STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

HAROLD R. WEAVER and CLARA WEAVER, Husband and Wife, and CLARA WEAVER TRUST, HAROLD R. WEAVER TRUST, and HAROLD R. and CLARA WEAVER CHARITABLE REMAINDER UNITRUST, under a trust agreement dated December 31, 1998,

Defendants-Appellees.

UNPUBLISHED
June 27, 2006

Nos. 257798 & 257799
Kent Circuit Court
LC Nos. 00-10127-CC & 00-10128-CC

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

HAROLD R. WEAVER and CLARA WEAVER, Husband and Wife, and CLARA WEAVER TRUST, HAROLD R. WEAVER TRUST, and HAROLD R. and CLARA WEAVER CHARITABLE REMAINDER UNITRUST, under a trust agreement dated December 31, 1998,

Defendants-Appellants.

Nos. 258087 & 258088
Kent Circuit Court
LC Nos. 00-10127-CC & 00-10128-CC

Before: Owens, PJ, and Saad and Fort Hood, JJ

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment on the verdict. Defendants appeal the court's order denying their motion to determine plaintiff's liability for costs and attorney

fees. These cases arose as condemnation actions for the construction of M-6. They were consolidated at trial and have been consolidated on appeal. We affirm.

On September 29, 2000, plaintiff executed two declarations of taking with respect to different parcels of property owned by defendants for the purpose of constructing M-6 through Gaines Township, Kent County. The estimated just compensation was $143,050 and $27,005 respectively. When defendants refused the good faith offer and the parties could not agree on a purchase price, plaintiff filed the respective condemnation actions and demanded a jury.

Plaintiff's expert, real estate broker and appraiser Donald Kishman, testified that he used a sales comparison approach. He determined that the highest and best use of the property was to separately sell the two-story colonial and the farm house located on the property, then sell the vacant land to a developer for the purpose of developing a residential subdivision. He accordingly performed three sales comparison analyses. He determined that the colonial was valued at $126,500, the farm house was valued at $81,500, and the 13.65 acres of vacant land were valued at $17,940 an acre for a total of $244,900.[1] Kishman adjusted for substantial differences in size, differences in dates of sale, and distance from defendants' property as well as for available frontage and usable land. Kishman acknowledged that defendants' property had electric and public water available to it from both streets adjoining the triangular-shaped parcel, a fiber optic cable television line running along a utility easement across the property, and available sewer nearby. He conceded that a residential subdivision could be developed on defendants' property without additional road construction. He did not, however, adjust for these costs of development when comparing defendants' property with the comparable sales.

Defendants' expert appraiser Allen Rietberg, on the other hand, used the subdivision development approach to valuation of the raw land; although he agreed that the sales comparison approach to raw land valuation was usually the most reliable, he found that there were insufficient comparable properties that had sold in the last several years given the unique configuration of, and service availability to defendants' property. Instead, he found comparable subdivision lots and, generally relying on information provided to him from defendants' expert in development Thomas Burgess,[2] backed out the costs to arrive at a figure indicating the most a developer would pay for a parcel of property with similar configuration and service availability.

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[1] Defendants' expert Allen Rietberg valued the colonial at $138,500 and the farmhouse at $79,500. Because there was little difference between the respective house valuations, and the respective house valuations are sparingly referred to on appeal, these valuations do not appear to be at issue.

[2] Burgess testified that he laid out 26 buildable lots, he determined the total cost to engineer, survey, run sewer, and grade the property was $186,000. He arrived at his estimate by consulting previous bids. The total estimate consisted of $6,000 for zoning and preliminary costs, $30,000 for engineering and surveying, $130,000 to run sewer to the property at $50 a foot, and $20,000 for grading – which included approximately $12,000 to move the floodway. In addition, Burgess obtained a letter from the zoning administrator indicating that the proposed project complied with zoning requirements.

Although Rietberg generally used Burgess' estimates, he calculated that the floodplain work would require an additional $20,000. He also subtracted $100,500 in soft costs – which consisted of marketing and professional fees and taxes – and $100,000, approximately 10.97 percent, in entrepreneurial profit. He concluded from his comparable lots that the proposed lots would command an average price of $38,500 a lot for a total developed land value of $885,500. His total concluded value, including the two houses and deducting the costs, was $811,500. Although Rietberg testified that the total value was generally subject to a cost factor, typically referred to as a discounting process, with respect to the time value of money, he indicated he did not apply this factor in the instant case. To support his decision, he cited a strong demand for entry level housing, low interest rates, and developers buying large blocks of lots up front – lots that sold immediately would not require a cost factor and would save on marketing costs. Additionally, he indicated that the increase in lot prices more than offset the cost of delay in money. The jury returned a verdict of $600,000.

Plaintiff first argues the court erred in permitting defendants' expert to testify regarding the subdivision development approach to valuation. We disagree.

A court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). However, to the extent the ruling involved a preliminary issue of law, the issue is reviewed de novo. *Transportation Dep't v Haggerty Corridor Partners, Ltd*, 473 Mich 124, 134; 700 NW2d 380 (2005), citing *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record. [Const 1963, art 10, § 2.]

"An award of just compensation is based on the fair market value of the property." *Stadium Authority v Drinkwater*, 267 Mich App 625, 633; 705 NW2d 549 (2005). Just compensation "'includes all elements of value that inhere in the property,'" *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378; 663 NW2d 436 (2003), quoting *United States v Twin City Power Co*, 350 US 222, 235; 76 S Ct 259; 100 L Ed 240 (1956) (Burton, J., dissenting), including value the property "'might have by reason of special adaptation to particular uses,'" *id.*, quoting *Clark's Ferry Bridge Co v Pub Service Comm*, 291 US 227, 238; 54 S Ct 427; 78 L Ed 767 (1934). It is intended to put the injured party in as good a position as he would have been in if the taking had not occurred; however, just compensation should not enrich the person at the public's expense, nor should it enrich the public at the person's expense. *Wayne Co v Britton Trust*, 454 Mich 608, 622; 563 NW2d 674 (1997).

Fair market value is determined by considering the highest and best use of the property, which means "'the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.'" *Stadium Authority, supra* at 633, quoting M Civ JI 90.09. Anything tending to affect the property's valuation as of the date of the condemnation is relevant. *Transportation Dep't v VanElslander*, 460 Mich 127, 130; 594 NW2d 841 (1999). However, the value of land at some future date is irrelevant. *State Highway Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961).

Citing *In re City of Detroit (City of Detroit v Hartner)*, 227 Mich 132; 198 NW 839 (1924), plaintiff argues Michigan law does not permit valuation of vacant land as though it were a developed subdivision. A jury may not award to a landowner what a developer's profit would be; it may only award what a developer would be willing to pay for the land in its condition at the time of taking. *In re City of Detroit, supra* at 138-139, quoting *Penn SVR Co v Cleary*, 125 Pa 442, 451; 17 Atl 468 (1889). According to Defendant's expert appraiser Stephen Nedeau, who testified at the hearing on plaintiff's motion in limine, the subdivision development analysis results in a value representing the maximum amount a developer would be willing to pay for land before development. Rietberg and Kishman similarly testified that the subdivision development analysis is used by developers to determine land values. Presumably, this was to determine how much a developer would be willing to pay for undeveloped property. Thus, the subdivision development analysis is not contrary to the Supreme Court's holding in *In re City of Detroit, supra* at 138-139.

Plaintiff claims the subdivision development approach is ineffective for the purpose of valuating property as of the date of condemnation because it requires an appraiser to forecast future events. In the context of tax valuation cases, this Court has stated:

> True cash value is synonymous with fair market value and is commonly determined by three different approaches: (1) cost less depreciation, (2) sales comparison, and (3) capitalization of income. [*Samonek v Norvell Twp*, 208 Mich App 80, 84; 527 NW2d 24 (1994).]

Hence, at least for tax purposes, the capitalization of income method has been recognized as a reliable method of valuation. Moreover, this Court recognized the validity of the income capitalization method of valuating condemned property in *In re Acquisition of Billboard Leases & Easements*, 205 Mich App 659, 662-663; 517 NW2d 872 (1994). And The Appraisal of Real Estate, 11th ed. at 324, indicates that the income capitalization method includes a subdivision development analysis.[3] Therefore, to the extent plaintiff argues the subdivision development method itself is improper, plaintiff's argument has no merit.

Nevertheless, plaintiff also argues that Rietberg improperly applied the subdivision development analysis, and the court improperly admitted the faulty analysis pursuant to MRE 702. MRE 702 provides:

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[3] Discounted cash flow analysis (subdivision development analysis) is used to value vacant land that has the potential for development as a subdivision when that use represents the likely highest and best use of the land [The Appraisal of Real Estate, 11th ed. at 328.]

> The use of subdivision development analysis to value vacant land is most applicable in cases where sales data on vacant tracts of land are inadequate but market data are available on the probable sale prices of developed lots and the demand for such lots [The Appraisal of Real Estate, 11th ed. at 331.]

> If the court determines that . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto . . . if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The rule "requires the trial court to ensure that each aspect of an expert witness's proffered testimony – including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data – is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). The court must not only determine whether the data is legitimate, but must also "evaluate the extent to which [the] expert extrapolates from [the] data." *Id.* at 783.

Plaintiff claims Rietberg's testimony was the product of unreliable methods because Rietberg failed to project the income and expenses associated with the proposed development and failed apply a discount rate to his vacant land valuation to bring the future income to a present value. Rietberg acknowledged that the subdivision development analysis generally required revenues to be projected and discounted; however, noting the simplicity of the project, the low interest rates, builders' practices of buying lots in bulk, and the high demand for entry level housing – which would lead to a short absorption rate and cause lot prices to increase, he stated that he did not apply a discount rate to his appraisal. Although he stated he conservatively projected a two-year sellout, he said he would not be surprised if the lots sold out immediately after platting was completed.

According to The Appraisal of Real Estate, 11th ed at 531, "in the final analysis, a value estimate reflects the appraiser's judgment based on appropriate research of the subject property and the market." Given the level of discretion accorded the appraiser's judgment with respect to discount rates, and Rietberg's testimony indicating that he exercised his professional judgment after considering the various relevant market factors, we cannot conclude that the court erroneously admitted Rietberg's testimony. Courts must liberally admit evidence of fair market value. *Stadium Authority, supra* at 647, citing *In re Memorial Hall Site (Detroit v Cristy),* 316 Mich 215, 220; 25 NW2d 174 (1946).

Plaintiff next argues the court erred in failing to give two requested supplemental instructions. We disagree.

A claim of instructional error is generally reviewed de novo. *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). However, the trial court has discretion to determine whether a supplemental instruction is applicable and accurate. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Clark v Kmart Corp (On Remand),* 249 Mich App 141, 151; 640 NW2d 892 (2002). The court's determination whether an instruction is supported by the evidence is entitled to deference. *Keywell & Rosenfeld v Bithell,* 254 Mich App 300, 339; 657 NW2d 759 (2002). Plaintiff sought the following instruction with respect to date of valuation in lieu of SJI2d 90.13:

> In this case, the market value of the property before the taking must be determined with respect to the condition of the property and the state of the market as of *October 10, 2000* and not at any earlier or later date.
>
> "[sic] You are to value the tract of land, and that only. You are not to determine how it could best be divided into building lots, or speculate how fast they could be sold, or at what price per lot. You are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. You have nothing to do with the subdivision of this tract, the price of the lots or the probability of their sale. You are to determine the fair selling value of the land before the acquisition by The Michigan Department of Transportation.

A supplemental instruction, if given, must be "unslanted" and "nonargumentative." MCR 2.516(D)(4). While plaintiff incorporated language from *In re City of Detroit, supra,* plaintiff omitted some relatively important phrases indicating that the jury *was* to consider the potential development of the property but *only* for the limited purpose of determining its then current value. By omitting this essential concept, plaintiff's proposed instruction could have been interpreted as directing the jury to entirely disregard defendants' valuation evidence rather than to regard it in the proper context and, thus, was somewhat misleading. A supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly and impartially. *City of Novi v Woodson,* 251 Mich App 614, 630-631; 651 NW2d 448 (2002). The trial court gave SJI2d 90.13. In compliance with precedent, the court instructed the jury about just compensation, the determination of value, the meaning of fair market value, the meaning of highest and best use, and the purpose of comparables. The court also stated:

> Generally, the more similar one property is to another, the closer the price paid for one may be expected to approach the value of the other. Thus, in weighing the opinion of a witness as to the value of the subject property based upon other market transactions you may consider the following matters: How near is the date of the other transaction to the date of valuation in this case? How near is the size and shape of the property to the size and shape of the owner's property? How similar are the physical features, including both improvements and natural features? How similar is the use to which the other property is or may be put to the use which is or may be made of the owner's property? . . . You should also consider the extent to which the witness has taken into account whatever dissimilarities may exist. If you are not satisfied that the transactions being used as comparables are, in fact, comparable, then you may consider that fact in weighing his opinion. You should bear in mind that comparable sales are not themselves direct evidence of value but merely the basis on which the witnesses have formed their opinions of value.

Given the fact that defendants' property was vacant, undeveloped land, and defendants' comparables were developed, platted lots, this instruction essentially directed the jury to negatively factor the items mentioned by plaintiff's proposed instruction when determining value. If jury instructions, when read in their entirety, fairly and adequately present the theories of the parties and applicable law to the jury, then no error requiring reversal occurs. *Bachman v*

Swan Harbour Assocs, 252 Mich App 400, 424; 653 NW2d 415 (2002); *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

The trial court also refused to give plaintiff's following proposed jury instruction:

> Members of the Jury, you are instructed that the law of the State of Michigan requires the Michigan Department of Transportation in a case such as this to fully compensate the owner for all costs and expenses, and attorney's fees after the trial in this case. You shall not consider such costs and fees or allow such matters to enter into your deliberations in arriving at your verdict.

Plaintiff claims that this was error because "[b]ased on MDOT's previous experience at trials, juries are not always aware that attorney fees and expenses are not part of just compensation". Other than plaintiff's blanket statement, it does not provide, nor did it provide at trial any evidence that the jury would consider attorney fees and expenses as part of just compensation. Thus, plaintiff has failed to establish the factual predicate for its claim. Cf. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

The jury instructions should include all the elements of the plaintiff's claim, and should not omit material issues, defenses, or theories supported by the evidence. *Case v Consumers Power Co*, 463 Mich 6; 615 NW2d 17 (2000). However, it is error to instruct a jury on a matter not sustained by the evidence or the pleadings. *Murdock, supra* at 60. As defendants note, the only times costs or fees were mentioned is when plaintiff's attorney questioned plaintiff's expert witnesses about the fees they charged. When the second witness was questioned about his fee arrangement, defendants objected on the ground that fee arrangements were irrelevant to any issue in the case, and the court sustained the objection on this ground. Therefore, because the fee arrangements were not at issue, the court did not err when it declined to give plaintiff's proposed instruction. Moreover, the court instructed the jury that its deliberations were limited to determining the market value of the property before the taking. Thus, the court's instruction sufficiently directed the jury to consider only the relevant issue in the case, juries are presumed to follow their instructions, *Craig v Oakwood Hospital*, 249 Mich App 534, 561; 643 NW2d 580 (2002) (Cooper, J, concurring), rev'd on other grds 471 Mich 67 (2004), and plaintiff has failed to establish error requiring reversal.

Defendants argue the court erred in failing to impose sanctions pursuant to MCR 2.403(O). We disagree.

Interpretation of a court rule is a question of law that is reviewed de novo. *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005). A court's decision whether to award attorney fees is reviewed for an abuse of discretion. *City of Lansing v Edward Rose Realty, Inc*, 224 Mich App 235, 238-239; 568 NW2d 159 (1997). In Michigan, attorney fees are generally not recoverable unless a statute, court rule, or common-law exception provides otherwise. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). Here, the judgment entered on the verdict ordered plaintiff to pay defendants' reasonable attorney fees and

expert witness fees pursuant to "Section 16 of the UCPA." Defendants' argument involves interpretation of both a statute and a court rule.[4] When interpreting a statute, a court's main purpose is to discover and effectuate legislative intent by ascribing to it the meaning plainly expressed in the words used without rendering any part of the statute nugatory. *Edgewood Dev Inc v Landskroener,* 262 Mich App 162, 167; 684 NW2d 387 (2004). MCL 213.66(3) provides:

> 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. If the agency or owner is ordered to pay attorney fees as sanctions under Michigan court rule 2.403 or 2.405, those attorney fee sanctions shall be paid to the court as court costs and shall not be paid to the opposing party unless the parties agree otherwise.

Thus, a party must pay fees to the court *only if* a party is ordered to pay attorney fees under MCR 2.403. Hence, the question is whether attorney fees were warranted under MCR 2.403. The rules of statutory interpretation also apply to court rules. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). MCR 2.403(O)(1) provides:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

Defendants argue that because plaintiff rejected the evaluation award, and the action proceeded to a verdict less favorable to plaintiff, plaintiff was required to pay defendants' actual costs. Actual costs are defined by MCR 2.403(O)(6).

> (6) For the purpose of this rule, actual costs are

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[4] With respect to defendants' argument that the Legislature intended to impose sanctions, the "sanctions" provision of the statute refers to the attorney fees awarded pursuant to MCR 2.403(O). Our Supreme Court has succinctly addressed whether MCR 2.403(O) should be considered punitive in nature. "Although one of the aims of the mediation rule is to discourage needless litigation, the rule is not intended to punish litigants for asserting their right to a trial on the merits." *McAuley v Gen Motors Corp*, 457 Mich 513, 523; 578 NW2d 282 (1998), overruled in part on other grounds *Rafferty v Markovitz*, 461 Mich 265 (1999). "[O]nly compensatory damages generally are available in Michigan, and . . . punitive sanctions may not be imposed. Because the purpose of compensatory damages is to make an injured party whole for losses actually suffered, the amount of recovery for such damages is thus limited by the amount of the loss." *Rafferty v Markovitz*, 461 Mich 265, 270-271; 602 NW2d 367 (1999).

* * *

> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

"[P]arties are limited by the court rule's definition of 'actual costs' to recovery of a reasonable fee as determined by the trial court, regardless of the fee amount a party may contractually agree to with his attorney or the total amount he may spend on litigation." *McAuley v Gen Motors Corp*, 457 Mich 513, 524; 578 NW2d 282 (1998). Nevertheless, before a party may recover under the mediation court rule, he must show that he has incurred the fees. *Rafferty v Markovitz*, 461 Mich 265, 271; 602 NW2d 367 (1999). If he already has been fully reimbursed for reasonable attorney fees through operation of a statutory provision, he cannot make this showing because there are no 'actual costs' remaining to be reimbursed. *Id.* Only if the statute limits recovery of attorney fees "to something less than a reasonable attorney fee" may the party recover an additional award under the court rule. *Id.* Because defendants' fee agreement in the instant case mirrors the reasonable attorney fee language of MCL 213.66(3), defendants did not incur attorney fees that were not recompensed by MCL 213.66(3). Hence, the last sentence of MCL 213.66(3) with respect to sanctions awarded pursuant to MCR 2.403(O)(6) never became operative.

Defendants next appear to argue that MCL 213.66(3) violates the separation of powers doctrine because it imposes the Legislature's will in matters of procedure, which is the Supreme Court's prerogative. With respect to defendants' violation of separation of powers argument, MCR 1.104 states, "Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by ruled adopted by the Supreme Court." MCL 213.66(3) does not attempt to award sanctions in contravention of MCR 2.403(O), but merely directs to whom the sanctions are to be paid if awarded under the court rule. Because the Supreme Court has not enacted a statute that supersedes this portion of the statute, the statute did not violate the separation of powers doctrine.

Affirmed.

/s/ Donald S. Owens
/s/ Karen M. Fort Hood