STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF ST. CLAIR,

Plaintiff-Appellee,

v

EDWARD J. SKOTCHER, VALERIA M. SKOTCHER, VALERIE A. SKOTCHER, and LAKESHORE MOTEL & APARTMENTS, INC.,

Defendants-Appellants.

UNPUBLISHED
January 12, 2010

No. 287225
St. Clair Circuit Court
LC No. 05-002328-CC

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's award of attorney fees and denial of expert witness fees in this easement condemnation action. We affirm in part, reverse in part and remand to the trial court.

Defendants owned and operated the Lakeshore Motel and Apartments, Inc. and also owned a private road and beachfront easement in Fort Gratiot Township, Michigan. The private road easement was located between the Lakeshore Motel and the Lake Huron beachfront easement. Defendants' easement burdened a 16-acre property parcel of undeveloped land located between the Lakeshore Motel and Lake Huron that was owned by The Detroit Edison Company.

Plaintiff, through its Parks and Recreation Commission, indicated an interest in obtaining the parcel of land owned by Detroit Edison to construct a county park. In 2002, Detroit Edison conducted an auction to sell the property. Plaintiff purchased the 16-acre property at the auction subject to defendants' private road and beachfront easement. Plaintiff obtained a land acquisition grant from the Michigan Department of Natural Resources that required, as a condition of the grant, that plaintiff would acquire defendants' easement. Hence, although defendants had initially approached plaintiff regarding the sale of the motel property and easement as a package deal, plaintiff required only acquisition of defendants' easement to proceed with its plans for the construction of a park. On January 12, 2005, Mark A Brochu, Director of plaintiff's Parks and Recreation Commission, authored a letter to Edward and Valerie Skotcher indicating, in relevant part:

> The St. Clair County Parks and Recreation commission has directed me to make a *formal offer* to purchase your current easement across the Citizens First and Detroit Water Board properties.
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> * * *
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> I am *authorized to offer* you one hundred thousand dollars ($100,000.00) for the purchase of your entire easement. I am prepared to give you a check for the entire amount as soon as you signed the required documents. [Emphasis added.]

The letter also indicated that defendants would retain for themselves and their motel guests "direct non-motorized access to the park" and suggested that plaintiff would move ahead with plans to construct a park at the site, which required "acquisition of your easement."

It is undisputed that defendants failed to accept this offer and retained condemnation counsel. Defendants contend that their counsel accepted the case on the basis of the $100,000 initial offer. Subsequently, plaintiff obtained an appraisal, which valued the easement at $240,000. On September 21, 2005, the St. Clair County Board of Commissions adopted a resolution by the St. Clair County Parks and Recreation Commission to authorize the County Administrator to make a "good faith offer for the easement" in the amount of the most recent appraisal and, if the offer was not accepted, to commence condemnation proceedings. Subsequently, on September 27, 2005, plaintiff authorized the submission of a "good faith offer" to purchase the easement for $240,000. This offer contained a cost recovery waiver. Because defendants did not accept this offer, plaintiff initiated condemnation proceedings on October 3, 2005.

The case was tried and resulted in a verdict of just compensation on April 4, 2008. Judgment on the verdict of $375,000, plus statutory interest in accordance with MCL 213.65, was entered on April 15, 2008. On May 13, 2008, defendants sought reimbursement of attorney fees and costs pursuant to the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.* A dispute arose regarding the proper amount or offer to be used under the UCPA for calculation of attorney fees to be awarded and whether the fees charged by three of defendants' experts – O. Fredrich Pertner, Dale S. Sass and Clif Seiber – should be reimbursed. The trial court ordered the reimbursement of attorney fees based on plaintiff's second written offer of $240,000, resulting in an award of $52,425.63, and approved reimbursement of expert witness fees for defendants' appraiser, surveyor and other related costs, which were stipulated to by plaintiff. At this time, the trial court denied defendants' request for reimbursement of $17,808.59 in expert witness fees for Seiber. In determining the second written offer of $240,000 was the proper figure for use in calculation of attorney fees, the trial court stated in relevant part:

> [T]his Court does not find that it was the letter that was written by Mr. Brochu that in essence was in response to contacts by the motel owners when they . . . were desirous to have the County buy . . . all of their property which the County was never really interested.
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> I don't quarrel with the fact that they got . . . Counsel involved, and things kind of went back and – between the County and Counsel, but the bottom line was

> that when negotiations broke down between the County and the motel owners as to what just compensation for the easement would be, the County made a decision and the decision they made was that they were going to file a lawsuit, and they got their appraisals, they followed the statutes. They – in this Court's opinion, they did it correct and they – before any litigation was filed in this case they laid the gamut [sic] down you might say, and they did that in their good faith offer of September of '05 of $240,000.

A separate hearing was conducted regarding defendants' request for reimbursement of $30,000 in fees for Pertner and $6,601.23 in fees for Sass. The trial court found that Pertner's fee of $30,000 for the financial analysis conducted was "a little bit shocking to the conscience . . . predicated upon the fact that Mr. Pertner admitted the Defendants' appraiser . . . did not rely on Mr. Partner's conclusions in his opinion." The trial court further opined that the analysis provided by Pertner addressed matters, which were unrelated to the immediate issue of just compensation for the easement. Subsequently, the trial court found Pertner's services were "not reasonably necessary for Defendants to prepare for trial" and denied reimbursement for his fees. With regard to the fees sought for Sass, the trial court noted that he was precluded from testifying at trial, other than as a possible rebuttal witness. Reimbursement for his fees were denied by the trial court stating:

> The UCPA does not allow for reimbursement of expert witnesses who are not called to testify at trial . . . . Mr. Sass was not called as a witness because he was stricken by the Court . . . . and again the report prepared by Mr. Sass . . . was not relied upon by the defendants or the defendants' expert in establishing just compensation, and under those circumstances . . . the County should not be responsible for his bill.

In denying reimbursement for fees incurred for Seiber to conduct a site analysis, the trial court stated, in relevant part:

> Mr. Seiber acknowledged . . . that the drawings that were provided to the Defendants . . . were not provided to the appraiser nor were they used in the Defendants' appraiser's analysis in coming to the amount that the jury was to consider for just compensation or the basis for it. And I ruled that Seiber couldn't testify regarding any of the proposed subdivision layouts . . . and frankly in all fairness I can't see where he added one thing for the purposes of the jury in – that would have enhanced or enlightened the jury in the testimony that he was allowed to present, that in this Court's opinion had any bearing per se on what the jury had to decide in this case.

This appeal ensued.

We review an award of attorney fees and costs pursuant to the UCPA for an abuse of discretion. *Detroit v Detroit Plaza Ltd Partnership,* 273 Mich App 260, 292; 730 NW2d 523 (2006). An abuse of discretion is deemed to have occurred when a trial court's decision is outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006) (citation omitted). However, questions of law, which

impact the determination, are reviewed by this Court de novo. *Hines v Volkswagen of America, Inc.*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

In determining an award of attorney fees pursuant to the UCPA, there are two relevant statutory provisions to be considered. MCL 213.55(1), which governs "good faith written offers" states, in pertinent part:

> Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established . . . . The good faith offer shall state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver. The amount shall not be less than the agency's appraisal of just compensation for the property. If the owner fails to provide documents or information as required by subsection (2), the agency may base its good faith written offer on the information otherwise known to the agency whether or not the agency has sought a court order under subsection (2). The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property. If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located.

In addition, MCL 213.66, which addresses the calculation of attorney fees, provides in relevant part:

> (1) Except as provided in this section, an ordinary or expert witness in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.
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> (3) If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney fees shall be determined by the court.

Defendants contend the trial court erred in failing to use plaintiff's original $100,000 offer to purchase the easement as the basis for the calculation of attorney fees in accordance with MCL 213.66(3). In contrast, plaintiff contends that the $100,000 offer was not a "good faith written offer" as contemplated by MCL 213.55(1) because it did not include a waiver and was not based on an appraisal and, therefore, was not in conformance with the statutory requirements. Plaintiff asserts that the letter indicating an offer to purchase for $100,000 was merely in the nature of initial negotiations.

As discussed by this Court in *Dep't of Transportation v Robinson*, 193 Mich App 638, 643; 484 NW2d 777 (1992), "[t]he written offer to be used as the fee base under § 16(3) must be made before the agency files its condemnation complaint." Unfortunately, in this case, both offers were made before the initiation of a condemnation action and "[t]he UCPA does not expressly contemplate multiple precomplaint offers." *Id.* at 644. Plaintiff's contention that the first figure of $100,00 cannot comprise a "good faith written offer" due to the omission of a waiver and other details as contemplated by MCL 213.55(1) is misplaced based on this Court's ruling in *City of Flint v Patel*, 198 Mich App 153; 497 NW2d 542 (1993). In *Patel* the plaintiff contested the use of an "original offer" based on the failure to include certain fixtures in the amount, resulting in the offer being "incomplete." *Id.* at 157-158. Addressing the omission of required content or an incomplete offer, this Court stated, in relevant part:

> Section 5 requires that a good-faith offer be made, and the city is presumed to know the law. The city is therefore estopped from asserting that, because it was incomplete, its original offer should not be used as the starting point for calculating attorney fees. To hold otherwise would encourage condemning authorities to make incomplete offers to the unwary, which contravenes the legislative aim of placing property owners in as good a position as they occupied before the taking. [*Id.* at 158 (footnotes and internal citations omitted).]

Hence, failure of the initial $100,000 offer to strictly comply with MCL 213.55(1) is not fatal to defendants' assertion that it constituted the good faith written offer to be used in the calculation of attorney fees.

In finding that plaintiff's original $100,000 offer was a good faith written offer and comprised the basis for subsequent calculation of attorney fees, we rely on our prior reasoning in *Robinson* in determining that the use of this initial, lower offer is consistent with the legislative intent of the statute. Specifically:

> Section 16 of the UCPA defines a limit on fees, not a formula that must be followed in every case. Under the predecessor statute the limit was $100. The Legislature liberalized the attorney fee provision in the UCPA in order to reimburse owners for expenses incurred as a result of agency actions.
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> This Court has identified three purposes of the attorney fee provision. First, awarding attorney fees will assure that the property owner receives the full amount of the award, placing the owner in as good a position as that occupied before the taking. Second, the fee structure penalizes agents of a condemnor for deliberately low offers because a low offer may result in the condemnor paying

> the owner's litigation expenses as well as its own. This Court has disapproved the practice of an agency attempting to bind an owner to a low offer and then revising its offer just before filing suit in order to minimize attorney fees. Third, the fee provision provides a performance incentive to the owner's attorney, because the fee awarded is directly proportional to the results achieved by counsel. The result generated by counsel was also central to the related question of what constitutes the "ultimate award," the second factor in the attorney fee calculation. The Court held that interest on the judgment should be included in the ultimate award, "as such was the product of the attorney's efforts."
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> Using the initial offer as the base figure for computing fees was reasonable in this case and served the legislative purposes of the statute. The owners hired the attorneys with that offer on the table, and the court's finding that the attorneys accepted the case on the basis of that offer is not clearly erroneous. Thus, awarding fees based on that amount will assure the owners full compensation. [*Robinson, supra* at 645-646 (citations omitted).]

This is consistent with this Court's earlier determination in *City of Bay City v Surath*, 170 Mich App 139; 428 NW2d 9 (1988), which provided, in relevant part:

> If property is to be acquired by a governmental agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action by filing a complaint for the acquisition of the property in the circuit court in the county in which the property is located. MCL § 213.52; MSA § 8.265(2) and MCL § 213.55; MSA § 8.265(5). Section 5 of the act, MCL § 213.55; MSA § 8.265(5), sets forth the procedural requirements for the initiation of condemnation proceedings. Before filing the complaint for the acquisition of the property, and before initiating negotiations for the purchase of the property, the agency must establish an amount it believes to be just compensation for the property. After an amount is established, the agency must submit to the owner a good faith written offer which shall not be less than the agency's appraisal of just compensation. If the owner rejects the agency's offer, the agency may then initiate condemnation proceedings by filing a complaint with the circuit court in the county where the property is located. Therefore, § 5 defines "offer" as that amount determined by the agency to be just compensation which is thereafter submitted to the owner for the purchase of the property. Procedurally, the written offer precedes the filing of the complaint. [*Id.* at 142.]

At the outset, we recognize that cases of this type are highly fact specific and we do not intend, by this opinion, to state a hard and fast rule regarding whether an offer made first in time of multiple offers always constitutes the basis for calculation of attorney fees. However, in this instance, the initial $100,000 offer was specifically designated as "authorized" and to constitute a "formal offer." Further, this was the initial offer solely for purchase of the easement, whereas, any previous negotiations initiated by defendants were for the sale of the easement and all related real properties. Hence, the $100,000 offer was "before initiating negotiations," as required by MCL 213.55(1), for purchase of the easement. Additionally, there is no dispute that defendants retained counsel based on this offer. Consequently, in order to fully compensate defendants in

accordance with the legislative intent of the statute, this initial offer should be utilized as the basis for calculation of attorney fees.

On remand of this issue to the trial court, we note that the trial court failed to undertake a determination regarding the reasonableness of the attorney fees based, we assume, on plaintiff's stipulation to fees if calculated on the basis of the $240,000 offer. As noted in *Detroit Plaza*, citing *Randolph*:

> [O]ur Supreme Court held that the plain and unambiguous language of "[s]ubsection 16(3) mandates reimbursement 'in whole or in part' of the 'owner's *reasonable* attorney fees.'" (Emphasis added). Thus, the Court held that when confronted with a request for attorney fees under the UCPA, a trial court must first determine whether the owner's fees are reasonable, and that
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> > [i]n making this reasonableness determination, the trial court should consider the eight factors listed in MRPC 1.5. If the trial court determines that the owner's attorney fees are *unreasonable*, it should utilize its discretion to determine what amount of the owner's requested attorney fees should be reimbursed by the agency.
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> In those cases in which the trial court finds the owner's attorney fees to be *reasonable*, subsection 16(3) gives the trial court *additional* discretion to order reimbursement of those fees "in whole or in part." Once the trial court has determined the owner's attorney fees to be reasonable utilizing the factors in MRPC 1.5(1), the trial court should consider, for fee-shifting purposes and in its discretion, whether the condemning agency should be required to reimburse the entire amount of the owner's reasonable attorney fees. The court must articulate the reasons for its decision in order to facilitate appellate review. Finally, any order of reimbursement is, of course, subject to the statutory maximum: one-third of the amount by which the ultimate award exceeds the agency's written offer. [*Detroit Plaza, supra* at 293-294 (citations omitted).]

Defendants further assert that the trial court erred in denying their request for expert witness fees for Pertner, Sass and Seiber. The award of expert witness fees is governed by MCL 213.66, which provides in relevant part:

> (1) Except as provided in this section, an ordinary or expert witness in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.
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> (5) Expert witness fees provided for in this section shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. For the purpose of this section, for each element of compensation, each party is limited to 1 expert witness to testify on that element of compensation unless, upon showing of good cause, the court permits additional

> experts. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned.

At the outset we find the trial court did not abuse its discretion in denying reimbursement of expert witness fees for Pertner based on the trial court's determination that his services were not "reasonably necessary to allow the owner to prepare for trial." This determination was based on the trial court's recognition that other experts provided the same or similar facts and conclusions, precluding the necessity of duplication by Pertner.

With regard to expert witness fees for Sass and Seiber, to the extent the trial court's ruling depended on its overly broad interpretation of the relevant statutory language to preclude reimbursement of fees for witnesses who fail to testify, we vacate that portion of the ruling based on its inconsistency with the actual statutory language of MCL 213.66(5). However, we affirm the trial court's ruling regarding the denial of fees for Sass based on the trial court's finding that the work of this individual did not relate to the issue of just compensation, which was the only issue before the trial court. In a similar vein, the preclusion of fees for Seiber, for work that was never provided to defendants, was not subject to reimbursement because it could not have been used at or in preparation for trial. While not specifically articulated by the trial court, it is our understanding that the remainder of these fees were denied because they were not reasonably incurred in preparation for trial because they were either duplicative of work or fees incurred by other experts or were ultimately unrelated to the issue designated for trial. As such, we cannot discern an abuse of discretion by the trial court in the denial of these fees.

Affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot