) & 39.1.

We decline to grant this undeveloped request. *See* C.A.R. 39.1 ("If attorney fees are recoverable for the appeal, the principal brief of the party claiming attorney fees *must* include a specific request, *and explain the legal and factual basis*, for an award of attorney fees.") (emphasis added); *cf. Cikraji v. Snowberger*, 2015 COA 66, ¶ 21 n.3 ("We do not consider bald factual or legal assertions presented without argument or development.").

VIII. Conclusion

¶ 60 The judgment is affirmed.

JUDGE J. JONES and JUDGE FREYRE concur.