STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF ORION, Plaintiff-Appellee,	UNPUBLISHED September 7, 1999
v	Nos. 204339; 213055 Oakland Circuit Court
PRIESKORN GOLF ENTERPRISES, INC., Defendant-Appellant.	LC No. 94-480776 CC

Before: Gribbs, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

In Docket No. 204339, defendant appeals as of right from an order entering judgment after a jury verdict that awarded defendant $45,541 as just compensation for the taking of a permanent sewer easement and a temporary construction easement across several holes of a golf course owned by defendant. In a related, consolidated appeal by leave granted (Docket No. 213055), defendant challenges the amounts of expert witness fees and costs awarded by the trial court. We affirm.

Defendant first contends that the trial court erred in excluding evidence of the costs defendant incurred in restoring the area of the golf course affected by plaintiff's sewer line construction. The trial court excluded this evidence because the parties had previously entered into a partial consent judgment concerning the necessity and possession issues of plaintiff's condemnation action, under which judgment plaintiff had agreed to perform the restoration for defendant, leaving just compensation as the sole issue for trial. Defendant preserved its evidentiary arguments by making an offer of proof at trial that contained the substance of the excluded evidence. *Heshelman v Lombardi*, 183 Mich App 72, 83-84; 454 NW2d 603 (1990). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997).

Pursuant to Michigan Constitution 1963, art 10, § 2, "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." "Just compensation" is defined as the amount that places the property owner in as good a condition as he would have been had the taking not occurred. *Detroit v Hamtramck Community Fed Credit Union*, 146 Mich App 155, 157; 379 NW2d 405 (1985). Either party to a condemnation proceeding may request a jury trial "as to the issue of just compensation." MCL 213.62(1); MSA

8.265(12)(1); *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 132; 573 NW2d 61 (1997).

The instant case involved a partial taking. This Court has explained that in partial taking cases, just compensation is generally measured as (the fair market value of the entire parcel before the taking) minus (the fair market value of the parcel remaining after the taking). *Dep't of Transportation v Sherburn*, 196 Mich App 301, 306; 492 NW2d 517 (1992). When in the course of a partial taking the property owner incurs "severance damages," property damages attributable to the taking, the property owner may additionally recover the financial expenditures necessary to cure these severance damages. *Id*. at 305. These "cost to cure" damages are not unlimited; the value of the remainder property plus the cost to cure expenses and the fair market value of the parcel taken may not exceed the fair market value of the whole parcel before the taking. *Id*. at 305, 306. Thus, where severance damages are claimed, just compensation is calculated as follows: (the fair market value of the parcel before the taking) minus (the fair market value of the remainder after the taking) plus (the cost to cure expenses), this total amount not to exceed the fair market value of the whole parcel before taking. *Id*. at 306. In this case, this just compensation formula would reflect the following: (the market value of the entire golf course property before the sewer and construction easements were taken) minus (the market value of the golf course burdened by the easements) plus (the costs to repair the easement construction damage).

Defendant argues that its right to have a jury determine just compensation using the above formula remains completely unaffected by the fact that plaintiff, in a partial consent judgment concerning this action, agreed to complete the restoration, rather than compensating defendant for doing it. A relevant provision of the parties' consent judgment explains that "[a]ll areas disturbed by [plaintiff] in the event of any repair or replacement of the sanitary sewer shall be repaired and restored to their condition as existed prior to such action." Defendant apparently suggests that, in light of plaintiff's failure to satisfy its restoration obligation, the trial court should have simply ignored or rescinded the consent judgment and instead provided defendant with his original option, that of having the jury determine the cost to cure as part of the just compensation figure. Once a consent judgment is entered, however, it has the same force and effect as a litigated judgment, and the proper remedy for its breach by either party is judicial enforcement. *Trendell v Solomon*, 178 Mich App 365, 368-369; 443 NW2d 509 (1989). Defendant is not entitled to rescission of the consent judgment on the basis that plaintiff allegedly failed to comply with its terms. *Id*. at 367-369 (Consent judgments generally will not be set aside or modified except for fraud or mutual mistake.).

Furthermore, defendant had previously filed a contempt motion based on plaintiff's failure to restore, and a hearing on that issue was to be scheduled after completion of the trial on the just compensation issue. Allowing the jury to consider restoration costs as part of defendant's compensation award when plaintiff, pursuant to the consent judgment, was already obligated to perform the restoration would have been allowing a double recovery, in contravention of the principle that a property owner is not entitled to be enriched because of the condemnation. *Sherburn*, *supra* at 306. Accordingly, we conclude that the trial court did not abuse its discretion in excluding defendant's proffered evidence of restoration costs.

Defendant next asserts that the trial court erred in allowing the trial court clerk to ignore the direction of MCR 2.625(F) in assessing expert witness fees and costs against plaintiff. We note initially, however, that MCR 2.625(F) does not apply to this case. When a statute that provides for costs and fees in a particular type of action requires costs to be judicially determined, or does not provide for apportionment to be performed by the court clerk, MCR 2.625(F) does not apply. *Maryland Cas Co v Allen*, 221 Mich App 26, 30; 561 NW2d 103 (1997); *Oscoda Chapter of PBB Action Committee, Inc v Dep't of Natural Resources*, 115 Mich App 356, 361-362; 320 NW2d 376 (1982). In condemnation actions, the awarding of costs and fees is governed by MCL 213.66; MSA 8.265(16), which requires a judicial determination and does not assign the responsibility of apportioning fees to a court clerk.

Therefore, the issue before us is whether the trial court properly applied the statute in determining the appropriate witness fees and costs. The statute providing for expert witness fees in condemnation cases states the following:

> (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 subsection (1) and this subsection 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 subsection (1) and this subsection, 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. [MCL 213.66; MSA 8.265(16).]

The trial court's determination of what expert witness fees are reasonably necessary in a condemnation case pursuant to MCL 213.66; MSA 8.265(16) is reviewed for an abuse of discretion. *In re Acquisition of 306 Garfield*, 207 Mich App 169, 187; 523 NW2d 644 (1994).

Defendant claims that the trial court supplied insufficient justification supporting its determinations of reasonable fees to allow this Court to review the trial court's award. Referring to the initial fee calculations of the clerk, the court said,

> I agree with [plaintiff]. I think they're reasonable. I've reviewed them. I agree with her calculations. There is nothing that . . . require[s] that she give certain reasons for her decisions. It's clear that she adopted the position of [plaintiff] in awarding costs.

While the trial court did not itself itemize which of the experts' expenses it found reasonable and compensable and which it did not, the court clearly adopted plaintiff's detailed analysis with respect to the appropriate expert witness fees and other costs, which analysis is available for this Court's review. Therefore, we need not remand this case to the lower court for more detailed findings regarding the reasonableness of each cost and fee.

Moreover, justification exists for each component of the court's decision regarding costs, and we will not simply substitute our judgment for that of the trial court. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997) (An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.). The trial court adopted plaintiff's arguments that defendant's expert witness Mary Jane Anderson had spent much of her charged time addressing restoration costs, an issue that, as we have discussed, played no part in the just compensation jury trial, and engaging in activities other than testifying or preparing for her testimony.[1] See *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987) (Under MCL 213.66; MSA 8.265(16), experts are properly compensated for court time and the time required to prepare for their testimony as experts; however, 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 properly compensable as expert witness fees.). We find no abuse of discretion in the trial court's determination that these challenged costs were not reasonably necessary to allow defendant to prepare for trial, especially in light of defendant's failure to specifically rebut plaintiff's challenges. *Id*. at 68 (The burden of proof rests on the party claiming costs.). While defendant argues that expert witness Vargas' fees should have been fully charged against plaintiff when Vargas properly "discuss[ed] the time involved in restoring the golf course to full operating condition," the record reveals that expert witness Anderson also testified regarding the time involved in restoring the course; she discussed course conditions through the spring and fall of 1995 and estimated lost revenues defendant likely suffered as a result of the poor conditions during this period. Because both experts' testimony was not reasonably necessary, see MCL 213.66(5); MSA 8.265(16) ("[F]or 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 trial court did not abuse its discretion in denying defendant the full amount of Vargas' charged fees. Finally, with respect to defendant's alleged trial preparation costs, we find no abuse of discretion in the trial court's refusal to recognize these charges because defendant also failed to rebut plaintiff's challenges regarding these costs, and thus did not meet its burden of proof. *Lufran*, *supra*.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

[1] Plaintiff specifically argued that the bulk of Anderson's charges represented time spent compiling restoration costs, consulting with defense counsel, attending depositions of other witnesses, and

attending trial when she was not testifying. Plaintiff also challenged defendant's attempt to "seek[] reimbursement for time of Gerald Anderson, a second appraiser, who did not testify."