

[¶2] Defendants retained Christopher M. McShane and the Ohnstad Twichell Law Firm to represent them throughout these proceedings. During the course of the proceedings defendants incurred substantial costs, disbursements, and attorney's fees. Defendants seek recoupment of those costs, disbursements, and attorney's fees pursuant to N.D.C.C. §32-15-32 as the "prevailing party." Two days prior to trial, Minnkota made an offer of settlement in the amount of \$119,074.20, inclusive of all costs and fees. The offer additionally sought a property right for Minnkota that was outside the scope of these proceedings. Defendants seek \$44,803.00 in attorney's fees; \$16,637.96 in appraisal fees; and \$3,256.68 in other costs and disbursements. Plaintiff resists the motion.

[¶3] N.D.C.C. §32-15-32 provides in relevant part:

"the court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings."

The North Dakota Supreme Court has addressed the issue of costs and attorney's fees in eminent domain proceedings in City of Devils Lake v. Davis, 480 N.W.2d 720 (ND 1992) and City of Bismarck v. Thom, 261 N.W.2d 640 (ND 1977). The general principle in those cases is that if a defendant receives an award from the jury in an amount greater than the amount offered by the plaintiff, the defendants are entitled to reasonable attorney's fees and costs.

[¶4] The award of costs and fees in an eminent domain action is discretionary with the trial court under N.D.C.C. §32-15-32. *See also* City of Medora v.

Golberg, 569 N.W.2d 257 (ND 1997). In determining the issue of attorney's fees, the court must determine a reasonable number of hours expended and a reasonable hourly rate. City of Medora v. Golberg at 261. The trial court 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's fees. City of Bismarck v. Thom at 646. A court must exclude any hours that are excessive, redundant, or otherwise unnecessary. City of Medora v. Golberg at 261-262.

[¶5] Minnkota argues that none of the defendants' attorney's fees after October 1, 2013, should be awarded because they were not reasonable or necessary to obtain just compensation. Minnkota relies on its offer just prior to trial in the amount of \$119,074.20, which was \$2,583.13 more than the jury awarded the defendants after trial. However, as noted above, this ignores the fact that substantial attorney's fees and costs had been incurred prior to October 1, 2013, and the offer to settle was inclusive of attorney's fees, costs, and disbursements. As such, had the defendants accepted Minnkota's offer on October 1, 2013, and been forced to pay their attorney's fees, costs, and disbursements out of their own pocket, the defendants would have recovered substantially less than \$116,491.07, which the jury awarded. The defendants also point out that this offer requested from the defendants additional property rights not sought in the eminent domain proceedings.

[¶6] Minnkota's opposition to the motion essentially rests on four arguments: 1) failure of the defendants to negotiate in good faith prior to trial; 2) defendants retained an appraiser whose land value determinations were grossly

exaggerated; 3) that shortly before trial Minnkota offered \$2,583.13 more than the defendants received from the jury; and 4) that the defendants should not be allowed non-taxable expenses.

[¶7] The defendants have submitted for the court's consideration the number of hours expended by their attorney and expert; the hourly rate charged by the attorney and the expert; a breakdown of the costs and disbursements incurred in bringing the matter through trial; and an explanation by way of affidavit and brief as to why the number of hours expended by their attorney was required. Conversely, the plaintiff has provided no information to contradict the hourly rate charged by defendants' attorney; number of hours worked; the amount charged by their own appraiser for valuing the property interest and testifying at trial; nor evidence of their own costs and disbursements incurred in seeking this eminent domain. Based on this record, the court concludes that the number of hours incurred by defendants' attorney were reasonably expended and the hourly rate charged by defendant's attorney was also reasonable. Defendants' refusal to accept the plaintiff's offer two days prior trial was not unreasonable given the substantial amount of attorney's fees and costs already incurred by that date and the fact that the offer for settlement included costs and attorney's fees. As far as the plaintiff's contentions that the defendants failed to negotiate in good faith prior to trial, given the jury's significant award, the court finds that the defendants clearly had a better understanding of the value of their property than did the plaintiff. Defendants are awarded \$44,803.00 in attorney's fees.

[¶8] Defendants also seek \$3,256.68 in other costs and disbursements. Plaintiff does not challenge the fact that these costs and disbursements were

incurred. Plaintiff analyzes the recovery of costs and expenses under N.D.C.C. §28-26-06 and §28-26-10. Plaintiff goes on to cite North Dakota Supreme Court rulings interpreting those statutes. However, as plaintiff acknowledges, an award of costs and expenses is governed in eminent domain proceedings under N.D.C.C. §32-15-32. The court finds that the defendants have incurred the costs outlined in their request, but does agree with the plaintiff that costs for legal research (Westlaw research) are generally not the types of taxable costs awarded to a prevailing party, but rather part of the cost of doing business for an attorney justifying significant hourly attorney fee rates. The court does conclude that hotel expenses, travel expenses, and the like for attorneys are typically a cost passed on by lawyers to their clients over and above the lawyer's hourly rate. Defendants are awarded costs and disbursements in the amount of \$3,139.42 (\$3,256.68 - \$117.26 Westlaw charges).

[¶9] Lastly, the defendants seek an award of \$16,637.96 in appraisal fees. Defendants have submitted an itemized billing from their appraiser, Kurt Kielisch, outlining the time spent and hourly rates charged. Plaintiff's primary objection to the payment of expert fees is that the fees were unreasonable because the opinions advanced by the expert were flawed, unpersuasive, and not credible. It is the court's opinion that this is the plaintiff's best argument for attacking any of the costs and disbursements sought by the defendants. It is clear from the jury verdict that the jury wholly disregarded the opinions of defendants' appraiser, Kurt Kielisch. Mr. Kielisch was proposing land values as great as \$6,100.00 per acre prior to the taking. Conversely, the jury found the value of that same land to be \$3,900.00 per acre after trial. (See jury verdict form at ¶1). As such, the defendants' appraiser was suggesting a land value

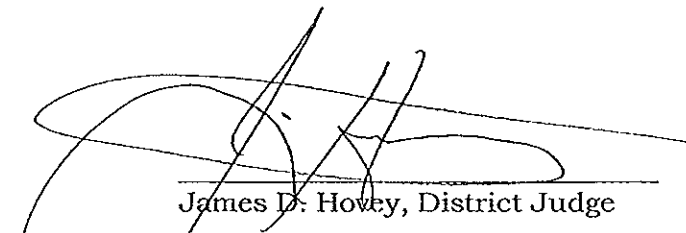
50% higher than the ultimately jury verdict for some of the land. Additionally, as pointed out to the jury during trial, the defendants' appraiser's initial report contained significant mistakes which were only corrected after being exposed by plaintiff's attorney. Even after making corrections, the testimony at trial indicated that the defendant's appraiser was relying on a second revised appraisal report when being cross examined by plaintiff's counsel. Plaintiff's counsel sufficiently impeached the credibility of defendants' appraiser with examples of misrepresentations while under oath at his deposition and the court agrees that the defendant's appraiser's testimony was "flawed, unpersuasive, and non-compelling." Had the defendants hired a more credible appraiser, the matter may well have settled prior to trial, saving both sides some costs and expenses. However, it would have been unreasonable to expect the defendants to come to trial without the assistance of an appraiser altogether. This would have left them in a situation where the plaintiff's had the only expert witness testifying as to land values and the diminution of such values after the taking. The court finds that an award of $\frac{1}{2}$ of the appraisal fees requested by the defendants is reasonable under all of the circumstances. As such, the defendants are awarded \$8,318.98 in appraisal fees.

[¶10] The court has considered the remainder of the plaintiff's objections and finds them to be without merit.

LET AMENDED JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 9th day of May, 2014.

By the Court:



James D. Howey, District Judge

Original: Eddy County Clerk of District Court
cc: Tami Norgard, Attorney for the Plaintiff (via e-mail)
Christopher M. McShane, Attorney for the Defendants (via e-mail)