STATE OF MICHIGAN

COURT OF APPEALS

BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF WASHTENAW,

Plaintiff-Appellee,

v

ROBERT J. RAYER, Trustee of the ROBERT RAYER TRUST, and MARILYN L. RAYER, Trustee of the MARILYN L. RAYER TRUST,

Defendant-Appellants.

UNPUBLISHED
July 9, 1999

No. 203942
Washtenaw Circuit Court
LC No. 95-004589 CC

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

WHITE, J. (concurring in part and dissenting in part).

I agree with the majority's determination regarding inventory.[1] I respectfully dissent from the majority's determination that § 5 of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.*; MSA 8.265(1) *et seq.*, mandates that plaintiff's amended offer be considered the "good faith written offer" under § 5 for purposes of determining attorney fees under MCL 213.66(3); MSA 8.265(16)(3).

Attorney fees under the UCPA must be reasonable, and this Court will uphold an award of attorney fees unless the trial court's finding on the reasonableness issue was an abuse of discretion. *In re Condemnation of Private Property for Highway Purposes*, 221 Mich App 136, 142-143; 561 NW2d 459 (1997), *Detroit v J Cusmano, Inc*, 184 Mich App 507, 512-513; 459 NW2d 3 (1989).

Both parties argue, and I agree, that under *Dep't of Transportation v Robinson*, 193 Mich App 638, 645; 484 NW2d 777 (1992), the circuit court had discretion to determine which precomplaint purchase offer to use to determine attorney fees under the UCPA, MCL 21366(3); MSA 8.265(16)(3). In *Robinson*, this Court upheld the circuit court's use of the plaintiff's initial precomplaint offer in its determination of a reasonable attorney fee. After noting that "[t]he UCPA does not expressly contemplate multiple precomplaint offers, and there are no cases directly on point," the

Robinson Court looked to principles of statutory construction and the purposes underlying the attorney fee provision for guidance:

> Section 16 of the UCPA defines a limit on [attorney] fees, not a formula that must be followed in every case. Under the predecessor statute the limit was $100. MCL 213.383; MSA 8.261, repealed by MCL 213.76; MSA 8.265(26), effective April 1, 1983. The Legislature liberalized the attorney fee provision in the UCPA in order to reimburse owners for expenses incurred as a result of agency actions. House Legislative Analysis, HB 4652, June 19, 1980.
>
> 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. . . .
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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. MCR 2.613(C). Thus, awarding fees based on that amount will assure the owners full compensation.[2] The trial court in this case did not suggest, nor do we, that plaintiff deliberately attempted to minimize attorney fees by making a last-minute, precomplaint revision in the offer. The court did note, however, that the initial offer reflected the agency's choice to offer only the lesser detach-reattach amount. The record shows that defendants' attorneys were instrumental in raising that offer to the ultimate award realized by defendants in this case. We see no abuse of discretion in the court's determination that, under the circumstances, the fee was reasonable. [193 Mich App at 645-646. Emphasis added.]

The *Robinson* Court also noted:

> . . . . We do not . . . suggest that the initial offer need always be the offer upon which attorney fees must be based under § 16.3. The statute leaves it to the sound discretion of the trial court to determine if a fee is reasonable under the circumstances. We only hold that, in this case, using the initial offer as the base resulted in a reasonable fee that did not exceed the statutory maximum. [193 Mich App at 646-647.]

Robinson, supra at 644, recognizes that more than one precomplaint good faith written offer may be made under § 5. See also *City of Flint v Patel*, 198 Mich App 153, 158; 497 NW2d 542 (1993) (noting "this Court's recent holding that where two § 5 offers were made before the commencement of condemnation proceedings, it was not unreasonable, given the purposes of the UCPA, for the trial court to order reimbursement of the defendant for attorney fees under § 16 on the basis of the first (and lower) of the two offers," citing *Robinson, supra.*)[3]

Further, plaintiff does not claim that MCL 213.55(3); MSA 8.265(5)(3) controls here and mandates the use of the amended offer for purposes of computing the maximum attorney fee.

The record in the instant case supports that defendants' counsel was instrumental in plaintiff's purchase offer increasing by $13,745 as to immovable fixtures. Plaintiff did not dispute this below, rather, it argued that the omission of immovable fixtures from its initial offers was "inadvertent."[4] Plaintiff's written good faith offer that immediately preceded the amended offer was less than the agency's appraisal of just compensation for the property, contrary to MCL 213.55 (1); MSA 8.265(5)[5] Defendants argue, and the record supports, that they retained defense counsel when a good faith written offer that did not include immovable fixtures was before them. Under these circumstances, the circuit court's focus on plaintiff's having changed its offer once defendants' counsel brought the omission of immovable fixtures to plaintiff's attention in denying attorney fees missed the mark,[6] and was an abuse of discretion.

I would affirm the circuit court's determination regarding inventory, reverse its denial of attorney fees pertaining to immovable fixtures and equipment, and order that the circuit court award attorney fees in the amount of 1/3 of $13,745.00.[7]

/s/ Helene N. White

[1] I agree with plaintiff that the award of $78,355 for inventory places defendants in as good a position as they were in before the taking as to inventory. See *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 340; 530 NW2d 183 (1995). Defense counsel does not argue, and the record does not support, that his labor enhanced the inventory award.

[2] See also *Dep't of Transportation v DiMatteo*, 136 Mich App 15, 17; 355 NW2d 622 (1984), which notes:

> . . . . Only nominal attorney fees were provided by the previous [UCPA] statutes. The current provision provides a performance incentive, as the fee awarded is directly proportional to the results achieved by counsel. Under the previous statute, the property owner was forced to pay a sizeable portion of his award to his attorney. The property owner was left without his property and with an award substantially less than just compensation. The new statute attempts to remedy this injustice and assure that the

property owner will receive the full amount of his award. MCL 213.66(3); MSA 8.265(16)(3).

[3] *Patel*, *supra* at 158, which states in pertinent parts:

> In this case the city filed only one written offer pursuant to § 5, and in that offer made no provision, ie., offered zero compensation, for removable fixtures. It is this offer that must be used to compute attorney fees under § 16. Using the original offer in these circumstances encourages fair and equitable initial offers on the part of condemning authorities because it penalizes deliberately low offers made under § 5. . . . We also note that, like the instant case, the city in *J Cusmano & Son* failed to include any compensation for removable fixtures in its §5 offer, yet that offer was used as the starting point for calculating attorney fees under § 16. Essentially the same analysis was applied and the same result was reached in *Dep't of Transportation v Pichalski*, 168 Mich App 712, 719-721; 425 NW2d 145 (1988).
>
> 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. [198 Mich App at 158.]

[4] At the August 30, 1996 hearing on defendants' motion for attorney fees, defense counsel argued:

> The other issue, Judge, other than the inventory is the fixtures. After we had a meeting, Mr. Deveccios [sic DelVecchio, Washtenaw Co Right of Way Acquisition Specialist] here and Mr. Rollinger [plaintiff's counsel] myself and my clients. We sat down. We look at the fixture appraisal. We looked at their offer. And their offer – their fixture appraisal had amount [sic] for immovable fixtures, their offer did not.
>
> Their feeling at the time was that a moveable [sic immovable] fixture should be considered part of the real estate. That was – that was an error. I pointed out the error to him. They corrected the error. Two weeks before the filing of the complaint.
>
> And, of course, I made noises, I made threats if you don't do this then – then the case is no good. You didn't make a good faith offer and the Court has to dismiss.
>
> So I'm patting myself on the back for that. And I think I did my client a good bit of work there.

Plaintiff's counsel responded:

> As to the issue of the immoveable [sic] fixtures and the equipment, what both Michigan Department of Transportation versus Robinson, which we've cited, which I believe Mr.

> Harrison has cited, as well as Bay City versus Surath, both indicate that there is no such thing as a good faith written offer to purchase before [sic?]. That in fact, there can be multiple and that is what the case talks about. They talk about having multiple pre-filing offers and that it's for the Court to look at whether or not it's the first offer that's the best offer in terms of reaching a determination on the reasonableness of the attorney fee.
>
> In this instance, there was an amended good faith offer . . . .
>
> Mr. And Mrs. Rayer were well aware that that was the value of the immoveable fixtures and equipment based on a fixture appraisal in April. On top of that . . . is the April 28th letter that I sent to Mr. Harrison amending the good faith offer to specifically enumerate and include the same sum, the $13,745.00.
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> The complaint was not filed until May 12th. In fact, in this letter to Mr. Harrison I indicate to him that he ask his clients very clearly with the addition –the set forth addition of this sum would his clients now agree to accept the amended good faith offer of the Plaintiff in lieu of filing condemnation.
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> If they wish to declined [sic], let me know and we would in fact then file our action for condemnation and we could determine, through a trial by jury, what the amount of compensation should be. His clients whose [sic chose] not to accept that amount. We deposited that sum as well as estimated just compensation as required by statute and as indicated in the complaint attached to our supplemental brief.

[5] MCL 213.55; MSA 8.265(5) of the UCPA provides in pertinent part:

> (1) Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property[5] and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established. . . . . *The amount shall not be less than the agency's appraisal of just compensation for the property.* . . . [Emphasis added.]

[6] The circuit court denied defendants' motion for attorney fees, stating as to immovable fixtures:

> . . . Plaintiff contends it amended its offer on April 28, 1995 to include a sum certain of $13,745 for immovable fixtures. The Defendants do not dispute that this same amount is included in the $132,305 awarded by consent judgment for the movable and immovable trade fixtures and equipment. They argue only that Plaintiff's amended offer must be excluded because it was only made after Defendants' attorney indicated to Plaintiff that such immovable fixtures were distinct from the real estate. Because Plaintiff did not include a fixture amount in its first offer, Defendant argues that an attorney fee is due on the entire $13,745.00. The Court disagrees.

> While the intent of the statute is to force the condemning agency to make a realistic good faith offer at the outset, there can be more than one pre-filing good faith offer. *MDOT v. Robinson*, 193 Mich App 638 (1992); *Bay City v. Surath*, 170 Mich App 149 [sic 139] (1988).
>
> When informed by Defendants that a separate immovable fixture offer must be made, it was immediately forthcoming. The difference between the initial fixture offer and that accepted by Defendants is zero. No fee can be awarded on that amount.

[7] The record supports that after a hearing was scheduled on defendants' motion for attorney fees, the parties stipulated to dismiss the evidentiary hearing and plaintiff waived any challenge to the reasonableness of the remaining fee claimed, the parties agreeing that the only issues remaining were legal and limited to determining which written purchase offer would serve as the basis for calculating the attorney fee. Plaintiff stated in pertinent part in its supplemental brief in opposition to defendants' motion for attorney fees:

> . . . the only issue that remains outstanding is the issue of the computation of a reasonable attorney fee in this case.
>
> . . . . The parties are prepared to abide by the decision of the Court relative to the determination of what a reasonable attorney fee should be for reimbursement purposes, in lieu of a [sic] holding an evidentiary hearing on the matter.

Defendants attached to their appellate brief a copy of an August 6, 1996 letter defense counsel sent plaintiff's counsel, which plaintiff's counsel signed, that states:

> To confirm our conversation with Judge Morris's judicial clerk today, and our conversation together before we made that call: (1) we have dismissed the evidentiary hearing; (2) you have waived any challenge to the reasonableness of the claimed fee as to qualifications, hourly rate, or time expended; (3) we have both waived our right to an evidentiary hearing; (4) we have agreed that the only issues are legal and that they may be decided by the motion scheduled for August 13th; and (5) that the legal issues are limited to determining the amount of the offer on which the attorney fee is calculated, i.e., whether the inventory is part of that offer and whether the increase of about $13,000 for the immovables is part of that offer.
>
> Please sign and return the attached letter indicating your agreement.

Defendants' counsel stated at the hearing on defendants' motion for attorney fees that he had not submitted all the information the court needed to reach a reasonableness determination because plaintiff's counsel had waived the question whether the fee requested was reasonable.