STATE OF MICHIGAN

COURT OF APPEALS

CITY OF NOVI,

Plaintiff-Appellee,

v

ARTHUR J. EVANS, MICHAEL D. BENNETT, and CARA P. BENNETT,

Defendants,

and

RAYMOND A. SCHOVERS, DIANE E. SCHOVERS, FRANCIS L. GUILIANI, SUSAN M. GUILIANI, BRUCE M. LOWELL, CAROLE B. LOWELL, DANIEL H. BERGSTROM, CONSTANCE BERGSTROM,

Defendants-Appellants.

UNPUBLISHED
June 3, 1997

Nos. 183034;191690
Oakland Circuit Court
LC No. 92-444609-CC

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

In Docket No. 183034, defendants appeal as of right from a judgment determining just compensation for their properties in this condemnation case. In Docket No. 191690, defendants appeal from an order granting in part and denying in part their motion for costs. We affirm.

Plaintiff filed the instant case pursuant to the Uniform Condemnation Procedures Act, MCL 213.51 *et seq.;* MSA 8.205 *et seq*., to acquire easements on defendants' residential properties, located along Miller Creek in Novi Township, for the construction and maintenance of a regional storm water detention basin. The parties stipulated to the necessity of acquiring the easements prior to trial, and the only issue at trial was the determination of just compensation for defendants' properties. The jury returned a verdict awarding $7,800 to defendants Bergstroms, $9,900 to defendants Lowells,

$4,700 to defendants Bennetts, $3,700 to defendants Guilianis, and $1,200 to defendants Schovers. Judgment was entered on the jury's verdict.[1]

Defendants first argue that the trial court erred by denying their motion for summary disposition pursuant to MCR 2.116(C)(10). We disagree.

An order granting summary disposition is reviewed de novo on appeal. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Michigan Mutual, supra* at 85. The motion may be granted when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented by the parties. *Id.*

Defendants argue that they were entitled to summary disposition because there was no genuine issue of material fact that plaintiff violated MCL 213.55(1); MSA 8.265(5)(1) by failing to make good faith offers to purchase their properties. MCL 213.55(1); MSA 8.265(5)(1) provides in part:

> Except as provided in section 25(4), before initiating negotiations for the purchase of property, the agency shall establish an amount which it believes to be just compensation for the property and promptly shall submit to the owner a good faith offer to purchase the property for the full amount so established. . . . The amount shall not be less than the agency's appraisal of just compensation for the property. . . . If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located.

Defendants assert that plaintiff's offers to purchase their properties were not "good faith offers" because plaintiff's appraisals considered defendants' properties to be vacant, and did not consider the fact that there were homes on the properties. In support of their motion, defendants submitted plaintiff's appraisal reports which indicated that the appraisals were "concerned with land values only." However, in response to defendants' motion, plaintiff submitted the affidavit of its appraiser, Robert Scott, stating that the appraisals did not include a computation of the diminution in the value of the residences because he did not believe the easements would affect the value of the residences. We agree with the trial court that the documentary evidence submitted by the parties created a fact issue with respect to whether the easements will result in damage to defendants' residences. Accordingly, the trial court properly denied defendants' motion for summary disposition with respect to their claim that plaintiff violated MCL 213.55(1); MSA 8.265(5)(1).

Defendants next argue that they were entitled to summary disposition pursuant to MCR 2.116(C)(10) because there was no genuine issue of material fact with respect to whether plaintiff violated MCL 213.74; MSA 8.265(24). MCL 213.74; MSA 8.265(24) provides that "[i]n order to compel an agreement on the price to be paid for the property, an agency may not advance the time of

condemnation, defer negotiations or condemnation, defer the deposit of funds for the use of the owner, nor take any other action coercive in nature."

Defendants assert that plaintiff engaged in coercive conduct by appraising the easements while protective covenants were in place, but then removing the covenants upon the filing of the instant action. In support of their motion, defendants submitted the affidavit of their appraiser, Donald Bowen, in which he indicated that the pre-suit easements appraised by plaintiff differed significantly from the easements sought in the present action because of the removal of the protective covenants. However, plaintiff submitted the affidavit of its appraiser, Robert Scott, stating that his appraisals did not consider the protective covenants which plaintiff included in its offers to purchase defendants' properties. Based on the documentary evidence submitted by the parties, it does not appear that plaintiff violated MCL 213.74; MSA 8.265(24). Therefore, the trial court properly denied defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

Defendants next argue that the trial court erred by excluding homeowner testimony as to partial loss of the market value of their homes due to the imposition of the easements. We find no abuse of discretion in the trial court's exclusion of the evidence.

Defendants first argue that the trial court erred by excluding defendant Bruce Lowell's testimony regarding the diminution in the value of his property resulting from the imposition of the easement. MRE 701 requires that a lay witness have personal knowledge of the matter about which he or she testifies. Furthermore, before a property owner may testify in a condemnation case regarding the value of his or her property, "a very basic foundation should first be laid establishing that the owner is familiar with his property and with any other property that he testifies about with regard to comparable value." *Grand Rapids v H R Terryberry Co*, 122 Mich App 750, 755-756; 333 NW2d 123 (1983).

In the instant case, Bruce Lowell could not have been familiar with his property after the imposition of the easement because, at the time of trial, the easement had not yet been imposed. Furthermore, Lowell testified that he was unable to find a comparable on which to base his valuation of his property after the imposition of the easement. Therefore, because Lowell's testimony was based on mere speculation, the minimum foundation required by *Terryberry, supra*, was not laid with respect to Lowell's testimony. Accordingly, the trial court properly excluded Lowell's testimony regarding the value of his property after the imposition of the easement.

Defendants next argue that the trial court erred by ruling that Bruce Lowell's testimony based on the assessed value of his property was hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). However, MRE 801(d)(2)(A) provides that an out-of-court statement is not hearsay if it is offered against a party and is made by a party/opponent. Michigan courts generally allow a property owner to admit evidence of the assessed value of condemned property on the ground that the introduction of such evidence by a property owner amounts to an admission against interest. *Jack Loeks Theaters, Inc v Kentwood*, 189 Mich App 603, 611; 474 NW2d 140 (1991), modified on other grounds 439 Mich 968; 483 NW2d 365 (1992). However, in the instant case, defendants' properties were located in, and assessed by, Novi Township, which was not a party to the instant case.

Therefore, the assessed value determined by Novi Township does not qualify as an admission against interest and Lowell's testimony based on the assessed value was properly excluded as hearsay.

Defendants next argue that the trial court abused its discretion by striking defendant Raymond Schovers' testimony regarding his opinion as to the value of damages caused to his property from the imposition of the easement.

Prior to trial, the trial court ruled in response to plaintiff's motion to exclude evidence that its use of the easement would pollute Miller Creek, that, if defendants established within a reasonable degree of certainty that pollution caused by the detention basin would adversely affect the resale value of defendants' properties, defendants may be compensated for such damages. See *United States v 760.807 Acres of Land*, 731 F2d 1443, 1447 (CA 9, 1984); *Fera v Village Plaza, Inc*, 396 Mich 639, 644; 242 NW2d 372 (1976); *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). Schovers' valuation of the damage the easement will cause to his property was based on the fear that the detention basin would malfunction, cause water to back up onto his property, and pollute his pond. However, as noted by the trial court, defendants did not establish a reasonable certainty that the detention basin would malfunction, or that the detention basin would cause Schovers' pond to become polluted. Accordingly, Schovers' testimony was properly stricken by the trial court.

Defendants next argue that the trial court abused its discretion by denying their motion for new trial based on the trial court's failure to properly instruct the jury regarding their determination of damages. We disagree.

It is proper for a court to instruct the jury that it must keep within the range of the testimony in its determination of damages and that it may accept the lowest figure submitted, the highest figure submitted, or a figure somewhere in between the lowest and highest figure submitted. SJI2d 90.23; *Dep't of Transportation v McNabb*, 204 Mich App 674, 676-677; 516 NW2d 83 (1994).

In the instant case, plaintiff's appraiser, Robert Scott, testified as to his determination of just compensation for each of defendants' properties. Defendants' appraiser, Donald Bowen, testified that the easements would result in a total taking of defendants' properties. Defendants offered no admissible evidence regarding partial taking damages. Accordingly, since the only testimony regarding partial taking damages came from plaintiff, there was no range of testimony within which the jury could determine partial taking damages. Therefore, the trial court properly instructed the jury that, if it determined that any defendant did not satisfy the burden of proving a total taking of his or her property, the jury must return a verdict in the amount to which plaintiff's appraiser testified as just compensation.

Defendants next argue that the trial court abused its discretion by denying their motion to strike Roy Shrameck's testimony on the ground that he lacked knowledge about the matters to which he testified, and that he testified as to policies of the Department of Natural Resources which had not yet been adopted as actual regulations of the DNR. We find no merit in defendants' argument. As noted by the trial court, defendants' objection to Schrameck's testimony goes to the weight to be given the testimony, rather than its admissibility.

Finally, defendants argue that the trial court abused its discretion by denying them reimbursement pursuant to MCL 213.66(1); MSA 8.265(16)(1) for certain expenses incurred by their expert witnesses in preparation for trial. We disagree.

MCL 213.66; MSA 8.265(16) of the Uniform Condemnation Procedures Act, provides:

> (1) 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.
>
> * * *
>
> (4) 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. 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; MSA 8.625 mandates an award of reasonable expert witness fees. *Dep't of Transportation v Schultz*, 201 Mich App 605, 609; 506 NW2d 904 (1993). However, an expert is not automatically entitled to compensation for all services rendered. *Schultz, supra* at 609. Experts are properly compensated for court time and time required to prepare for their testimony. *Id.* The fees and compensation authorized by MCL 213.66; MSA 8.625 are those allowed by MCL 600.2164; MSA 27A.2164. *City of Detroit v Lufran Co*, 159 Mich App 62, 66; 406 NW2d 235 (1987).

In the instant case, the trial court properly denied fees for Paxton's time spent assisting other witnesses, as such time was not spent in preparation for his testimony. Furthermore, fees for photographs, video playback at trial, and siteplan enlargements used by defense witnesses to illustrate their testimony to the jury were not recoverable. In the absence of express authority, costs may not be awarded to recompense for a claimed litigation expense. *Taylor v Anesthesia Associates of Muskegon, P.C.*, 179 Mich App 384, 387-388; 445 NW2d 525 (1989). Similarly, there is no authority for the recovery of fees for deposition transcripts reviewed by Paxton. Accordingly, the trial court properly denied these expenses.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Although the jury returned a verdict in favor of defendants Bergstroms in the amount of $7,800, the court entered judgment in favor of defendants Bergstroms in the amount of $7,300.