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JULY 16, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20180028
Cass County District Court No. 09-2016-CV-2207

Cass County Joint Water Resource District,
a North Dakota Political Subdivision,

Plaintiff/Appellee/Cross-Appellant,

v.

Curtis W. Erickson, Karen S. Erickson

Defendants/Appellants/Cross-Appellees.

and

Choice Financial Group,

Defendant/Appellee.

REPLY/RESPONSE BRIEF OF APPELLANTS/CROSS-APPELLEES CURTIS W. ERICKSON AND KAREN S. ERICKSON

Appeal From The November 21, 2017 Judgment And September 12, 2017 Order Of Fee Simple Condemnation And Determination Of Just Compensation Of The Honorable John C. Irby, East Central Judicial District, Cass County

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LAW AND ARGUMENT

I. THE JUST COMPENSATION AWARD MUST BE REVERSED

[¶1] Tellingly, Appellee furnishes no substance in response to Ericksons' appeal, instead seeking refuge in the alleged standard of review. This Court's decision does not turn on the standard of review. At issue are the protections afforded landowners by the Fifth Amendment; Article I, § 16; and Chapter 32-15. This Court has likened these to a contract to compensate an owner for his damages. Hager v. City of Devils Lake, 2009 ND 180, ¶ 34, 773 N.W.2d 420. The requirement of highest and best use, and prohibition against project influence, are paramount terms of that contract. They are statutory embodiments of Constitutional protections which must be enforced.

[¶2] This means the "highest and best use" of land ***must*** be considered in determining just compensation. United States v. 320.0 Acres of Land, More or Less in Monroe Cty., State of Fla., 605 F.2d 762, 817 (5th Cir. 1979). And any evidence obtained for or as a result of the project, and/or preliminary actions of the condemnor, ***must*** be excluded. W.R. Assoc. of Norwalk v. Comm'r., 751 A.2d 859, 866 (Conn. Super. Ct. 1999); 29A C.J.S. Eminent Domain § 140.

[¶3] The District Court disregarded the presumptive highest and best use of Ericksons' lots; disregarded applicable zoning and land use restrictions; failed to consider all uses for which Ericksons' lots were adaptable; explicitly found Ericksons' lots were suitable for residential construction, yet failed to value them for that use; and judicially rezoned the lots despite no such building restrictions 1) at law or 2) in the appraisal it purported to adopt. These were legal errors. They also

resulted in an award which falls outside the range of the ***admissible*** evidence. The District Court's just compensation award must be reversed.

II. APPELLEE'S CROSS APPEAL MUST BE DISMISSED

[¶4] The Order Awarding Costs afforded Appellee an offset of $11,538.19 for taxes it paid on Ericksons' behalves. App. at 66, 69. A party who accepts a substantial benefit of a judgment waives the right to appeal from that judgment. See, e.g., Haff v. Hettich, 1999 ND 94, 593 N.W.2d 383. Having sought and received this substantial offset, Appellee cannot appeal from the Order which effectuated it. Supp. App. at 12-23.

III. THE ORDER AWARDING COSTS SHOULD BE AFFIRMED

A. Appellee Stipulated It Would Not Oppose An Award

[¶5] Counsel for the parties executed and filed a Stipulation (App. at 55), wherein in exchange for the dismissal of Ericksons' Counterclaims, Appellee, through Counsel, agreed it "***will not oppose*** the Ericksons requesting an award of reasonable attorneys fees and costs . . . reserving its right to challenge the reasonableness of the costs and fees requested . . . ." The District Court correctly interpreted the Stipulation to prohibit Appellee from objecting to an award *in toto*.

[¶6] Stipulations which affect rights which are the subject matter of a lawsuit are entitled to all the sanctity of a conventional contract. Wagner v. Wagner, 1999 ND 169, ¶¶ 9-11, 598 N.W.2d 855. When the language of the contract is unambiguous, its interpretation is a question of law. Northstar Founders, LLC v. Hayden Capital USA LLC, 2014 ND 200, ¶ 46, 855 N.W.2d 614. A contract is

ambiguous only when reasonable arguments can be made for different meanings. Bakken v. Duchscher, 2013 ND 33, ¶ 13, 827 N.W.2d 17.

[¶7] The Stipulation is unambiguous. The words "will not oppose" could not be clearer. Appellee's objection violates the Stipulation.

[¶8] This Court has declared:

> Just as 'All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth' (In re Michael, 326 U.S. 224, 227, 66 S.Ct. 78, 80, 90 L.Ed. 30, 33 (1945)), so failure to perform commitments made in open court damages the judicial process regardless of whether the parties are damaged.

Matter of Malloy, 248 N.W.2d 43, 46 (N.D. 1976). See also State v. Carlson, 258 N.W.2d 253, 258 (N.D. 1977)(violation of Stipulation in open Court grounds for discipline). This admonition squarely apply here.

[¶9] Appellee's rationalizations for violating the Stipulation are sophomoric. The Stipulation had nothing to do with Appellee's invalid "Rule 68 Offer", which by its terms was an offer for Ericksons' property, not to settle Ericksons' Counterclaims (Supp. App. at 1, 9), and so violated Section 32-15-32. See Gissel v. Kenmare Twp., 512 N.W.2d 470, 476–77 (N.D. 1994) (Rule 68 inapplicable to eminent domain). Further, Rule 68 only addresses costs, not attorneys' fees.

[¶10] Because Appellee agreed it would not oppose Ericksons' request, its arguments should be rejected and the Order Awarding Costs affirmed.

B. Appellee Mischaracterizes The Law

[¶11] Space prohibits responding to every one of Appellee's mischaracterizations of law. See Doc. ID # 173. But this Court has been ***crystal clear*** regarding the

factors applicable to an award under Section 32-15-32. In City of Bismarck v. Thom, 261 N.W.2d 640, 646 (N.D. 1977), this Court directed:

> [. . .] [I]n determining a reasonable fee the trial judge must first determine the number of hours expended. Whenever possible his findings should be made upon contemporaneous records, and when such records are not available, then upon reasonable reconstruction or estimates of time amounts. The trial judge must then assign specific hourly rates based upon the attorney's experience and reputation which will constitute the "lodestar." The hourly rate can be adjusted upwards or downwards on the basis of objective evaluation of the complexity and novelty of the litigation and the corresponding degree of skills displayed by the attorney.
>
> The trial court or judge should also consider the character of the services rendered, the results which the attorney obtained, and the customary fee charged in the locality for such services, as well as the ability and skill of the attorney. ***The court should not rely on any single item in determining reasonable attorney fees. The number of hours spent in total and the rate per hour are the predominant factors in determining reasonable attorney fees.***

[¶12] Thom flatly ***prohibits*** District Courts from applying only the "result obtained" at the expense of all other factors. Accordingly, in City of Medora v. Goldberg, 1997 ND 190, ¶ 22, 569 N.W.2d 257, this Court reversed a reduction of attorney fees based on their proportionality to the verdict, finding such an analysis ***"is not authorized by our caselaw and could have a chilling effect when the owner of a small parcel of land resists condemnation of the land."*** This Court has held the "only requirement is that the fee which the court fixes in each case must be reasonable for the services rendered." Municipal Airport Auth. of City of Fargo v. Stockman, 198 N.W.2d 212, 215 (N.D. 1972).

[¶13] This Court also long ago rejected the "prevailing party" requirement Appellee advocates. In Gissel, 476–77, this Court reasoned:

> Rule 68(a), N.D.R.Civ.P., applies to offers of settlement in civil actions and requires an offeree to pay costs incurred after the making of an offer, ***if "the judgment is not more favorable than the offer."*** However, Section 32-15-32, N.D.C.C., specifically addresses costs in eminent domain proceedings . . . .
>
> ***Section 32-15-32, N.D.C.C., outlines limited circumstances for shifting costs to a landowner in an eminent domain action, but is silent about shifting costs when there is a refusal of an offer of settlement. However, Section 32-15-06.1, N.D.C.C., imposes a duty on the condemnor to negotiate and to submit an offer of just compensation to the landowner. That statute and Section 32-15-06.2, N.D.C.C., were enacted in 1981 N.D.Sess. Laws ch. 353, and as originally introduced, included a proposed amendment to Section 32-15-32, N.D.C.C., to authorize the award of "litigation expenses" to the landowner in certain situations, including the instance when a condemnation award exceeded the condemnor's offer by certain specified amounts.*** . . . .
>
> The Legislature did not adopt that proposed amendment to Section 32-15-32, N.D.C.C. [. . . .] ***[T]he rejection of that proposed amendment limits cost shifting in eminent domain proceedings to those specific situations already delineated in Section 32-15-32, N.D.C.C., regardless of negotiations or offers of settlement.***

See also City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 375 (N.D. 1996) (N.D.R. Civ. P. 54(e) and N.D. Cent. Code § 28-26-06(5) inapplicable to eminent domain). The absence of any prevailing party requirement was reaffirmed by the recent decisions Appellee cites (and misquotes). See North Dakota Dep't of Transp. v. Rosie Glow, LLC, 2018 ND 123, ¶ 23, 911 N.W.2d 334; North Dakota Dep't of Transp. v. Schmitz, 2018 ND 113, ¶¶ 15-16, 910 N.W.2d 874.

[¶14] Because Rule 68 does not apply in eminent domain, such offers are irrelevant to the District Court's determination under Section 32-15-32. The cases cited by Appellee are "quick take" cases featuring initial deposits from which a

landowner appealed. See Rosie Glow, LLC, supra.; Schmitz, supra.; Golberg, supra.; City of Devils Lake v. Davis, 480 N.W.2d 720, 727 (N.D. 1992); Sauvageau v. Hjelle, 213 N.W.2d 381 (N.D. 1973). While these cases also make clear the "result obtained" is but one factor, this is not a quick take and there was no "initial deposit". Appellee's position as to just compensation at trial was ***$37,100***. This is the number against which the result obtained must be measured.

[¶15] Stated another way, in order for the $150,000 amount to have any relevance to the District Court's analysis, it needed to be the amount Appellee submitted as just compensation at trial. See N.D. Cent. Code Section 32-15-06.1.

[¶16] Appellee's "public policy" arguments merit no discussion. They are imaginary, and pale in comparison to the Constitutional protections for landowners at issue here.

C. The District Court's Award Complied With Thom

[¶17] The District Court's decision on fees and costs cannot be overturned on appeal unless an abuse of discretion is shown. Rosie Glow, LLC, 2018 ND 123, ¶ 7. The District Court "is an expert on what is a reasonable fee". Id. at ¶ 11.

[¶18] Ericksons submitted all the information required by Thom, including contemporaneous billing records of Counsel and their experts, which itemized the number of hours expended and hourly rates billed; and Affidavits of Counsel and three trial Attorneys attesting to the character of the services rendered, the customary fee charged in the locality for such services, the ability and skill of Counsel, Counsels' experience and reputation, and the complexity and novelty of the issues involved. Doc. ID # 143-49, 178-80, Supp. App. at 3-11. Appellee did

not argue any amounts requested by Ericksons were themselves unreasonable, or that Counsel's hourly rates or hours expended were unreasonable, or that Counsel was not sufficiently experienced or qualified, or that any of the rates or amounts charged by Ericksons' experts were unreasonable. Appellee submitted no Affidavits or other evidence substantiating any such arguments. While Appellee takes issue with the fees of Ericksons' Appraiser, it does so based solely upon the "result obtained", and incorrectly cites United Dev. Corp. v. State Highway Dep't, 133 N.W.2d 439, 443 (N.D. 1965) for the proposition that costs of an expert whose opinions were rejected cannot be reimbursed. This case applied Section 28–26–06(5), which does not apply in eminent domain proceedings.

[¶19] The District Court correctly and thoughtfully summarized the law during a 55 minute hearing. Tr. Of App. For Fees Hrg. at 30-33. The District Court did not "question" Ericksons' appraiser's "competency"; to the contrary it noted the appraiser had "impeccable credentials" and "did a lot of work". The District Court simply (and Ericksons assert unlawfully) disagreed with his opinions. Most importantly, the District Court correctly attributed Ericksons' significant expenses to Appellee's inappropriate and ostensibly rejected effort to use project-influenced evidence to drive down the value of their properties.

CONCLUSION

[¶20] The District Court's Judgment And September 12, 2017 Order should be reversed. The Order Awarding Costs should be affirmed. Ericksons should be awarded their costs and reasonable attorneys' fees pursuant to Section 32-15-32.

Dated this 16th day of July, 2018.

/s/ Michael T. Andrews

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AFFIDAVIT OF SERVICE BY E-MAIL

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The undersigned, being first sworn, says upon her oath that on 16th day of July, 2018, she delivered via e-mail a true and correct copy of each of the following:

Reply/Response Brief and Supplemental Appendix of Defendants/Appellants/Cross-Appellees

A copy of the foregoing was securely e-mailed to the address(es) as follows:

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To the best of Affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail.

Dated this 16th day of July, 2018.

Liza A. Gion

Subscribed and sworn to before me this 16th day of July, 2018.

BRIANNA WOLF
Notary Public
State of North Dakota
My Commission Expires Nov. 10, 2021

Notary Public