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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

WILLIAM J. KLOUBEC and LOUISE B. KLOUBEC, Husband and Wife,	)	Filed January 25, 1979
Appellants,	)	
vs.	)	
SHERIFF OF LINN COUNTY, IOWA, LINN COUNTY BOARD OF SUPERVISORS, and LINN COUNTY, IOWA,	)	787 2-61915
Appellees.	)	

Appeal from the Linn District Court - August F. Honsell, Judge.

Plaintiffs-condemnees appeal from trial court's denial of their application for taxation of reasonable attorney fees incurred in connection with eminent domain proceedings. Affirmed.

John D. Randall of Cedar Rapids, and Ronald W. Wendt of Cedar Rapids, for appellants.

Eugene Kopecky, Linn County Attorney, and James Affeldt, Special Assistant Linn County Attorney, of Cedar Rapids, for appellees.

Heard by Oxberger, C.J., and Snell, Carter and Johnson, JJ.; Donielson, J., takes no part.

PER CURIAM

William and Louise Kloubec (condemnees) appeal from the trial court's denial of their application for taxation of reasonable attorney fees incurred in connection with eminent domain proceedings initiated by the defendants, condemnors. We affirm the trial court.

The record reflects that initially condemnors started proceedings under ch. 472, The Code, to condemn a portion of condemnees' farm for road purposes. This resulted in a compensation commission award of $4,550 for the taking. Condemnees appealed the amount of damages to the district court and, in addition, asserted in that court that the proceedings before the compensation commission were void because the property sought to be taken had been misdescribed in the notice of condemnation. The district court agreed with the later contention, set aside the proceedings before the compensation commission, and voided the taking.

Thereafter, condemnors commenced new eminent domain proceedings, but this time proceeded under ch. 306, The Code, rather than ch. 472. These proceedings resulted in an agreed award of $14,700 to condemnees.[1] Subsequent to this award, condemnees filed an application in the district court docketed under the name and style of the appeal proceeding which had resulted in the voiding of the original condemnation award under ch. 472. In this application it was conceded that there is no statutory authority for taxing attorney fees of condemnees as part of costs in an eminent domain proceeding processed under ch. 306, The Code. It was asserted in the application, however, that condemnees' attorney fees for services performed on the district court appeal from the original ch. 472 condemnation may be taxed against condemnors pursuant to §§ 472.33 or 472.34, The Code. The trial court ruled that neither of these statutes authorizes taxation of attorney fees on the facts of the present controversy. We agree.

[1]The record indicates that this sum was paid to condemnees by condemnors as a result of an agreement of settlement. It does not appear in the record how the amount was arrived at or what was given up by condemnees in exchange for this sum. In oral argument, condemnors asserted that this settlement included dismissal of a damage action brought by condemnees for the condemnors' wrongful possession under the initial taking, which was subsequently voided and, as such, did not represent the damages for the taking by eminent domain. Because of the disposition which we make, we need not decide this point.

I. On appeal, condemnees concede that they must point to some statutory authorization in order to support their claim for attorney fees.[2] They initially point to § 472.33, as allowing taxation of such fees. In this regard, we note that it is clear that there is no entitlement to taxation of attorney fees under that statute for those services expended in relation to the jurisdictional challenge. This issue was determined adversely to condemnees in Reter v. Davenport, R.O. & N.W. Ry. Co., 243 Iowa 1112, 54 N.W.2d 863, 870 (1952). But, condemnees' application also includes a claim for attorney fees for preparation for the trial of the damage issues in the ch. 472 appeal to the district court. With respect to this portion of their claim, condemnees' argument is based upon the language of § 472.33, which provides:

> "The applicant shall also pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the tribunal from which the appeal was taken." (Emphasis added.)

Condemnees argue that the language of the statute suggests that a reasonable attorney fee for condemnees' attorney is to be taxed in all appeals absent a damage award on appeal which exceeds the award of the compensation commission. They urge that an appeal under ch. 472 was taken by condemnees in the present dispute, that a final judgment was entered in that appeal as a result of their jurisdictional challenge, and that because there has been no award of damages, the statutory condition for negating condemnees' entitlement to attorney fees does not exist.

While condemnees' argument is ingenious, we must reject it. We recognize the rule that in the construction of provisos, those who claim to benefit from an exception to a general statutory provision must ordinarily establish that they fall within it or else the general provision shall govern. State v. Ricke, 160 N.W.2d 499, 500 (Iowa 1968); Wood Bros. Thresher Co. v. Eicher, 231 Iowa 550, 1 N.W.2d 655, 661 (1942). In the ordinary case, however, the party relying on the proviso has the burden of establishing the facts which bring the proviso into play.

With respect to appeal by a condemnee under § 472.33, there is in fact no burden placed upon the condemnor to establish an award the same as or less than that of the

[2] See, e.g., Atherton v. State Conservation Commission, 203 N.W.2d 620, 622 (Iowa 1973).

compensation commission in order to defeat a claim for attorney fees. The burden of proof as to all elements of damages on appeal remains at all times upon the condemnee. The legislature, in enacting the statute, must have been cognizant that this was the practical effect thereof regardless of the language employed. For this reason, we cannot attribute to the legislature the intent which condemnees suggest.

Condemnees' argument would apply to all situations where an appeal was taken to the district court and then, for some reason, the matter was terminated without a trial. Included in such situations might be instances where the action failed solely as a result of fault attributable to the condemnee (such as a jurisdictional defect attributable to the condemnee or dismissal pursuant to R.C.P. 215.1). We cannot conclude that this is the intent of the statute. Section 472.33 contemplates the existence of a valid award of damages by the compensation commission, which may serve as a benchmark for determining entitlement to attorney fees as a result of a district court appeal resulting in a higher award. In the present controversy, the district court appeal did not result in a higher award. Nor is there a valid compensation commission award to serve as a benchmark. The award of the commission in the present case was voided, because it related to a notice of taking describing some 4.01 acres when only 1.71 acres were intended to be taken. The subsequent condemnation under ch. 306 also involved 1.71 acres. But the uncertainty of the description in the first proceeding makes it impossible to determine if the same 1.71 acres are involved in both condemnations. Under these circumstances condemnees' application is not sustainable under § 472.33.

II. The trial court also rejected condemnees' claim that attorney fees should be taxed in their favor under § 472.34, The Code. That statute applies when, after an appeal, the condemnor (a) declines to take the property which is the subject of the eminent domain proceedings; and (b) refuses to pay the damages awarded. Neither condition exists in the present case and, the trial court properly determined the statute has no application to the present controversy. See Atherton v. State Conservation Commission, 203 N.W.2d 620, 622 (Iowa 1973).

We have considered all issues presented and find no basis for reversal.

AFFIRMED.