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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1644**

County of Hennepin, petitioner,
Respondent,

vs.

Daniel T. Fitzgerald, et al.,
Appellants.

**Filed May 18, 2010
Affirmed
Stauber, Judge**

Hennepin County District Court
File Nos. 27CV0813507; 27CV0719794

Michael O. Freeman, Hennepin County Attorney, Louis K. Robards, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Larry D. Martin, Dennis T. Olson II, L.D. Martin & Associates, Ltd., Chaska, Minnesota (for appellants)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Wright, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

In this attorney-fees dispute arising from a condemnation of their property, appellants argue that the district court erred in awarding attorney fees based on a formula proposed by respondent-county, rather than appellants' contract with counsel where the

contract was not ambiguous and where a failure to award appellants all of the fees incurred will encourage the county's "low-ball" negotiating tactics. Because the award of attorney fees was reasonable and proper based on the information submitted by the county, we affirm.

FACTS

Appellants Daniel and Patricia Fitzgerald owned a one-acre parcel of residential land (the property), which included a single-family two-story farmhouse and a four-car detached garage. The property is located in Eden Prairie at the southwest corner of the intersection of County Road 1 and County Road 4. Respondent Hennepin County decided to upgrade County Road 1 (the project). The project required temporary and permanent easements as well as removal of appellants' house and garage.

In June 2005, a county representative met with appellants to discuss the project. Because appellants' house and garage would need to be moved or demolished to accommodate the project, the county offered appellants two options: (1) the county's total acquisition of the property or (2) appellants' retention of the .86 acres of the property not needed for the project and relocation of the house and garage onto the remaining land. Appellants initially decided to retain the residual property and relocate their house and garage away from the road construction.

During the following two years, the county had several discussions with appellants, who reiterated their desire to retain and relocate their house and garage. Based on appellants' decision, the county appraised the property preliminary to making an offer for the partial taking. The county furnished appellants with a written report,

which appraised the entire property at \$325,000. The appraisal report was accompanied by the county's written offer of \$132,000 for the permanent partial taking and temporary easements. The offer did not include a value for the house and garage and residual property in light of appellants' decision to retain them.

In October 2007, the county filed its condemnation petition, proposing January 7, 2008, as the date of acquisition by "quick take." Just days before the condemnation hearing, appellants retained counsel. Counsel informed the county that appellants planned to object to the proposed quick-take date because they needed additional time to relocate their house and garage on site. At the hearing on November 16, 2007, the parties agreed that the county would take title to the road easements on January 7, 2008, and make the quick-take payment by that date. But appellants would have until May 1, 2008, to relocate their house and garage.

In December 2007, appellants changed their position and informed the county that due to the high cost of relocating their house and garage on site, they now desired to move elsewhere. Hearings were then conducted to value the total taking. At the hearings, the county's appraiser testified that the value of the property before commencement of the project, including the house and garage, was \$315,000.¹ The county's appraiser also testified that the value of the vacant .86-acre residue was \$90,000. Thus, the county's appraiser concluded that appellants were entitled to \$225,000 in compensation. Appellants' appraiser testified to a value of \$416,000 before the

¹ The \$315,000 value was \$10,000 less than the county's original appraisal. The county claims that the lower value reflects the drop in real-estate values between April 2007 and the January 7, 2008, quick-take date.

acquisition, and valued the vacant .86-acre residue at \$20,000, for an estimated compensation of \$396,000 for the land and improvements. Following the hearing, the condemnation commissioners adopted appellants' before-taking valuation of \$416,000 and the county's residual-property valuation of \$90,000, for total net damages of \$326,000 for the permanent easement.

Appellants sought review of the commissioners' award in district court, and the county cross-appealed. The matter settled before trial, with appellants receiving compensation of \$416,000 for the entire property.² Based on the settlement, the parties stipulated to dismissal of their appeals. The stipulation also provided that the district court would determine the amount of appellants' attorney fees that the county would be required to pay.

In May 2009, appellants moved the district court for reimbursement of their attorney fees and litigation costs. Appellants sought attorney fees in the amount of \$94,666.67, which was one-third of the difference between (1) the county's written offer of \$132,000 for the initially requested partial taking and (2) the final settlement of \$416,000 for the full taking. The one-third amount sought was premised on the contingency fee agreement between appellants and their attorney.

The county contested the amount of attorney fees sought by appellant, arguing that the amount of attorney fees should not exceed one-third of the difference between (1) the final settlement of \$416,000 and (2) the county's original appraisal of \$325,000 for the total taking. The district court agreed, awarding attorney fees in the amount of

² Relocation costs were also paid, but that is not a part of this appeal.

\$30,333.33; one-third of the difference between \$416,000 and \$325,000. This appeal follows.

DECISION

“Recovery of attorney fees must be based on either a statute or a contract.”

Schwickert, Inc. v. Winnebago Seniors, Ltd., 680 N.W.2d 79, 87 (Minn. 2004).

Minnesota law allows for recovery of attorney fees and costs in certain eminent-domain proceedings where there is an award of damages. Minn. Stat. § 117.031(a) (2008). A district court’s award of attorney fees is reviewed for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 611 (Minn. 1987).

Minn. Stat. § 117.031(a) provides:

If the final judgment or award for damages, as determined at any level in the eminent domain process, is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition, the court shall award the owner reasonable attorney fees, litigation expenses, appraisal fees, other expert fees, and other related costs in addition to other compensation and fees authorized by this chapter. If the final judgment or award is at least 20 percent, but not more than 40 percent, greater than the last written offer, the court may award reasonable attorney fees, expenses, and other costs and fees as provided in this paragraph.

In authorizing an award of attorney fees, courts should consider the following factors: (1) the time and labor required; (2) the nature and difficulty of the responsibility assumed; (3) the amount involved and the results obtained; (4) the fees customarily charged for similar legal services; (5) the experience, reputation, and ability of counsel;

and (6) whether the fee arrangement existing between counsel and the client is fixed or contingent. *City of Minnetonka v. Carlson*, 298 N.W.2d 763, 765–67 (Minn. 1980).

Appellants argue that the district court erred in determining the amount of attorney fees because the district court failed to consider the fee agreement between appellants and their attorney. The agreement provides:

Fees for legal services will be determined based upon the result of the negotiations and/or litigation. The first written offer is the base amount (“Base Amount”) from which the result will be measured. The other amount that will determine the result from which the legal fee will be measured is the final award (“Final Award”). The Final Award is equal to the sum of the following amounts: (i) the settlement that is negotiated or the award that is made by the condemnation commissioners appointed in the above referenced matter; (ii) interest on the settlement or award; and (iii) any award of legal fees. The legal fee will equal one third (1/3) of the difference between the Final Award and the Base Amount.

Appellants argue that, based on the fee agreement, they are entitled to one-third of the difference between the final award and the first written offer. Appellants contend that the final award was \$416,000, and the first written offer made by the county was \$132,000.³ Thus, appellants argue that they are entitled to attorney fees in the amount of \$94,666.67.

The county does not dispute the district court’s discretionary decision to award attorney fees under section 117.031(a). Nor does the county dispute the reasonableness

³ Notably, the fee agreement conflicts with Minn. Stat. § 117.031(a) because the fee agreement references the “first written offer” as the base amount and the statute references the “last written offer.” But, the county only made one written offer. Consequently, the last written offer and the first written offer here are one and the same.

of the contingent-fee agreement between appellants and their attorney. But the county argues that the amount of attorney fees should be determined based on a difference between the final settlement offer of \$416,000 and the county's initial \$325,000 appraisal. We agree.

The record reflects that the county's first written offer was, in fact, for \$132,000. Thus, pursuant to the fee agreement between appellants and their attorney, the \$132,000 figure could be used as the base amount to determine the attorney fees as between them. But the fee agreement was not binding on the county, and the \$132,000 offer was only for a partial taking. When appellants eventually opted for a total acquisition, the resulting \$416,000 settlement was for the total taking. Consequently, the \$132,000 figure and the \$416,000 figure are not suitable for comparison because one is premised on a partial taking and the other is based on a total taking. In other words, this is not an "apples to apples" comparison.

Appellants argue at length that the county "low-balled" them by offering \$132,000 initially, and that to discourage the government from continuing such inappropriate negotiating tactics, the \$132,000 figure should be used as the base amount. But the record reflects that appellants initially and consistently told the county that they wanted to retain their house and garage and relocate them onto the residual property. Relying on appellants' position, the county made the initial written offer of \$132,000 for a *partial taking*. It was much later that appellants changed their position and decided they wanted the county to exercise a total taking. The record reflects that the county was willing to accommodate appellants for either a partial or total taking, and at the time the county

made the first written offer (for the partial taking), the county had also appraised the entire property at \$325,000 for a total taking and provided appellants with that appraisal. But for appellants' initial decision to remain on the property, the record indicates that the county's first written offer to purchase the property would have been \$325,000. Therefore, the district court did not abuse its discretion in concluding that the award of attorney fees should be one-third of the difference between the \$416,000 final settlement award and the county's \$325,000 initial appraisal of the property.

Affirmed.