STATE OF MICHIGAN

COURT OF APPEALS

CITY OF GRAND RAPIDS,

Plaintiff-Appellee,

v

ELLIS PARKING COMPANY,

Defendant-Appellant,

and

HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA, CARE REAL ESTATE, f/k/a J R INCOME MANAGERS, INC., ROBERT W. BROWNE, LYNN H. BROWNE, PETER C. COOK TRUST, PENN PLAZA LIMITED PARTNERSHIP, GRAND BANK, N.A., TRENTONLEE CORPORATION, and PENINSULAR CLUB,

Defendants.

UNPUBLISHED
October 22, 1996

No. 159684
LC No. 89-63355 CC

CITY OF GRAND RAPIDS,

Plaintiff-Appellant,

v

ELLIS PARKING COMPANY,

Defendant-Appellee.

No. 162918
LC No. 89-63355 CC

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* Circuit judge, sitting on the Court of Appeals by assignment.

Before: Fitzgerald, P.J., and O'Connell and T.L. Ludington,* JJ.

PER CURIAM.

In these consolidated appeals stemming from an eminent domain proceeding, defendant Ellis Parking Company, Inc. ("defendant" hereinafter), appeals as of right the judgment of the circuit court concluding that defendant's parking business had no "going-concern value."[1] Plaintiff appeals as of right a subsequent order taxing the cost of defendant's expert witness fees against plaintiff.[2] We affirm.

Defendant operated a parking facility in downtown Grand Rapids. Defendant did not own the property on which the parking lot was located, but leased it on a month to month basis.

In 1989, plaintiff condemned the parcel on which defendant's lot was located, as well as several adjacent lots, to construct a municipal parking facility. Plaintiff then erected a multi-story parking ramp. Significantly, plaintiff targeted the same hourly, as opposed to monthly, parkers as defendant had, and plaintiff also utilized the parcel as an income-producing property, as had defendant.

The owners of the property were compensated for the condemnation, and are not parties to this appeal. Defendant, though not an owner of the property, also sought compensation for the going-concern value of its parking operation. Following a bench trial, the court concluded that defendant was entitled to no compensation in this context, and awarded defendant only approximately $4,000 in relocation costs.[3] Defendant has appealed.

The court later allowed defendant to tax its expert witness fees against plaintiff despite the fact that defendant had not prevailed in its attempt to obtain compensation. Plaintiff has appealed this order.

With respect to defendant's appeal, defendant contends that it is entitled to the going-concern value of the business it operated on the condemned parcel. We conclude that defendant's business was acquired as a "going-concern," yet find that the business had no "going-concern value" as that term is used in the law of eminent domain. In short, we determine that the value of defendant's business was reflected in the value of the property itself (which value was remunerated to the owners of the property) and that defendant has demonstrated no customer goodwill or other intangibles warranting additional compensation.

The circuit court's findings in the context of plaintiff's acquisition of a going concern, and its value, are factual determinations. This Court reviews a trial court's findings of fact for clear error. A finding of fact is clearly erroneous when there is no evidence to support it or when this Court, after reviewing the entire record, is left with a definite and firm conviction that a mistake has been made. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

The value of a commercial property is dependent on the estimated profitably of the commercial enterprises that may be operated on that property. As stated by the United States Supreme Court in *Kimball Laundry Co v United States*, 338 US 1, 9; 69 S Ct 1434; 93 L Ed 1765 (1948), "[t]he

market value of land as a business site tends to be as high as the reasonably probable earnings of a business there situated would justify . . . ." Similarly, this Court, in *State Highway Comm v L & L Concession Co*, 31 Mich App 222, 234; 187 NW2d 465 (1971), stated "where the value of the leasehold as an estate in land and the value of the business there conducted cannot readily be separated, the valuation ascribed to the leasehold may reflect the value of the business there operated." Because of this law of the marketplace, the value of commercial property frequently incorporates the value of the business as well, less "the value of specially adapted plant and machinery exceed[ing] its value as scrap . . . ." *Kimball*, *supra*. In such a situation, the governmental entity seeking condemnation remunerates fully the business owner *and* land owner by paying market price for the real property.

However, under some circumstances, a business owner may be entitled to going-concern value where the property on which his business operates is condemned. As set forth in *State Highway Comm*, *supra*, p 229, "[o]rdinarily no compensation is allowed for the goodwill or going-concern value of a business operated on the real estate being condemned." However, where the business is taken for use as a going concern, the owner of the business is entitled to the goodwill or going concern value of the business. See *Detroit v Michael's Prescriptions*, 143 Mich App 808, 811-812; 373 NW2d 219 (1985). This is true even where, as in the present case, the business is operated on property it holds pursuant to a lease rather than property it owns in fee.[4] *State Highway Comm*, *supra*, pp 228-229.

Here, defendant's parking business was acquired as a going concern. While it is relatively uncommon that a governmental entity will condemn land and then continue to use that land for the same purpose to which it was being put by private individuals, thereby acquiring a going concern, such cases do occasionally arise. For example, in *Kimball Laundry*, *supra*, the United States condemned a piece of property pursuant to the Fifth Amendment of the United States Constitution, on which was a large laundry facility, to service the needs of its troops during the war. Shortly after the war ended, the Army returned the property to its owner. Plaintiff brought suit for this temporary taking, and was awarded the estimated rental value of the property and plant. Plaintiff appealed, contending that it was also entitled to compensation for loss of going-concern value or goodwill because it had been unable to exploit its "trade routes," a term used to denote both "the lists of customers built up by solicitation over the years and for the continued hold of the Laundry upon their patronage." *Id.*, p 8. The Court agreed.

We find no material distinction between the present case and *Kimball Laundry* insofar as both cases reflect the acquisition of a going concern. In *Kimball Laundry*, the United States condemned a property on which was a laundry facility and utilized the property as a laundry for several years. The Supreme Court held that the owner was entitled to compensation for the diminution in going-concern value or goodwill.[5] Here, plaintiff acquired a parking facility and, after expanding the facility, continued to court the same transient parker market that defendant had exploited, and viewed this market as an income-generating opportunity, as had defendant. It would be difficult to conceive of a clearer example of the acquisition of a going concern. Thus, to the extent that the circuit failed to find that plaintiff acquired a going concern, we hold that the court committed clear error. *Hertz*, *supra*.

However, our inquiry does not end here. Once it has been established that a governmental entity has acquired a business as a going-concern and that the business owner is, therefore, entitled to compensation for its "going-concern value" or goodwill, that goodwill must be valued. As noted above,

the value of a commercial piece of property, in general, reflects the value of the business operated on that property. Thus, the terms "going-concern value" and "goodwill" must denote something beyond the mere value of the business as reflected in the value of the real property underlying the business.

These terms were explored in *Kimball*, *supra*, pp 9-10. To quote at length from that decision, where, to reiterate, "trade routes" were alleged to give rise to going-concern value,

> [s]ince [Kimball Laundry Company, as owner of the real property underlying its laundry business,] has been fully compensated for the value of its physical property, any separate value that its trade routes may have must therefore result from the contribution to the earning capacity of the business of greater skill in management and more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment. The product of such contributions is an intangible which may be compendiously designated as "going-concern value," but this is a portmanteau phrase that needs unpacking.
>
> Though compounded of many factors in addition to relations with customers, that element of going-concern value which is contributed by superior management may be transferable to the extent that it has a momentum likely to be felt even after a new owner and new management have succeeded to the business property. But because this momentum can be maintained only by the application of continued energy and skill, it would gradually spend itself if the effort and skill of the new management were not in its turn expended. See Paton, *Advanced Accounting* 427, 435 (1945). Only that exercise of managerial efficiency, however, which has contributed to the future profitability of the business will have a transferable momentum that may give it value to a potential purchaser; that which has had only the effect of increasing current income or reducing expenses of operation from year to year. The value contributed by the expenditure of money in soliciting patronage, although likewise of limited duration, differs from managerial efficiency in that it derives not merely from the contribution of personal qualities but from the original investment or the plowing back of income. As such it may sometimes be more readily recognized as an asset of the business. It is clear, at any rate, that the value of both these elements, in combination, must be regarded as identical with the value alleged to inhere in the trade routes.

Thus, while "portmanteau phrase" may have been something of an understatement, the Court delineated that "going-concern value" was meant to encompass those items that increase the profitability of a concern beyond what the value of the underlying property would seem to indicate, such as managerial expertise and pronounced customer loyalty. These items do not fit neatly in a profit and loss statement, if they fit at all, but are, nonetheless, properly considered as part of the value of a business, value that may not be reflected in the value of the underlying property.

Where going-concern value exists, a business owner is entitled to be compensated for the portion of that value that may not be transferred to a new location for the business. As stated in *Michael's Prescriptions*, *supra*, p 819, "recovery of the going concern value of a business lost to

condemnation will depend on the transferability of that business to another location. If the business can be transferred, nothing is taken and compensation is therefore not required."

To summarize, the market value of a piece of real estate is presumed to reflect the value of the commercial enterprise that may be operated on that property, less particular items on the property specifically adapted to the commercial enterprise. However, there may also exist "going-concern value" that is not reflected in the value of the underlying real property. Such things as managerial expertise that increase the profitability of a business beyond what one would expect from the value of the underlying property and customer loyalty are examples of "going-concern value." A business is entitled to be compensated for this "going-concern value" when the real property underlying his business is condemned.

Turning, then, to the estimation of going-concern value in the present case, we find no evidence of any going-concern value with respect to defendant's parking lot business. Defendant took great pains below, and has continued to emphasize on appeal, that the value of his parking business was, as one would expect, virtually completely dependent on its location. We find no record evidence contesting this assertion. Defendant has put forth no evidence suggesting that the value of its parking business is derived from any source other than its location. Thus, in accordance with the principles set forth above, defendant has presented no evidence of going-concern value. There is simply no indication that the value of defendant's business was derived to some extent from managerial expertise or customer loyalty or from any intangible that could be comprehended by the term phrase "going-concern value" even broadly construed. Because the value of the location of the real property as a parking lot was reflected in plaintiff's compensation to the owners of that property and defendant has presented no evidence of going-concern value, defendant was entitled to no compensation upon the condemnation of the property and the concomitant cessation of his parking business at that location. To the extent that the circuit court's opinion conflicts with this determination, we find the court's decision to constitute clear error. *Hertz, supra*.

Because we have concluded that there existed no going-concern value or goodwill in the present case, we need not address the issue of transferability of these intangibles. See *Michael's Prescriptions, supra*. Therefore, we affirm the trial court's award of no compensation to defendant.

With respect to the issue of witness fees, plaintiff contends that the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*.; MSA 8.625(1) *et seq*., should not be construed to allow an award of expert witness fees in the case at hand. We disagree. Statutory construction is a question of law that this Court reviews de novo for error. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

Generally, this Court interprets a statute to find and give effect to the Legislature's intent. *Folands Jewelry Brokers, Inc v Warren*, 210 Mich App 304, 307; 532 NW2d 920 (1995). This Court must first look to the specific language of the statute to make its determination concerning the Legislature's intent. *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If this language is clear, this Court should apply the statute as written. *Livingston Co Bd of Soc Service v Dep't of Soc Service*, 208 Mich App 402, 406; 529 NW2d 308 (1995). Thus, it is only

appropriate to construe a statute when reasonable minds could differ on the meaning of the statute's language. *Standard Fed Sav Bank v Genesee Co*, 208 Mich App 569, 572-573; 528 NW2d 793 (1995).

The UCPA controls the resolution of actions seeking the condemnation of private property by governmental agencies. MCL 213.52(1); MSA 8.265(2)(1). The UCPA provides that "[a]ll laws and court rules applicable to civil actions shall apply to condemnation proceedings *except as otherwise provided in this act*." *Id*. [Emphasis added.] As one of these exceptions, the UCPA provides:

> A witness, either ordinary or expert, 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. [MCL 213.66(1); MSA 8.265(16)(1).]

Moreover, the UCPA states:

> Expert witness fees provided for in subsection (1) shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. [MCL 213.66(4); MSA 8.265(16)(4).]

This Court has specifically determined that such an award under these sections is mandatory. *In re Acquisition of 306 Garfield*, 207 Mich App 169, 187; 523 NW2d 644 (1994). Thus, it would appear that plaintiff's argument on appeal is meritless.

Nevertheless, plaintiff argues that one must first determine whether a taking occurred before the defendant is entitled to these fees. In other words, plaintiff asserts that only a defendant who is a prevailing party may receive the fees in question. Plaintiff's argument must fail for two reasons.

First, plaintiff's argument would cause an absurd result. To illustrate, the UCPA provides:

> 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(4); MSA 8.265(16)(4).]

Thus, under the plain meaning of this provision, the governmental entity must pay the fees even though the owner loses on summary disposition. Yet, under plaintiff's proffered interpretation, an owner, who loses at trial because no taking was found, cannot collect the fees. Because the proffered interpretation yields an absurd result, this Court will not adopt it. *Rowell v Security Steel Processing Co*, 445 Mich 347, 354; 518 NW2d 409 (1994).

Additionally, plaintiff's proffered construction renders the "other disposition" language in MCL 213.66(4); MSA 8.265(15)(4) surplusage because summary disposition in the governmental entity's favor would generally be based upon a finding that no taking occurred. This Court must not render such

language nugatory or surplusage. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Thomas L. Ludington

[1] Court of Appeals docket number 159684.

[2] Court of Appeals docket number 162918.

[3] Aspects of the court's decision not pertinent to this appeal have been omitted.

[4] The value of the leasehold is a distinct issue, one not raised on appeal presumably because the value of defendant's leasehold was relatively insignificant, being a month to month lease.

[5] We note that the dissent in *Kimball Laundry* emphasized that the majority awarded compensation for loss of goodwill despite the fact the goodwill was "wholly useless" to the military because the property was not operated as a for-profit laundry but as a laundry for military uniforms. *Kimball*, *supra*, pp 22-24 (Douglas, J., dissenting). To this extent, the "United States [was] forced to pay not for what it gets but for what the owner loses." *Id*., p 23. We believe that the present situation represents a clearer example of the acquisition of a going concern because, as elucidated in the text of this opinion, plaintiff acquired a for-profit business and continued to operate it as a for-profit business.