ATTORNEYS FOR APPELLANT

Theodore E. Rokita
Attorney General of Indiana

Abigail R. Recker
Deputy Attorney General
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Bryan H. Babb
James E. Carlberg
Bradley M. Dick
Bose McKinney & Evans LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

State of Indiana,

Appellant-Defendant,

v.

Brian Koorsen and
Kelly Hoffman,

Appellees-Plaintiffs.

December 1, 2021

Court of Appeals Case No.
20A-PL-2306

Appeal from the Hamilton
Superior Court

The Honorable Michael A. Casati,
Judge

Trial Court Cause No.
29D01-1504-PL-2753

Weissmann, Judge.

[1] Utility is in the eye of the beholder. In this case, a small body of water—characterized as both a necessary highway drainage pond and a weed-infested swamp, ill-suited to a high-end subdivision—spouted an inverse condemnation action that cost the State $216,640.56. The State now appeals, arguing that the trial court erred in concluding that landowners Brian Koorsen and Kelly Hoffman (Landowners) accepted the State's $45,000 settlement offer and were entitled to an additional $171,640.56 in litigation expenses.

[2] The State claims its settlement offer included litigation expenses as a matter of law. To address this issue, we must untangle three eminent domain statutes: Indiana Code § 8-23-17-27(c) (the RARPA Expense Statute); Indiana Code § 32-24-1-12 (the Settlement Statute); and Indiana Code § 32-24-1-14 (the EDC Expense Statute). Ultimately, we agree with Landowners that our legislature did not intend for the State's statutorily required settlement offer to include litigation expenses by default. But due to differing intentions as to how Landowners' litigation expenses would otherwise be handled, we do not agree that the parties struck a proper bargain.

[3] Because Landowners did not mutually assent to the State's offer to settle this cause for $45,000, we find the trial court erred in entering a judgment against the State for $216,640.56.[1]

---

[1] The judgment consisted of $45,000 (just compensation for the land); $136,788 (attorney's fees); $3,750 (appraisal costs); $5,610 (engineering fees); $492.56 (filing fees, postage, copy costs); and $25,200 (prejudgment interest).

Facts

[4] Landowners each own a lot in a Carmel, Indiana subdivision with restrictive covenants reserving all lots for residential use. The State violated those covenants by constructing a detention pond on a separate, State-owned lot to provide drainage for U.S. Highway 31. In response, Landowners filed an inverse condemnation action against the State, seeking just compensation for the taking and additional sums for litigation expenses.

[5] The State lost the inverse condemnation action, and a court-ordered appraisal found Landowners' damages to be zero dollars. Landowners, however, procured their own appraisals, which reflected combined damages of $125,000. The parties then engaged in the following statutorily required settlement negotiations:

> **[*State's Offer*]**
>
> The Plaintiff (sic), State of Indiana, acting pursuant to Indiana Code § 32-24-1-12, offers Defendants (sic), Brian Koorsen and Kelly Hoffman, total just compensation exclusive of interest and costs in the amount of Forty-Five Thousand Dollars ($45,000.00) to settle this cause.
>
> ***
>
> **[*Landowners' Response*]**
>
> The Plaintiffs, Brian Koorsen ("Koorsen") and Kelly Hoffman ("Hoffman"), by counsel, respectfully notify the State of Indiana and the Court that they accept the Offer of Settlement for total just compensation, exclusive of interest and costs, in the amount of Forty-Five Thousand Dollars and Zero Cents ($45,000.00) (the

“Settlement Amount”). Because this cause was brought pursuant to Ind. Code § 32-24-1-16 and Ind. Code § 8-23-17-27, Koorsen and Hoffman also are entitled, in addition to the Settlement Amount, an award of “reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the proceeding.” Ind. Code § 8-23-17-27(c). Therefore, Koorsen and Hoffman respectfully request that the Court schedule a hearing so the Court can determine interest, costs, and an appropriate award pursuant to Ind. Code § 8-23-17-27(c).

***

[*State’s Reply*]

The Defendant, State of Indiana, acting pursuant to Ind. Code § 32-24-1-12, notifies the Plaintiffs, Brian Koorsen and Kelly Hoffman, that it rejects Plaintiffs’ counter-offer styled as a “Response to the Offer of Settlement and Request for Hearing to Determine Award Pursuant to Ind. Code § 8-23-17-27” and the State counter-offers and renews the State’s offer to Plaintiffs . . . of total just compensation, exclusive of interest and costs, in the amount of Forty-Five Thousand Dollars ($45,000.00) (“Settlement Amount”) to settle this cause.

Because the Defendant, State of Indiana’s, offer of September 9, 2020, was exclusive only of “interest and costs,” and Plaintiffs’ response filed on September 14, 2020, requests amounts in addition to the sum of the Settlement Amount, costs, and interest, Plaintiffs’ response constitutes a counteroffer. As such, Defendant is entitled to tender this counteroffer in writing within five (5) days of September 14, 2020, pursuant to IC 32-24-1-12.

***

[*Landowners Surreply*]

The Plaintiffs and the State of Indiana have agreed that just compensation for the property interests taken from the Plaintiffs

> is $45,000. Specifically, the State of Indiana, pursuant to Ind. Code § 32-24-1-12(a), offered the Plaintiffs $45,000 for their property interests. The Plaintiffs, pursuant to Ind. Code § 32-24-1-12(b), accepted it. That part already has been settled.
>
> Ind. Code 32-24-1-12(d) expressly states this "section does not limit or restrict the right" of Koorsen and Hoffman "to payment of any amounts authorized by law in addition to damages for property taken[.]"
>
> This lawsuit, an inverse condemnation lawsuit, was brought by Plaintiffs under Ind. Code 32-24-1-16 and Ind. Code 8-23-17-27.
>
> Ind. Code 8-23-17-27 provides that "[t]he court in proceeding brought under IC 32-24-1-16 shall determine and award or allow to the plaintiff, as part of the judgment or settlement sum that will in the opinion of the court or the agency reimburse the plaintiff for reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the proceeding."
>
> The law requires this Court to determine and award Plaintiffs expenses, including reasonable attorneys' fees, appraisal fees, etc. There is no discretion to award attorneys' fees and other expenses. Ind. Code 8-23-17-27 mandates it.
>
> ***

Appellant's App. Vol. II, pp. 94-103 (emphasis omitted).

[6] The trial court concluded that the parties' negotiations resulted in an accepted offer of $45,000 as just compensation for the taking and that Landowners were entitled to litigation expenses, costs, and interest in addition to the settlement sum. Following entry of judgment, the State appeals.

Discussion and Decision

[7] The State argues that the parties never reached a settlement agreement because, by the State's reading of the applicable eminent domain statutes, litigation expenses were inherently included in the $45,000 settlement sum. Landowners counter that the statutes clearly exclude litigation expenses and, thus, the State's settlement offer could not have included them. In resolving this dispute, a review of the statutes in their broader eminent domain context is helpful.

I. Legal Background

[8] Eminent domain proceedings take two general forms—direct and inverse condemnation actions. A direct condemnation action is filed by the government to formally seize private property for a public purpose. An inverse condemnation action is filed by a private property owner when the government informally takes property without just compensation. *See generally Ind. Dep't of Transp. v. S. Bells, Inc.*, 723 N.E.2d 432, 434 n.1 (Ind. Ct. App. 1999).

[9] Both direct and indirect condemnation actions fall under the general provisions of Indiana's Eminent Domain Code (EDC). Though the procedures are phrased in terms of direct condemnations, Indiana Code § 32-24-1-16 extends the processes to inverse condemnations in "substantially the [same] manner." Ind. Code § 32-24-1-16; *see generally State Highway Comm'n v. Blackiston Land Co.*, 158 Ind. App. 93, 97, 301 N.E.2d 663, 666 (1973) (interpreting "plaintiff" and "defendant" in EDC's interest provision to mean "condemnor" and "condemnee," respectively, when applied in inverse condemnation action).

[10] As originally enacted in 1905, the EDC did not provide for the recovery of litigation expenses. *See State v. Holder*, 260 Ind. 336, 338, 295 N.E.2d 799, 800 (Ind. 1973) (holding attorney's fees not recoverable as "costs" under EDC). Accordingly, each party to an eminent domain proceeding was required to pay their own fees. *City of Indpls. v. Cent. R. Co. of Indpls.*, 175 Ind. App. 120, 125, 369 N.E.2d 1109, 1112 (1977) (citing *Trotcky v. Van Sickle*, 227 Ind. 441, 445, 85 N.E.2d 638, 640 (1949)). This changed in 1971, when the Indiana General Assembly enacted the Relocation Assistance and Real Property Acquisition Act (RARPA). *See* Ind. Code ch. 8-23-17 (formerly Ind. Code ch. 8-13-18.5).

[11] Codified in Title 8 (Utilities and Transportation), RARPA was enacted to comply with a federal statutory scheme designed "to insure that all property owners whose land was seized by Federal agencies, or by state agencies with federal financial assistance be treated fairly and uniformly."[2] *City of Indpls.*, 175 Ind. App. at 128-29, 369 N.E.2d at 1114-15. Like its federal counterpart, RARPA created "a narrow exception to the general rule of non-recovery of litigation expenses in condemnation proceedings." *City of Hammond v. Marina Ent. Complex, Inc.*, 681 N.E.2d 1139, 1142 (Ind. Ct. App. 1997) (citing *United States v. 410.69 Acres of Land*, 608 F.2d 1073, 1076 (5th Cir. 1979)); *compare* 42 U.S.C. § 4654, *with* Ind. Code § 8-23-17-27.

---

[2] Known as the Uniform Relocation Assistance and Real Property Acquisition Act of 1970, the federal scheme is codified at 42 U.S.C. §§ 4601-55. *See generally* 42 U.S.C. § 4621 ("This subchapter establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance.").

[12] Now codified as Indiana Code § 8-23-17-27(c), RARPA's fee-shifting provision for inverse condemnation actions—the RARPA Expense Statute—states:

> The court rendering a judgment for the plaintiff in [an inverse condemnation] proceeding . . . in awarding compensation for the taking of property by an agency, or the agency effecting a settlement of a proceeding, shall determine and award or allow to the plaintiff, as a part of the judgment or settlement a sum that will in the opinion of the court or the agency reimburse the plaintiff for reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the proceeding.

Ind. Code § 8-23-17-27(c) (formerly Ind. Code § 8-13-18.5-13(c)).[3]

[13] Fee shifting in eminent domain proceedings further changed in 1977, when the General Assembly amended the EDC to require settlement negotiations and to permit the landowner's recovery of litigation expenses, under certain circumstances, when those negotiations fail. Now codified as Indiana Code § 32-24-1-12, the amendment's negotiation provision—the Settlement Statute—states, in pertinent part:

> (a) Not later than forty-five (45) days before a trial involving the issue of damages, the plaintiff shall, and a defendant may, file and serve on the other party an offer of settlement. . . . The offer must state that it is made under this section and specify the

[3] Though RARPA was enacted, in part, to address concerns related to federally funded seizures of private property, it seems the legislature has since amended the definition of "agency," as used in the RARPA Expense Statute, to include entities and projects not directly tied to federal funding. *Compare* Ind. Code § 8-23-17-1 (2021) *with* Ind. Code § 8-13-18.5-2 (1977); *see generally City of Indpls.*, 175 Ind. App. at 129-30, 369 N.E.2d at 1115.

amount, exclusive of interest and costs, that the party serving the offer is willing to accept as just compensation and damages for the property sought to be acquired. . . .

***

(c) If the offer is rejected, it may not be referred to for any purpose at the trial but may be considered solely for the purpose of awarding costs and litigation expenses under section 14 of this chapter.

(d) This section does not limit or restrict the right of a defendant to payment of any amounts authorized by law in addition to damages for the property taken from the defendant.

***

Ind. Code § 32-24-1-12 (formerly Ind. Code § 32-11-1-8.1).

[14] As indicated in subsection (c) above, the Settlement Statute operates in conjunction with Indiana Code § 32-24-1-14—the EDC Expense Statute—to permit litigation expenses under certain circumstances. In pertinent part, the EDC Expense Statute states:

> [I]f there is a trial and the amount of damages awarded to the defendant by the judgment, exclusive of interest and costs, is greater than the amount specified in the last offer of settlement made by the plaintiff under section 12 of this chapter, the court shall allow the defendant the defendant's litigation expenses, including reasonable attorney's fees, in an amount not to exceed the lesser of:
>
> (1) twenty-five thousand dollars ($25,000); or
>
> (2) the fair market value of the defendant's property or easement as determined under this chapter.

Ind. Code § 32-24-1-14(b) (formerly Ind. Code § 32-11-1-10).

II. Validity of Settlement Agreement

[15] The State and Landowners engaged in settlement negotiations within the knotted schemes of the RARPA Expense Statute, Settlement Statute, and EDC Expense Statute. According to the State, however, the parties never reached a settlement agreement. "A settlement is an agreement to terminate or forestall all or part of a lawsuit, and the judicial policy of Indiana strongly favors these agreements." *Harding v. State*, 603 N.E.2d at 179 (internal citation omitted). Whether a settlement agreement exists is a question of law, which we review *de novo*. *Martins v. Hill*, 121 N.E.3d 1066, 1068 (Ind. Ct. App. 2019).

[16] Settlement agreements are governed by principles of contract law. *State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998). "A valid contract requires offer, acceptance, consideration, and manifestation of mutual assent." *Martins*, 121 N.E.3d at 1068. "[F]or an offer and an acceptance to constitute a contract, the acceptance must meet and correspond with the offer in every respect." *Id.* at 1070. "An acceptance which varies the terms of the offer is considered a rejection and operates as a counteroffer, which may be then accepted by the original offeror." *Id.*

A. State's Offer Did Not Include Litigation Expenses

[17] The State claims Landowners' Response was a counteroffer, not an acceptance, because it varied the terms of the State's Offer by requesting litigation expenses in addition to the $45,000 settlement sum. According to the State, the

settlement sum inherently included litigation expenses under the Settlement Statute. Resolution of this issue requires statutory construction.

[18] The goal of statutory construction is to determine, give effect to, and implement the intent of the legislature. *Mayes v. State,* 744 N.E.2d 390, 393 (Ind. 2001). Our first task when interpreting a statute is to give its words their plain meaning and consider the structure of the statute as a whole. *West v. Off. of Ind. Sec'y of State*, 54 N.E.3d 349, 353 (Ind. 2016). We "avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results." *Id.* at 355 (internal quotation omitted).

[19] The State contends that, because a settlement offer made under the Settlement Statute is "exclusive of interest and costs," Ind. Code § 32-24-1-12(a), it must be *inclusive* of litigation expenses. This contention is not only a deductive fallacy;[4] it also ignores the plain language of the Settlement Statute and the EDC's fee-shifting scheme as a whole.

[20] As set forth above, subsection (a) of the Settlement Statute requires a settlement offer to "specify the amount . . . that the party serving the offer is willing to

[4] "Formal deductive logic is the act of the mind in which, from the relation of two propositions to each other, we infer, that is, we understand and affirm, a third proposition." Ruggio J. Aldisert, Logic for Lawyers: *A Guide to Clear Legal Thinking* 54 (3d ed. 1997). "[T]he two propositions which imply the third proposition, the conclusion, are called premises." *Id.* "If one premise is negative, the conclusion must be negative." *Id.* at 156. "If both premises are negative, we cannot determine anything regarding their relation to one other. *Id.* (emphasis in original). As a matter of logical form, deductive arguments which violate these rules are invalid. *See id.* at 156-58 (discussing the fallacy of negative premises). For example: "From the premises, James is not a lawyer; lawyers are not steelworkers, we cannot conclude that James is or is not a steelworker." *Id.* at 156.

accept as *just compensation* and damages for the property sought to be acquired."[5] Ind. Code § 32-24-1-12(a) (emphasis added). "Attorney's fees or litigation expenses are not embraced within the just compensation to be paid for lands taken by eminent domain." *Bd. of Aviation Comm'rs of Clark Cty. v. Schafer*, 174 Ind. App. 59, 66, 366 N.E.2d 195, 199-200 (1977). Thus, the Settlement Statute's plain language does not contemplate the inclusion of litigation expenses.

[21] The Settlement Statute also operates in conjunction with the EDC Expense Statute to reserve the issue of litigation expenses as an incentive for parties to settle. *See* Ind. Code § 32-24-1-12(c). Under the EDC Expense Statute, a landowner can recoup litigation expenses if the case proceeds to trial and the damage award exceeds the government's final settlement offer. If litigation expenses were inherently included in the settlement offer, that offer could not later be compared to the factfinder's damage award to determine if a low-ball settlement offer triggered the landowner's entitlement to litigation expenses under the EDC Expense Statute. *See* Ind. Code § 32-24-1-14(b). In other words, the statutory scheme would be unworkable.[6]

---

[5] Damages in this context are defined by Indiana Code § 32-24-1-9 (formerly Ind. Code § 32-11-1-6). *See Harding*, 603 N.E.2d at 180. They do not include litigation expenses.

[6] The Settlement Statute and EDC Expense Statute are taken almost verbatim from Sections 708 and 1205 of the Model Eminent Domain Code. *See Harding*, 603 N.E.2d at 179; *City of Garrett v. Terry*, 512 N.E.2d 405, 407 (Ind. 1987). As the Comment to Section 708 explains:

[22] For these reasons, we disagree with the State that their offer to settle under the Settlement Statute inherently included litigation expenses. But that does not mean the parties reached a settlement.

B. Landowner's Response Was Not An Acceptance

[23] "A meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract." *Zimmerman v. McColley*, 826 N.E.2d 71, 77 (Ind. Ct. App. 2005). Significantly, the relevant intent is not the parties' subjective intentions but the outward manifestations thereof. *Id.* When the objective manifestations of the parties' intent fail to show agreement on an essential term of the purported agreement, there is no mutual assent—hence, no contract. *Olsson v. Moore*, 590 N.E.2d 160, 162 (Ind. Ct. App. 1992).

[24] Here, the parties' intentions were objectively manifested in the State's Offer and Landowners' Response. The State offered "to settle this cause" for $45,000 under the Settlement Statute. App. Vol. II, p. 103. As explained above, this sum did not include litigation expenses because the Settlement Statute, in

---

> Section 708 establishes a procedure by which either party to a condemnation action may make a formal offer to settle.
>
> The [government's] decision to accept or reject an offer made by a [landowner] will be influenced by the prospect that the latter will be entitled to an award of litigation expenses under Section 1205 if the amount awarded by the trier of fact exceeds the amount of the rejected settlement offer. Conversely, a [landowner's] decision to accept or reject such an offer from the [government] will be affected by the realization that if the award is less than the offer, the [landowner] will be denied recovery of costs incurred after the offer was made.

Model Eminent Domain Code § 708 cmt. (1974).

conjunction with the EDC Expense Statute, reserves those expenses as an incentive for the parties to settle. Thus, the State's objective intent was for Landowners to forego litigation expenses in the interest of settlement.

[25] In purporting to accept the State's Offer, Landowners noted that "this cause" includes a claim for litigation expenses under the RARPA Expense Statute. *Id.* at 100. Landowners therefore requested that they be awarded litigation expenses in addition to the settlement sum. Because Landowners' objective intent was not to forego litigation expenses in the interest of settlement, their Response did not correspond with the State's Offer in every respect. Accordingly, there was no mutual assent. *See Martins*, 121 N.E.3d at 1068; *Olsson*, 590 N.E.2d at 162; *Zimmerman*, 826 N.E.2d at 77.

[26] Landowners complain that, unlike the EDC Expense Statute, the RARPA Expense Statute authorizes their recovery of litigation expenses whether they settle or not. Landowners emphasize that the Settlement Statute "does not limit or restrict the right of a defendant to payment of any amounts authorized by law in addition to damages for the property taken." Ind. Code § 32-24-1-12(c). But they take this provision out of its statutory context. The incentivizing purpose of the Settlement Statute is lost without the risk/reward of litigation expenses under the EDC Expense Statute. Though Landowners are generally entitled to litigation expenses under the RARPA Expense Statute, that is not what the State offered in settlement.

[27] It is easy to understand why a meeting of the minds was unattainable in this case. Both the RARPA Expense Statute and EDC Expense Statute are applicable to inverse condemnation actions brought under the EDC. *See* Ind. Code § 8-23-17-27(c); Ind. Code § 32-24-1-16; *City of Garrett*, 512 N.E.2d at 406. But the RARPA Expense Statute authorizes a landowner to recover litigation expenses as part of a settlement, Ind. Code § 8-23-17-27(c), and the Settlement Statute inherently excludes litigation expenses from the settlement sum. Ind. Code § 32-24-1-12. The RARPA Expense Statute also authorizes a landowner to recover litigation expenses as part of a judgment, Ind. Code § 8-23-17-27(c), but the EDC Expense Statute only authorizes their recovery when the landowner's damages following trial exceed the government's last settlement offer. Ind. Code § 32-24-1-14(b). It is unclear how these statutes can be reconciled.

[28] Another anomaly of these dueling fee-shifting schemes is the potential for significantly divergent litigation fee awards depending on whether the parties proceed under RARPA or the more general provisions of the EDC. The EDC Expense Statute authorizes litigation expenses only when the matter proceeds to trial and, even then, only under limited circumstances. Ind. Code § 32-24-1-14(b). It also caps a landowner's litigation expenses at $25,000 or the fair market value of the taking, whichever is less. *Id.* The RARPA Expense Statute,

on the other hand, authorizes landowners who settle prior to trial to recover all reasonable litigation expenses "actually incurred."[7] Ind. Code § 8-23-17-27(c).

[29] As the provisions of the RARPA Expense Statute, Settlement Statute, and EDC Expense Statute are amenable to conflicting interpretations as to when litigation expenses must be offered and awarded, we can only presume the uncertainty seeped into the parties' negotiations. In the end, the State offered to settle this cause for $45,000. Landowners responded with a counteroffer of $45,000—plus litigation expenses—which the State promptly rejected. The State then renewed its original offer, but Landowners never accepted it. The trial court therefore erred in finding a settlement agreement had been reached.

[30] The judgment of the lower court is reversed and this case is remanded for further proceedings.

Mathias, J., and Tavitas, J, concur.

---

[7] Though we cannot explain why our General Assembly chose to cap litigation expenses under one statute but not the other, Landowners suggest:

> The different treatment afforded to property owners in this regard is the commonsense realization that Hoosier property owners are not institutional litigators like the State and the burden to file, maintain and move forward an inverse condemnation lawsuit is materially more burdensome than simply accepting service of an already filed condemnation lawsuit and then litigating a taking to which the State has already admitted.

Appellees' Br., p. 44. *But see City of Garrett,* 512 N.E.2d at 406 (holding EDC Expense Statute's cap on litigation expenses "appl[ies] to inverse condemnation proceedings"); *accord Sagarin v. City of Bloomington*, 932 N.E.2d 739, 745 (Ind. Ct. App. 2010).