

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

UNPUBLISHED
August 4, 1998

Plaintiff-Appellant,

v

No. 196084
Oakland Circuit Court
LC No. 93-460328 CC

NOVEL SAFOU a/k/a NOUEL SAFOU and
MARTHA SAFOU,

Defendants-Appellees,

and

NATALIE, INC. d/b/a STOP AND SHOP and
MICHIGAN NATIONAL BANK,

Defendants.

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Following a hearing, plaintiff appeals by leave granted an order of attorney fees and costs in favor of defendants in a condemnation action following a hearing. We reverse and remand. Plaintiff sought to obtain certain property located in the city of Pontiac for its planned improvement of Highway M-59. The property was owned by defendant Novel Safou and his wife, Martha Safou. Defendant Natalie Inc d/b/a Stop and Shop operated a party store on the property and held a five-year leasehold on the property with an option to purchase.

Plaintiff argues that the trial court abused its discretion in awarding attorney fees to the Safous in excess of the statutory limit, based on an erroneous finding that MDOT made a separate good-faith offer of \$47,000 to the Safous. We agree. MDOT initially offered a combined total of \$155,000 for the property to the Safous and Natalie, Inc. Ultimately, the jury awarded a total compensation of

\$205,000 for the property. The court apportioned the award based upon the jury's verdict, awarding \$155,000 to the Safous and \$50,000 to Natalie, Inc. The Safous and MDOT stipulated to post-complaint interest in the amount of \$9,278.12, resulting in a "total award," including interest, of \$214,278.12. Therefore, the difference between the total first offer made by MDOT and the total award was \$59,278.12. The maximum chargeable to plaintiff, one-third of that amount pursuant to § 16(3) of the UCPA, is \$19,739.38. However, the trial court awarded \$43,066.47 in attorney fees pursuant to the UCPA only to the Safous, an amount well in excess of one-third of the difference to be awarded to *both* the Safous and Natalie, Inc. Accordingly, we find that the trial court erred in awarding the Safous an amount of attorney fees exceeding the limit imposed by the UCPA.¹

MCL 213.55(1); MSA 8.265(5)(1) clearly permitted MDOT to make one unitary offer where more than one party had an interest in the property. Pursuant to MCL 213.63; MSA 8.265(13), the court, and not MDOT, was required to apportion the compensation for the property. See also *State Highway Comm'r v Woodman*, 366 Mich 385, 390; 115 NW2d 90 (1963). The Safous contend that the award of their fees was not in excess of the statutory one-third limit, based upon the assertion that MDOT made a good faith offer of \$47,000. This is based on the valuation statement which set the value of the Safous' fee interest at \$47,000. The Safous also rely on the letter from MDOT which stated that it "appeared" to MDOT that the Safous' interest in the property was valued at \$47,000. However, we find that MDOT's references to the appraised value of their interest is the not equivalent to a separate, good faith offer in the amount of \$47,000. MDOT never made separate offers to the Safous and Natalie, Inc. Rather, MDOT clearly indicated in subsequent letters to the Safous and Natalie, Inc., that they would have to decide how to divide the proceeds from the award. In addition, two memoranda regarding negotiations indicate that MDOT informed the Safous and Natalie, Inc. that they would have to agree between themselves as to the apportionment of compensation. Accordingly, the court erred in awarding attorney fees to the Safous pursuant to the UCPA based on a separate offer when the record indicates that MDOT did not make a separate offer to them.

MDOT also argues that the court abused its discretion in adding expert witness fees to the award considered in awarding attorney fees pursuant to the UCPA. Again we agree. Statutory witness fees may not be included in the term "ultimate award" under MCL 213.66(3); MSA 8.265(13). *Dep't of Transportation v Dennis*, 133 Mich App 207, 212; 349 NW2d 261 (1984). Because the owner's attorney fees are at issue, the term should not include monies not immediately generated by the attorney's performance. *Id.* It is evident in its order awarding attorney fees pursuant to the UCPA that the court added expert witness fees in making its award. This was incorrect. Accordingly, the court erred in awarding the Safous attorney fees based on an ultimate award that included expert witness fees.

Next, MDOT argues that the trial court erred in awarding attorney fees as mediation sanctions based upon separate mediation evaluations. We agree. We review the court's decision whether to grant mediation sanctions de novo because it involves a question of law, not a discretionary matter. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127; 573 NW2d 61 (1997). Pursuant to MCR 2.403(O)(4)(a), costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation. See also *Broadway Inc*

v Commercial Ins (Amended Opinion), 217 Mich App 109, 115; 550 NW2d 838 (1996). MDOT obtained an aggregate verdict of \$205,000, which was more favorable to it than the second mediation evaluation, which awarded an aggregate compensation of \$265,000. Accordingly, the court erred in awarding attorney fees as mediation sanctions.

MDOT also argues that the court erred in awarding attorney fees as mediation sanctions pursuant to MCR 2.403(O) without holding an evidentiary hearing and without considering the relevant factors.² We agree. This Court has held that a trial court should consider the relevant factors in determining the reasonableness of attorney fees as mediation sanctions. *Temple v Kelel Distributing*, 183 Mich App 326, 333; 454 NW2d 610 (1990). We find that the trial court erred in awarding attorney fees as mediation sanctions pursuant to MCR 2.403(O) without holding an evidentiary hearing and without considering the relevant factors. The trial court awarded the Safous \$23,148.09 in attorney fees as mediation sanctions before ruling that the fees sought were reasonable. The record indicates that the court did not apply the relevant factors and make an independent determination before approving the fees or state its grounds for finding that the fees were reasonable.

MDOT also argues that the court erred in basing its decision to award attorney fees as mediation sanctions on a contingency fee basis pursuant to MCR 2.403(O)(6). We agree. This Court has recognized that MCR 2.403(O)(6) was intended to require mediation sanctions to be based on a reasonable daily or hourly rate, rather than on a contingent fee. *Temple, supra* at 331-332. The transcript indicates that the court awarded attorney fees as mediation sanctions based, at least in part, on the Safous' contingency fee agreement with their counsel. Accordingly, we find that the court erred in awarding attorney fees as mediation sanctions on a contingency fee basis.

Next, MDOT argues that the court erred in awarding costs to the Safous pursuant to the UCPA and MCR 2.403(O). We agree. We find that the court erred in awarding the Safous \$421.28 in costs pursuant to the UCPA. While the UCPA does provide for the payment of attorney fees, there is no provision which requires MDOT to pay costs. In its order awarding \$421.31 in costs, the court did not make any independent determination or provide any statutory authority for making such an award. The Safous have not cited any statutory authority for the award of these costs in their brief on appeal. Accordingly, the court erred in awarding the \$421.31 in costs pursuant to the UCPA.

In addition, we find that the court also erred in awarding costs totaling \$3,046.31 pursuant to MCR 2.403(O). The costs awarded by the court pursuant to MCR 2.403(O) apparently consist of expert witness fees incurred after mediation (\$2,625), and the same \$421.31 in documents and transcript fees the court awarded pursuant to the UCPA. Pursuant to MCR 2.403(O)(4)(a), costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate mediation evaluation. The court did not make any independent determination or provide any statutory authority before making the award. The Safous have not cited any statutory authority for the award of these costs pursuant to MCR 2.403(O) in their brief on appeal. Accordingly, the court erred in awarding the \$3,046.31 in costs pursuant to MCR 2.403(O).³

Reversed. On the basis of plaintiff's acknowledgments at oral argument, see *supra* note 1, attorney's fees are awarded to defendants in the amount of \$19,739.38.⁴

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

¹ Because we find that the court erred in awarding attorney's fees in excess of the limit imposed by the UCPA, and because appellant has acknowledged at oral argument that the UCPA-imposed limit of \$19,739.38 is based upon a reasonable calculation of attorney's fees, it is unnecessary for us to address appellant's argument that the court erred in awarding attorney's fees pursuant to the UCPA without holding an evidentiary hearing and without considering the appropriate factors.

² MCL 213.66(3); MSA 8.265(16)(3) was recently amended by P.A. 474 of 1996, effective December 26, 1996, to forbid awarding of attorney fees to the opposing party as court costs pursuant to MCR 2.403(O), unless the parties agreed otherwise. But see *Great Lakes Gas Transmission Ltd Partnership, supra* in which this Court held that MCR 2.403 applies to condemnation actions.

³ Because we find that the court erred in awarding attorneys fees as mediation sanctions pursuant to MCR 2.403(O), it is unnecessary for us to reconcile the language of subsection (4) relating to "a plaintiff who obtains an aggregate verdict" with the instant condemnation situation in which the plaintiff is in the position of the payor. See *Detroit v Kallow Corp*, 195 Mich App 227, 232; 489 NW2d 500 (1992).

⁴ Although we are cognizant of this Court's decision in *Michigan Dept of Transportation v Safou*, (Unpublished Opinion, Docket No. 189707, rel'd 5/30/97), we have not sought to reconcile each of the aspects of the instant decision with those of this separate case. Rather, we have limited this opinion to the four corners of the controversy herein presented to this Court.