

STATE OF MICHIGAN  
COURT OF APPEALS

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DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant/Cross-Appellee,

v

LONDON'S FARM DAIRY, INC.,

Defendant-Appellee/Cross-Appellant.

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UNPUBLISHED

February 21, 1997

No. 189868

St. Clair Circuit Court

LC No. 92-002057-CC

Before: McDonald, P.J., and Murphy and M.F. Sapala,\* JJ.

PER CURIAM.

Plaintiff Michigan Department of Transportation (DOT) appeals as of right from the trial court's judgment awarding defendant \$215,879.46 in attorney fees pursuant to MCL 213.66(3); MSA 8.265(16)(3) in this condemnation proceeding. Defendant cross-appeals from the same judgment, challenging the award of interest on the attorney fees. This litigation arose out of DOT's acquisition, through the power of eminent domain, of fee title in and easements to certain parcels of property owned by defendant. We affirm in part and reverse in part.

Plaintiff first argues that the trial court erred in awarding defendant the statutory maximum attorney fees because it calculated defendant's attorney fees on a contingency basis rather than a lodestar basis. We disagree. Per *Flint v Patel*, 198 Mich App 153, 159-160; 497 NW2d 542 (1993), we have examined the trial court's fee award and justifications against the evidence offered by the parties, the three purposes of § 213.66(3)'s attorney fee provisions as set forth in *Dep't of Transportation v Robinson*, 193 Mich App 638, 645; 484 NW2d 777 (1992), and the nonexclusive list of factors set forth in *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 341-342; 530 NW2d 183 (1995). We find that the trial court's decision was amply justified. This award did not leave defendant with an outstanding attorney fee to be paid, was just given the state's initial low offer and was proportionate to the result. Moreover, the award was consistent with the defense attorneys' experience, the complexity of the issues presented in this case, the type of fee customarily charged in condemnation actions, the attorneys' prior relationship with the client and the

\* Recorder's Court judge, sitting on the Court of Appeals by assignment.

fact that the attorneys were operating under time restraints given the effect this taking would have on defendant's business. We find no abuse of discretion. *Dep't of Transportation v Curis*, \_\_\_ Mich App \_\_\_ (Docket No. 184828, issued January 21, 1997, 9:00 a.m.); *Robinson, supra*, 193 Mich App 643.

Plaintiff next argues that the trial court erred in awarding defendant \$21,000 of the attorney fees, as this portion was calculated from a base that included one-third of the interest that accrued on plaintiff's original offer while it was in escrow during the instant litigation. We disagree. Even the cases cited by plaintiff hold that a defendant may receive a one-third maximum attorney fee award calculated from judgment interest as well as the judgment amount. *Detroit v J Cusmano & Sons, Inc*, 184 Mich App 507; 459 NW2d 3 (1989). Plaintiff also argues that this \$21,000 fee award was unjustified because it was not actually incurred as attorney fees. We disagree. There was testimony indicating that whether this was a legal expense to defendant was uncertain. However, there was testimony that it was believed to be owed. We find that the trial court's award was not an abuse of discretion on this ground.

Finally, plaintiff argues that the trial court erred in awarding defendant post-judgment interest on defendant's attorney fees. We agree. While such a bar on attorney fee interest does prevent a condemnation defendant from being fully compensated for its loss, we are constrained to follow the holding of *Patel, supra*, 198 Mich 160-161, which states that a condemnation defendant simply may not be awarded interest on its attorney fee award. For this reason also, defendant's argument on cross appeal that it should have been granted an even greater amount of interest on its attorney fee award must fail.

Affirmed in part, reversed in part, and remanded for recalculation of defendant's attorney fee award in conformance with this opinion.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ Michael F. Sapala