

FILED

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CLERK SUPREME COURT

474

IN THE COURT OF APPEALS OF IOWA

CITY OF DES MOINES, IOWA,)

Plaintiff-Appellant,)

Filed April 29, 1980

vs.)

GELLER GLASS & UPHOLSTERY, INC.,)

Defendant-Appellee,)

and)

JEROME AND BARBARA ROSE GELLER,)

0-72
2-63888

Plaintiffs-Appellees,)

vs.)

CITY OF DES MOINES, IOWA,)

Defendant-Appellant.)

Appeal from Polk District Court - Louis A. Lavorato, Judge.

City appeals district court award of damages and attorney fees in an action to condemn fee simple interest of condemnees Jerome and Barbara Geller and the leasehold interest of condemnee Geller Glass & Upholstery, Inc. Affirmed.

Nelda Barrow Wells, Assistant City Attorney, Des Moines, for plaintiff-appellant and defendant-appellant.

John R. Ward, Des Moines, for defendant-appellee, Geller Glass & Upholstery, Inc., and plaintiffs-appellees, Jerome and Barbara Rose Geller.

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

DONIELSON, J.

City appeals from district court award of damages and attorney fees in an action to condemn fee simple interest of condemnees Jerome and Barbara Geller and leasehold interest of condemnee Geller Glass & Upholstery, Inc. Condemnees request an award of attorney fees for this appeal. We affirm the district court judgment and deny condemnees' request for attorney fees.

On September 22, 1978, City filed an application to condemn Geller's fee simple interest in certain property. A condemnation commission awarded Gellers \$64,000 for their interest and they subsequently appealed to the district court. After Gellers threatened to bring a mandamus action, City filed on March 13, 1979, an application to condemn an unrecorded oral leasehold held by Geller Glass & Upholstery, Inc., a corporation wholly owned by Gellers. A condemnation commission awarded \$37,000 for the leasehold interest and \$900 in attorney fees. Both City and tenant appealed leasehold award. Actions concerning fee simple interest and leasehold awards were consolidated for trial.

After trial, the jury returned verdicts awarding \$90,000 for the fee simple interest and \$42,500 for the leasehold interest. On June 27, 1979, these awards were entered on the record. City filed a notice of appeal on July 11, 1979. Condemnees filed a motion for allowance and taxing of attorney fees and witness fees as costs. After a hearing on this motion, district court awarded attorney fees of \$8,500 to Gellers and \$14,000 to Geller Glass & Upholstery, Inc. City filed a notice of appeal from this decree. The supreme court, on October 22, 1979, consolidated both appeals.

The following issues are presented by City for review:

(1) Whether evidence of future additional expense and inconvenience of operations is admissible as descriptive of the injury resulting to a leaseholder in a whole taking where measure of damages is fair market value, or actual, intrinsic value, immediately before condemnation.

(2) Whether recovery of damages in an amount exceeding \$95,000, which Geller's own appraiser testified was fair market value of all interests in the fee simple absolute title, shows the above-mentioned error at law substantially and materially affected the outcome of the litigation.

(3) Whether magnitude of jury verdict is ground for reversal of decision since the award cannot be characterized as within testimonial range of the evidence when a property valued at \$95,000 by the condemnees' appraiser for all interests involved is compensated for in the amount of \$132,500.

(4) Whether district court erred in awarding attorney fees commensurate with or parallel to contingent fee contractual arrangements of condemnees with their lawyer.

(5) Whether district court erred in allowing attorney fees for time and effort occasioned by the silence and duplicitous action of Jerome and Barbara Geller who appeared at the condemnation hearing as if they held only the fee simple interest in the property, and subsequently claimed in the name of Geller Glass & Upholstery to hold an oral unrecorded leasehold interest that remained to be condemned.

(6) Whether district court erred in purporting to take judicial notice "that Mr. Ward [condemnees' counsel] is an experienced and competent trial lawyer" based on the court's own personal knowledge.

I.

In the first issue presented for review, City asserts evidence of projected future expenses and inconvenience of operations is not admissible as descriptive of the injury resulting to a leaseholder in a complete taking of an interest. While City acknowledges evidence of increased costs and inconvenience is admissible in an action involving a partial taking, see Korf v. Fleming, 239 Iowa 501, 518, 32 N.W.2d 85, 93 (1945), City contends district court erred in overruling its motion in limine on this matter. This motion was designed to prohibit the corporation from offering such evidence, which City argues is not relevant to the sole measure of damages: fair market value, or actual, intrinsic value, immediately before condemnation. We find the City's argument to be without merit. Because of this decision, we find it unnecessary to address the corporation's preservation of error or harmless error counter-arguments.

Measure of damages for a leasehold interest taken under eminent domain is generally declared to be the fair market value of the leasehold or unexpired term of the

lease. Interstate Finance Corp. v. City of Iowa City, 260 Iowa 270, 274, 149 N.W.2d 308, 311 (1967). In certain cases, however, it is difficult, if not impossible, to ascertain the market value of leaseholds. See Interstate Finance Corp., 260 Iowa at 274, 149 N.W.2d at 311-12; Korf, 239 Iowa at 518-19, 32 N.W.2d at 32 (quoting 1 Nichols, The Law of Eminent Domain, § 233 (2d ed. 1917)); Des Moines Wet Wash Laundry v. City of Des Moines, 197 Iowa 1082, 1089, 198 N.W. 486, 488 (1924). Value must be determined by consideration of the uses to which the property is adapted. Korf, 239 Iowa at 518, 32 N.W.2d at 95 (quoting Des Moines Wet Wash Laundry, 197 Iowa at 1089, 198 N.W. at 489). All circumstances thus affecting market or intrinsic value become open to consideration.

Proof of the intrinsic value of a leasehold is often competent evidence in determining market value. Fritz v. Iowa State Highway Commission, 270 N.W.2d 835, 841 (Iowa 1978) (quoting Ranek v. City of Cedar Rapids, 134 Iowa 563, 568-69, 111 N.W. 1027, 1029 (1907)). In determining intrinsic value, the jury may consider a variety of elements of loss, expense, and inconvenience, not as substantive elements of damages, but as descriptive of the injury resulting to the leaseholder by the condemnation. Interstate Finance Corp., 260 Iowa at 275, 149 N.W.2d at 311. These items are not to be considered as a basis or measure of recovery, but as explaining and supporting the estimates made of the value of the property as it stands. Fritz, 270 N.W.2d at 841 (quoting Ranek, 134 Iowa at 568-69, 111 N.W. at 1029). This analysis, contrary to City's arguments, applies to a whole taking as well as a partial taking. Interstate Finance Corp., 260 Iowa at 271-72, 274-75, 149 N.W.2d at 309-10, 312-14.

City sought to prevent the introduction into the record of evidence regarding projected future expenses and inconveniences by a motion in limine. The district court denied this motion and allowed testimony regarding the difficulty in finding an alternative location for the corporation and the additional cost of operating at another location. This information is relevant to the intrinsic value of the leasehold. We hold the district court did not err in overruling City's motion in limine and admitting evidence of the intrinsic value of the corporation's leasehold.

II.

In its second issue, City contends recovery of damages in an amount greatly exceeding the fair market value of all interests in the property shows the error of law regarding the admission of projected additional cost and inconvenience substantially and materially prejudiced the outcome of this case. Our holding in division I disposes of this argument. Moreover, it is well-established that "where the damage to the owner and leasee might be separately assessed, the condemnor might be required to pay the sum of such damages even though in excess of the damage to the undivided whole interest." Comstock v. Iowa State Highway Commission, 254 Iowa 1301, 1316, 121 N.W.2d 205, 214 (1963); see Fritz, 270 N.W.2d at 843; Wilson v. Fleming, 239 Iowa 718, 734-35, 31 N.W.2d 393, 401-02 (1948); Korf, 239 Iowa at 524-26, 32 N.W.2d at 98-99; Simons v. Mason City and Fort Dodge Railroad, 128 Iowa 139, 143, 103 N.W. 129, 131 (1929). City's argument is without merit.

III.

City contends the jury verdict constitutes grounds for reversal since the award is not within the "testimonial range" of the evidence. In support of this argument, City points to condemnees' own appraiser testifying to a market value of \$95,000 for all interests in the property, but the jury returning a verdict for \$132,500. We find the jury verdict is supported by substantial evidence in the record.

Ordinarily, the amount of damages awarded to a condemnee is a question peculiarly for the trier of fact. Van Horn v. Iowa Public Service Co., 182 N.W.2d 365, 372 (Iowa 1970). In reviewing the alleged excessiveness of an award, the evidence must be viewed in the light most favorable to the condemnee that the evidence can reasonably bear. Townsend v. Mid-America Pipeline, 168 N.W.2d 30, 33 (Iowa 1969). Unless the amount allowed is shown to be wholly unfair and unreasonable, we will affirm the award. Crozier v. Iowa-Illinois Gas & Electric Co., 165 N.W.2d 833, 835-36 (Iowa 1969); Stortenbecker v. Iowa Power & Light Co., 250 Iowa 1073, 1082-83, 96 N.W.2d 468, 473-74 (1959).

After carefully considering the evidence, we find the award is not so excessive as to shock the conscience and require reversal. During the trial, one appraiser testifying for the City stated the value of Gellers' interest was \$55,000 and the corporation's

leasehold had no value. A second appraiser for the City valued Gellers' interest at \$68,000 and stated there was no leasehold. An appraiser for the Gellers testified the value of the fee was \$95,000, although his testimony is unclear as to exactly what he included in his valuation. The jury verdict of \$90,000 for the fee simple interest and \$42,500 for the leasehold interest exceeded the condemnation commission's award by \$26,000 and \$5,500 respectively. We cannot say the jury verdict is unsupported by substantial evidence in the record. See Stortenbecker, 250 Iowa at 1083, 96 N.W.2d at 473-74.

IV.

The City appeals the attorney fee award on three grounds: District court erroneously awarded attorney fees on the basis of a contingent fee arrangement between condemnees and their lawyer; district court erroneously awarded attorney fees for time and effort caused by Gellers' failure to raise leasehold claim in the original action before condemnation commission; and district court erroneously took judicial notice of condemnees' counsel's experience and competence based on court's personal knowledge. We find no reversible error in attorney fee award.

Under section 472.33, The Code 1979, the district court may tax as costs to condemnor reasonable attorney fees if damages awarded are greater than that allowed by condemnation commission. A lawyer-client contract is to be ignored by the district court in establishing fees in a condemnation appeal. Carmichael v. Iowa State Highway Commission, 219 N.W.2d 658, 663 (Iowa 1974) (citing In re Condemnation of Lands, 261 Iowa 146, 154, 153 N.W.2d 706, 711 (1967)). Here, City apparently contends district court based its attorney fee award on contingent fee contract existing between condemnees and their attorney, rather than the proper criteria. Condemnees' counsel described this contractual arrangement, which provided he would receive one-third of the increase from the \$64,000 awarded by the condemnation commission, in his professional statement to the court. A review of the district court's findings shows the court exhaustively analyzed the law and facts in light of relevant precedents and arrived at an award based not on the contract, but on the correct award criteria.

City also challenges on this point the reasonableness of the award. Our review of the fee allowance is not de novo. Hetherington Letter Co. v. City of Cedar Rapids, 207

N.W.2d 800, 804 (Iowa 1973); Nelson v. Iowa State Highway Commission, 253 Iowa 1248, 1256, 115 N.W.2d 695, 700 (1962). The district court has considerable discretion in fixing attorney fees although the court's exercise of that discretion must be reasonable, not arbitrary. Hetherington, 207 N.W.2d at 804; Schrader v. City of Sioux City, 167 N.W.2d 669, 670 (Iowa 1969). Discussing standards applicable to allowance of attorney fees in condemnation proceedings, the supreme court has stated:

In determining a reasonable attorney fee to be taxed as costs in this type of case a number of matters should be considered. They include the time spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of issues, responsibility assumed, and the results obtained. In addition, the recovery of a fee in this type of action is wholly contingent upon plaintiff recovering damages in a larger amount than awarded by the condemnation commission. [citations omitted]

Nelson, 253 Iowa at 1256-57, 115 N.W.2d at 700, quoted in Sykes v. Iowa Power & Light Co., 263 N.W.2d 551, 554 (Iowa 1978); see Perry v. Iowa State Highway Commission, 180 N.W.2d 417, 424 (Iowa 1970).

Here, district court's analysis fully examined relevant facts and law in arriving at its award. The principal error alleged by City is district court's finding counsel's efforts resulted in a \$42,500 increase in damages for the leasehold, instead of the \$5,500 increase claimed by City. The district court justifiably used the total leasehold damage award since that was the amount in jeopardy at trial. While the condemnation commission awarded \$37,000 for the leasehold, City argued at trial the leasehold had no value. Thus, the entire \$42,500 leasehold award may be attributable to efforts of condemnees' counsel. We thus find the district court's attorney fee award of \$22,500 for an increase in the condemnation award of \$68,500 is reasonable and within its discretion.

Our holding the attorney fee award as reasonable disposes of the need to address at length the city's second challenge to the fee award. City argues Gellers' silence regarding the leasehold at the original condemnation hearing and subsequent claiming of the leasehold interest without tender of corrective procedure to the original award is duplicitous conduct. While Geller's silence caused a second condemnation hearing to be held, we fail to see how it reaches the level of duplicity. It cannot be gainsaid that City

had a responsibility to ascertain the existence of leaseholds concerning condemned property. Additionally, the attorney fees challenged here are for the appeal to the district court, which supposedly would have been incurred whether both claims were combined or not at the condemnation commission hearing.

City's argument regarding the district court taking judicial notice of the experience and competence of condemnees' counsel is also without merit. At the hearing on allowance of attorney fees, the court voluntarily purported to take judicial notice "that Mr. Ward is an experienced and competent trial lawyer." Whether this action was in error we find unnecessary to decide since if there were any error, it was harmless. Under cross-examination, City's witness testified to condemnees' counsel's reputation as a successful attorney. Based on that testimony, counsel's professional statement as to experience, and counsel's performance at trial, district court had sufficient information to make a finding regarding counsel's experience and competence without taking judicial notice of such subjects.

V.

Condemnees seek an award of attorney fees necessitated by this appeal. No statutory basis exists for an award to condemnees on appeal to this court in a condemnation award appeal. Iowa Department of Transportation v. Read, 262 N.W.2d 533, 537 (1978); Wilson v. Fleming, 239 Iowa 918, 920, 32 N.W.2d 798, 798-99 (1948); \$ 472.33. Since attorney fees are not taxable as part of the costs of an action unless specifically authorized by statute, Id. at 919, 32 N.W.2d at 798, condemnees' request is denied.

District court judgment is affirmed.

AFFIRMED.