STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

EDWARD J. KOLBICZ LIVING TRUST and NBD CADILLAC,

Defendants-Appellees.

UNPUBLISHED
May 5, 2000

No. 214661
Wexford Circuit Court
97-012809-CC

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff Michigan Department of Transportation appeals by leave granted from the trial court's order requiring plaintiff to pay defendant Kolbicz Living Trust's (defendant[1]) attorney and expert witness fees, costs, and mediation sanctions totaling $42,256. Plaintiff challenges only the award of mediation sanctions (in the form of an attorney fee of $8,326) under MCR 2.403(O). We reverse.

This appeal arises out of a condemnation action in which plaintiff sought to acquire approximately 10.8 acres owned by defendant in order to improve a section of US 131. The parties agree that plaintiff originally offered defendant $23,000 as just compensation for the property, and following a determination by its appraiser that valued the property at $27,000, plaintiff deposited that amount with the trial court. A mediation panel unanimously determined that defendant was entitled to $82,000. Defendant accepted this award, but plaintiff rejected it. A jury ultimately determined that defendant was entitled to $91,800 as just compensation for the property.

Defendant's contingent fee agreement with its attorney provided for the payment of an attorney fee of one-third of the difference between plaintiff's initial offer and the ultimate amount of compensation that defendant received. Defendant moved for reimbursement of its attorney fees, expert witness fees, and costs under MCL 213.66(3); MSA 8.265(16)(3),[2] and for $8,326 in mediation sanctions under MCR 2.403(O).[3] Defendant claimed that, notwithstanding the fact that the costs awarded to it under the statute were sufficient to cover its total attorney fee, it was also entitled to a reasonable attorney fee as a sanction for plaintiff's rejection of the mediation award. Plaintiff agreed that defendant was entitled to recover the actual attorney fee of $22,910,[4] but disputed that defendant was entitled to recover

additional attorney fees as a mediation sanction where defendant had already been fully recompensed under the statute for the attorney fees paid pursuant to the contingent fee agreement. The trial court concluded that defendant's request for a total of $31,236.50 in attorney fees represented "reasonable attorney fees" under the statute and the court rule, despite the fact that the $8,326 "attorney fee" awarded under the mediation sanction rule would not be paid to defendant's attorneys, but rather would be retained by defendant.[5]

Plaintiff now contends that the trial court's decision to award an additional attorney fee under MCR 2.403(O) is contrary to the case law and results in a windfall for defendant. Because this issue involves the interpretation of statutes and court rules, it is a legal question and we review it de novo. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

This Court explained in *Dep't of Transportation v Robinson*, 193 Mich App 638, 645; 484 NW2d 777 (1992), that:

> This Court has identified three purposes of the attorney fee provision [in MCL 213.66(3); MSA 8.265(16)(3)]. 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. . . . 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. [Citations omitted.]

It cannot be disputed that none of these purposes is effectuated by awarding defendant an amount in excess of the maximum amount it could have received under both the statute and the contingent fee agreement. In particular, we note that defendant acknowledged in its motion for attorney fees that the $22,910 paid under the contingent fee agreement is a reasonable attorney fee, and that the use of a contingent fee agreement provides its own incentive to the property owner's attorney because the fee is "directly proportional to the results achieved by counsel."

The trial court nevertheless found, and defendant argues on appeal, that the condemnation statute and the mediation sanction court rule represent different policies and therefore the trial court's decision to award additional attorney fees under the mediation sanctions court rule serves to effectuate these different policies. We disagree.

In *McAuley, supra*, our Supreme Court held that a complete recovery of attorney fees under the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq*., precluded the plaintiff from also recovering attorney fees pursuant to the mediation sanctions rule. The Court explained:

> [W]e begin by noting that Michigan follows what is commonly termed the "American rule" with regard to payment of attorney fees. . . . Under this rule, attorney

> fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. . . .
>
> It is well established that generally only compensation damages are available in Michigan and that punitive sanctions may not be imposed. . . . Because the purpose of compensatory damages is to make the injured party whole for the losses actually suffered, the amount of recovery for such damages is inherently limited by the amount of the loss; the party may not make a profit or obtain more than one recovery. . . . That an award of attorney fees is typically compensatory in nature is illustrated by the well-established body of law holding that a litigant representing himself may not recover attorney fees as an element of costs or damages under either a statute or a court rule because no attorney fees were incurred. . . . Thus, in order for a party to recover attorney fees under the mediation rule, he must show that he has incurred such fees. . . . Obviously, if the prevailing party has already been fully reimbursed for reasonable attorney fees through the operation of a statutory provision . . . there are no "actual costs" remaining to be reimbursed under the court rule. On the other hand, if the applicable statute limits the recovery of attorney fees to something less than a reasonable attorney fee and there are actual costs remaining, an additional award may be appropriate in some cases. [*McAuley, supra* at 519-521; citations omitted.]

By way of illustrating this last point, the Court in *McAuley* cited this Court's decision in *Dep't of Transporation v Dyl*, 177 Mich App 33; 441 NW2d 18 (1989), and noted that:

> To the extent that the statutory remedy may have only partially compensated the plaintiff for the reasonable attorney fees that would ordinarily be recoverable under MCR 2.405, an additional award under the court rule would be appropriate in the amount by which the attorney fees recoverable under the statute were less than the amount recoverable under the court rule. [*McAuley, supra* at 521.]

The Court went on to opine:

> However, we also agree with the prior decisions of the Court of Appeals that hold that where the purposes of the court rules and statutes providing for an award of attorney fees serve independent policies, recovery under both may be appropriate. . . . [W]e acknowledge that independent policies and purposes may serve to allow a party double recovery. [*Id.* at 522; citations and footnote omitted.]

The trial court appears to have based its decision largely on this observation from *McAuley*. However, as Justice Levin cautioned, "An observation is, definitionally, nothing more than dictum." *People v Joeseype Johnson*, 407 Mich 196, 271; 284 NW2d 718 (1979) (Levin J., dissenting). That the Court's observation in *McAuley* was dicta, was made clear by its subsequent decision in *Rafferty v Markovitz*, 461 Mich 265, 272-273, n 6; 602 NW2d 367 (1999), where the Court reaffirmed its prior decision, but "repudiate[d] the dicta in *McAuley* that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney fee provision serves an independent

purpose." The Court in *Rafferty* therefore held that because the plaintiff "was compensated for her reasonable attorney fees under [the Civil Rights Act] . . . [s]he thus had no remaining 'actual costs' for which she could claim compensation under the mediation court rule." *Id.* at 272.

We conclude that *McAuley* and *Rafferty* control the resolution of this case. Defendant was obligated to pay his attorneys one-third of the difference between the initial offer and the ultimate amount of just compensation determined by the jury's verdict. Defendant has acknowledged that this amount was a reasonable attorney fee. Defendant obtained reimbursement of this entire amount pursuant to MCL 213.66(3); MSA 8.265(16)(3). Defendant therefore had no remaining "actual costs" for which it could claim compensation under the mediation court rule. The trial court therefore committed error requiring reversal when it awarded defendant additional compensation pursuant to MCR 2.403(O).

Defendant nevertheless argues that our determination should be controlled by our previous decision in *Dyl*, *supra*. We disagree. The *Dyl* decision was released prior to the effective date of the conflict resolution rule, MCR 7.215(H)(1), and it is therefore not precedentially binding. In light of our Supreme Court's decisions in *McAuley* and *Rafferty*, we conclude that an expansive reading of *Dyl* is unjustified. Accordingly, having paid its attorneys the actual attorney fees of $22,910 under the contingent fee agreement, defendant is not entitled to recover additional attorney fees as mediation sanctions under MCR 2.403(D), as well as to recover its actual attorney fees under MCL 213.66(3); MSA 8.265(16)(3).

Reversed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] Defendant NBD Cadillac, the mortgagor of the subject property, was dismissed from the lawsuit by stipulation of the parties after it issued a discharge of the mortgage. Accordingly, references to "defendant" in this opinion are only to the Edward J. Kolbicz Living Trust.

[2] At the time the cause of action in this case arose, MCL 213.66(3); MSA 8.265(16)(3) provided:

> If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney fees shall be determined by the court.

[3] MCR 2.403(O) provides in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. . . .

* * *

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation. . . . After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

* * *

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation. . . .

[4] In its brief on appeal, defendant explains that the actual one-third fee would be $22,933.33, but that defendant erroneously requested $22,910 in its motion for fees and that this was the figure that was adopted by the trial court. Defendant has not cross-appealed seeking to have the lower amount adjusted to the "mathematically correct" figure.

[5] The problem presented in this case should not recur in the future. MCL 213.66(3); MSA 8.265(16)(3) has been amended to provide that "[i]f the agency or owner is ordered to pay attorney fees as sanctions under Michigan court rule 2.403 or 2.405, those attorney fee sanctions shall be paid to the court as court costs and shall not be paid to the opposing party unless the parties agree otherwise.