

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

UNPUBLISHED
September 9, 1997

Plaintiff-Appellant/Cross-Appellee,

v

No. 194281
Macomb Circuit Court
LC No. 91-002300 CC

SAMIR A. DANOU and MARY JANE DANOU,

Defendants-Appellees/Cross-Appellants,

and

MANUFACTURERS NATIONAL BANK OF
DETROIT,

Defendant.

Before: Hood, P.J., McDonald and Young, JJ.

PER CURIAM.

In this condemnation proceeding, plaintiff appeals by right from the trial court's opinion and order awarding defendants Samir and Mary Jane Danou attorney fees, expert witness fees, and costs. We affirm in part, reverse in part, and remand for further proceedings.

On May 17, 1991, plaintiff filed a complaint against defendants claiming that it was vested with the power to secure fee simple or lesser estates in real property from defendants for the purpose of improving M-59 Highway in Macomb County. Plaintiff made an initial good faith offer of \$630,822. Plaintiff then reappraised the property and reduced the offer to \$615,995. Defendants rejected both offers. On September 7, 1995, the parties entered into a consent judgment which transferred title to defendants' property to plaintiff in exchange for \$1,700,000.

Prior to entry of the consent judgment, defendants brought a motion to compel reimbursement of attorney fees and costs pursuant to the Uniform Condemnation Procedures Act (UCPA), MCL

213.51 *et seq.*; MSA 8.265(1) *et seq.* Defendants requested an award of attorney fees in an amount equal to one-third of the difference between the first written offer and the just compensation paid. Following an evidentiary hearing on defendants' motion, the trial court granted defendants' request for the maximum attorney fees permissible under the UCPA's § 16(3), MCL 213.66(3); MSA 8.265(16)(3). Additionally, after deducting non-compensable expenses, the trial court awarded defendants expert witness fees totaling \$94,876 and costs in the amount of \$20.

I

On appeal, plaintiff first argues that the trial court abused its discretion by awarding the statutory maximum attorney fee under § 16(3) of the UCPA. We disagree.

The UCPA provides for the award of reasonable attorney fees, but not in excess of one-third of the amount by which the ultimate award exceeds the agency's written offer. MCL 213.66(3); MSA 8.265(16)(3); *Dep't of Transportation v Curis*, 221 Mich App 136, 139; 561 NW2d 459 (1997). An award of attorney fees in a condemnation case will be upheld unless the trial court abused its discretion in determining the reasonableness of the fees. *Curis, supra* at 139-140. The burden of proof is upon the landowner claiming compensation. *Id.* at 139. The court is required to make an independent review and, on the basis of the record of the case, determine what constitutes a reasonable attorney fee. *Id.*

Plaintiff argues that the trial court abused its discretion by awarding defendants attorney fees based upon the maximum one-third calculation provided by the statute. Plaintiff contends that the appropriate manner of calculation is by multiplying the number of reasonable hours worked by a reasonable hourly fee (the so-called "lodestar" analysis). We are not persuaded by plaintiff's claim that the lodestar analysis was adopted by reference in *City of Flint v Patel*, 198 Mich App 153; 497 NW2d 542 (1993). Indeed, under *Curis*, it is not an abuse of discretion for a trial court to grant the maximum statutory fee without providing an hourly-wage analysis, provided that the record supports the conclusion. See *Id.* at 139-140.

There are eight factors which must be addressed by the trial court in determining what constitutes a reasonable attorney fee in a condemnation case:

"(1) [T]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." [*Id.* at 140, quoting *Dep't of Transportation v D & T Construction Co*, 209 Mich App 336, 341-342; 530 NW2d 183 (1995).]

Additionally, the existence of a contingency fee agreement may be considered by the trial court in making its determination. *Id.*

Our review of the record and the factors enumerated above indicates that the trial court in this case did not abuse its discretion in awarding the maximum statutory attorney fee to defendants. *Id.* at 143. Alan Ackerman testified that over 1,300 hours were spent on this case, and that he personally spent over 500 hours on the matter, which involved complex issues, namely zoning concerns, loss of frontage and backage of defendants' property, and the possibility of having to relocate a drain. In light of this evidence, the trial court did not clearly err in finding that the acceptance of this employment precluded other employment. Further, extensive testimony demonstrated that the customary fee for condemnation cases was one-third of the difference between the government's initial offer and the final award.

The record also demonstrated that defendants received approximately \$1,700,000 after an initial offer of \$630,000. This settlement exceeded the original offer by more than \$1 million. *Id.* at 141-142. Moreover, the trial court did not clearly err in finding that although there was no definite time limitation, defendants were entitled to expect both just and timely compensation. The record also supports the trial court's finding that the only legal relationship between defendants and counsel was the instant lawsuit, and that the experience, reputation and ability of the lead attorneys was impeccable. It is likewise clear that defendants had a contingency fee agreement with defense counsel.

The *Curis* Court also reaffirmed the policy concerns, initially expressed by this Court in *Dep't of Transportation v Robinson*, 193 Mich App 638, 645; 484 NW2d 777 (1992), underlying the attorney fee provision of the UCPA:

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. 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. [*Id.* at 142-143 (citations omitted).]

Those policy concerns were considered by the trial court in the present case, and lend additional support to its determination. Here, as in *Curis*, an hourly rate would have placed defendants in a worse position than they occupied before the taking, and would have undermined the statutory purpose of penalizing low offers. *Curis, supra* at 143. The trial court did not abuse its discretion in holding that an award of one-third of the difference between the first written offer and the ultimate award constituted reasonable attorney fees. *Id.*

II

Plaintiff next argues that the trial court abused its discretion in awarding \$94,876 in expert witness fees to defendants. Plaintiff claims that the record does not support the fees awarded. We agree.

A trial court's award of expert witness fees is reviewed for an abuse of discretion. *In re Acquisition of 306 Garfield*, 207 Mich App 169, 187; 523 NW2d 644 (1994). Under the UCPA, payment of reasonable expert witness fees is mandatory. MCL 213.66; MSA 8.265(16); *Michigan Dep't of Transportation v Schultz*, 201 Mich App 605, 608; 506 NW2d 904 (1993). Experts are properly compensated for court time and the time required to prepare their testimony. *Schultz, supra* at 609. However, any appraisal service that goes beyond the scope of the type of services that would normally be rendered by a person in that profession are not compensable. *Id.* Conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position are not considered compensable expert witness fees. *Robinson, supra* at 641; *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987).

Defendants concede that plaintiff originally requested, and was entitled to, an evidentiary hearing on the reasonableness of defendants' requested expert witness fees, but that the parties agreed that depositions would be taken in lieu of a hearing. Those depositions were never taken. Rather, the trial court apparently relied on documentary evidence attached to defendants' motion for reimbursement of costs. We agree with plaintiff that the evidence presented was insufficient for the trial court to determine which services performed by the various experts were properly compensable and assessable against plaintiff under *Lufran, supra*.

Moreover, while defendants maintain that they provided itemized billing statements for all of their experts, we were unable to locate in the lower court record any billing statements, itemized or otherwise, for the services of Gerald Anderson and Urban Land Consultants. Rather, it appears that the trial court relied solely on the figures contained in defendants' motion for reimbursement of costs in arriving at the fees awarded for those experts. Consequently, we are remanding this matter for an evidentiary hearing on all of defendants' requested expert witness fees. The trial court should make findings of fact and explain the basis for its allowances. See *Wayne Co Road Comm'rs v GLS LeasCo*, 394 Mich 126, 143; 229 NW2d 797 (1975).

III

Defendants had argued on cross-appeal that they are entitled to post-judgment interest on the award of attorney fees. However, at oral argument, defense counsel stated that the issue was being abandoned. Consequently, we need not review it.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.

