

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELSON BAUR, TIMOTHY IRION, SANDRA IRION, MICHAEL ARMBRUSTER, Trustee, PAUL STECKER, HEIDI STECKER, ROGER GREMEL, DOROTHY GREMEL, KEN FIEBIG, DONALD FIEBIG, FREDERICK BAUER, ALICE BAUER, MARK BAUER, JAMES BAUER, LARRY ADAM, MARY LOU ADAM, DAVID LUTZ, DANA LUTZ, RICHARD GREMEL TRUST, WALTER GREMEL, LORRAINE PRIEBE, THOMAS PRIEBE, GRUEHN FARMS II, AHAFIA HINTON, WALTER GREMEL, MARILYN ELENBAUM TRUST, GERALD ELENBAUM TRUST, DARWIN SNELLER, KATHY SNELLER, DWIGHT JACOBS, DORIS JACOBS, POELMA LAND COMPANY, ROBERT HAAG, MARJORIE ELENBAUM, DENNIS FRITZ, RANDALL FRITZ, RANDALL ELENBAUM, EDWARD OESCHGER TRUST, LES SCHAPER, TRACY SCHAPER, RON AND ELAINE GAYARI TRUST, JAMES GREMEL, CINDY GREMEL, CHRIS GAYARI, HELEN GAYARI, STEVE GAYARI, ACTIVE FEED COMPANY, RAN-CYN FARMS, INC., STEVE GREMEL, PATTI GREMEL, RANDY SCHULZE, KEN KASSERMAN, SHIRLEY KASSERMAN, TERRY RENN, UW FARMS, L.L.C., ERIC AND REBECCA MILLER TRUST, JAMES KROHN, and BETTY TOWNLEY,

Plaintiffs-Appellees,

v

INTERNATIONAL TRANSMISSION COMPANY,

Defendant-Appellant,

and

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UNPUBLISHED  
February 19, 2013

No. 309664  
Huron Circuit Court  
LC No. 12-105001-CC

MICHIGAN ELECTRIC AND GAS  
ASSOCIATION, MICHIGAN ELECTRIC  
COOPERATIVE ASSOCIATION,  
TELECOMMUNICATIONS ASSOCIATION OF  
MICHIGAN, CONSUMERS ENERGY  
COMPANY, DETROIT EDISON COMPANY,  
and MICHIGAN CONSOLIDATED GAS  
COMPANY,

Amicus Curiae.

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Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Defendant, a Michigan corporation, appeals by right the circuit court order awarding plaintiffs' attorney fees pursuant to MCL 213.55(2) of the Uniform Condemnation Procedures Act (UCPA). On appeal, defendant argues that the trial court erred in awarding attorney fees. We agree and vacate the award.

Defendant is an independent transmission company as defined by MCL 460.1001, *et seq.*, and MCL 486.251, *et seq.* The Michigan Public Service Commission authorized defendant to construct what is known as the "Thumb Loop," which is a transmission line designed to transmit wind-generated energy throughout Michigan's Thumb Area. To construct the line, defendant requires easements over private properties in Huron County. While defendant purchased easements from some landowners voluntarily, it resorted to condemnation procedures under the UCPA against others, such as plaintiffs.

Prior to filing a condemnation complaint, a condemning agency like defendant is required to make a good-faith, written offer to purchase an easement from a landowner. MCL 213.55(1). To facilitate the calculation of the amount the agency believes to be just compensation, "the agency has the right to secure tax returns, financial statements, and other relevant financial information for a period not to exceed 5 years before the agency's request." MCL 213.55(2). Through an accounting firm, defendant sent letters to plaintiffs, accompanied by requests for specific information concerning farming operations, lease agreements, and tax returns.

Rather than provide the requested information, plaintiffs retained legal counsel and sought a declaratory judgment in the circuit court. Plaintiffs argued that: defendant's business valuation requests exceeded the scope permitted under MCL 213.55(2); defendant had not demonstrated that it would maintain the statutorily-required confidentiality of the information it sought; and plaintiffs were entitled to reimbursement of costs incurred in providing defendants with the requested information, including fees paid to attorneys. In response, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).

After oral argument, the trial court ordered plaintiffs to provide defendant with the requested information and ordered defendant to “take any steps necessary to preserve the confidentiality” of that information. With regard to the reimbursement of costs and fees, the court concluded the following:

The Court finds that under MCL 213.55(2), Plaintiffs are entitled to reimbursement from [defendant] of the actual, reasonable cost of producing the financial information pursuant to this Order, including the actual, reasonable attorney fees incurred in conjunction with such production, not to exceed \$1,000 as provided for by the UCPA and specifically MCL 213.55(2).

The court dismissed the matter without prejudice and closed the case. Defendant asserts that the trial court erred in awarding attorney fees.

“Generally, attorney fees are not recoverable unless expressly allowed by statute, court rule, or common-law exception.” *Terra Energy, Ltd v State*, 241 Mich App 393, 397; 616 NW2d 691 (2000), citing MCL 600.2405(6).<sup>1</sup> In this case, the trial court awarded attorney fees pursuant to MCL 213.55(2), which provides as follows:

During the period in which the agency is establishing just compensation for the owner’s parcel, the agency has the right to secure tax returns, financial statements, and other relevant financial information for a period not to exceed 5 years before the agency’s request. The owner shall produce the information within 21 business days after receipt of a written request from the agency. *The agency shall reimburse the owner for actual, reasonable costs incurred in reproducing any requested documents, plus other actual, reasonable costs of not more than \$1,000.00 incurred to produce the requested information.* Within 45 days after production of the requested documents and other information, the owner shall provide to the agency a detailed invoice for the costs of reproduction and other costs sought. The owner is not entitled to a reimbursement of costs under this subsection if the reimbursement would be duplicative of any other reimbursement to the owner. If the owner fails to provide all documents and other information requested by the agency under this section, the agency may file a complaint and proposed order to show cause in the circuit court in the county specified in [MCL 213.55(1)]. The court shall immediately hold a hearing on the agency’s proposed order to show cause. The court shall order the owner to provide documents and other information requested by the agency that the court finds to be relevant to a determination of just compensation. An agency shall keep documents and other information that an owner provides to the agency under this section confidential. However, the agency and its experts and representatives may utilize the documents and other information to determine just compensation, may utilize the documents and other information in legal proceedings under this

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<sup>1</sup> MCL 600.2405(6) provides that, “unless otherwise directed,” a court may award “[a]ny attorney fees authorized by statute or court rule.”

act, and may utilize the documents and other information as provided by court order. If the owner unreasonably fails to timely produce the documents and other information, the owner shall be responsible for all expenses incurred by the agency in obtaining the documents and other information. This section does not affect any right a party may otherwise have to discovery or to require the production of documents and other information upon commencement of an action under this act. A copy of this section shall be provided to the owner with the agency's request. [Emphasis added.]

The trial court apparently found that attorney fees incurred by plaintiffs constituted "actual, reasonable costs of not more than \$1,000.00 incurred to produce the requested information" within the meaning of the statute.

A trial court's decision to grant or deny a motion for attorney fees presents a mixed question of fact and law. This Court reviews the trial court's findings of fact for clear error, and questions of law de novo. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." However, this Court reviews a trial court's ultimate decision whether to award attorney fees for an abuse of discretion. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* [*Brown v Home Owners Ins Co*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 307458, issued December 4, 2012), slip op at 6 (citations omitted), lv app pending.]

To resolve this appeal, we must apply MCL 213.55(2). The application is "a matter of law that is subject to review de novo." *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). In *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 313-314; 683 NW2d 148 (2004), we restated the rules of statutory interpretation as follows:

The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature; the rules of statutory construction merely serve as guides to assist in determining that intent with a greater degree of certainty. It is a fundamental principle that a clear and unambiguous statute leaves no room for judicial construction or interpretation. "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case." Thus, this Court "may engage in judicial construction only if it determines that statutory language is ambiguous."

Where the language in a statute is ambiguous, a court may go beyond the statute's words in order to ascertain legislative intent. "An ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute as used in its particular context has more than one common and accepted meaning." If

reasonable minds can differ with respect to the meaning of a statute, that statute may be considered ambiguous and judicial construction is appropriate. [Citations omitted.]

In considering the statutory language, all of the words and phrases employed “shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.” MCL 8.3a.

The term “attorney fees” is not expressly included in MCL 213.55(2). Rather, the statute speaks of reimbursing those “reasonable costs incurred in reproducing any requested documents, plus other actual, reasonable costs of not more than \$1,000.00 incurred to produce the requested information.” In *Attorney General v Piller (After Remand)*, 204 Mich App 228, 229-230; 514 NW2d 210 (1994), Michigan’s attorney general alleged that the defendants had filled in wetlands without a permit, in violation of Michigan’s Environmental Protection Act (MEPA), MCL 691.1201, *et seq.*, and the Wetland Protection Act, MCL 281.701, *et seq.*<sup>2</sup> The trial court awarded defendants \$3,500 in attorney fees pursuant to § 3(3) of the MEPA, which provided that “Costs may be apportioned to the parties if the interests of justice require.” *Id.* at 230-231, quoting MCL 691.1203(3). Defendants appealed, arguing that the trial court abused its discretion by refusing to award the bulk of defendants’ requested attorney fees. *Id.* at 230, 232. This Court affirmed the denial of attorney fees, reasoning that “there is no authority to award attorney fees in § 3(3) of the MEPA.” *Id.* at 233.

Similarly, MCL 213.55(2) does not specifically allow for the award of attorney fees, and there is nothing in the statutory language that indicates that the Legislature intended that the term “reasonable costs” include such fees.

In contrast, MCL 213.55(3) does provide for the reimbursement of attorney fees in certain circumstances:

(3) In determining just compensation, all of the following apply:

\* \* \*

(b) . . . If the owner fails to provide sufficient information after being ordered to do so by the court, the court may assess an appropriate sanction in accordance with the Michigan court rules for failing to comply with discovery orders, including, but not limited to, barring the claim. *In addition, the court also shall consider any failure to provide timely information when it determines the maximum reimbursable attorney fees under section 16.*

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<sup>2</sup> Our Legislature subsequently repealed these statutes.

(c) . . . If the owner fails to provide supplementary information as required under this subdivision, the court may assess an appropriate sanction in accordance with the Michigan court rules for failing to comply with discovery orders, including, but not limited to, barring the claim. *In addition, the court also shall consider any failure to provide timely supplemental information when it determines the maximum reimbursable attorney fees under section 16.*

(d) After receiving a written claim from an owner, the agency may provide written notice that it contests the compensability of the claim, establish an amount that it believes to be just compensation for the claim, or reject the claim. If the agency establishes an amount it believes to be just compensation for the claim, the agency shall submit a good faith written offer for the claim. The sum of the good faith written offer for all claims submitted under this subsection or otherwise disclosed in discovery for all items of property or damage plus the original good faith written offer constitutes the good faith written offer *for purposes of determining the maximum reimbursable attorney fees under section 16.* [Emphases added.]

Section 16 of the UCPA, MCL 213.66, provides in relevant part as follows:

(2) If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, *the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.*

(3) 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. . . .*

\* \* \*

(6) Except as provided in subsection (7), *an agency is not required to reimburse attorney or expert witness fees attributable to an unsuccessful challenge to necessity or to the validity of the proceedings.*

(7) In any matter under this act involving the relocation of an indigent person, other than a proceeding concerning the taking of property for the construction of a government-owned transportation project, *the court may award reasonable attorney and expert witness fees attributable to an unsuccessful challenge to necessity or to the validity of the proceedings if the court finds that there was a reasonable and good faith claim that the property was not being taken for a public use. . . .* [Emphases added.]

“Generally, when language is included in one section of a statute, but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion.” *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). Here, the exclusion of any reference to attorney fees in § 5(2), coupled with the express use of the term in the above cited sections, indicates that attorney fees were improperly awarded under MCL 213.55(2).

Reversed and remanded. The award of attorney fees is vacated.<sup>3</sup> We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Joel P. Hoekstra

/s/ Peter D. O’Connell

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<sup>3</sup> The award of other actual, reasonable costs of producing the requested information was proper.