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Committee on Condemnation and Land Use Control, LS-1
Department of Legal Studies, Highway Research Board

LAND ACQUISITION MEMORANDUM 204

204-1 ATTORNEY'S FEES IN CONDEMNATION PROCEEDING ARE NOT TAXABLE AS COSTS AGAINST OPPOSITE STATUTORY PARTY, EXCEPT BY EXPRESS PROVISIONS. Frost v. Cedar County Board of Supervisors, 163 N.W.2d 432 (Supreme Court of Iowa, December 10, 1968).

This 1968 Iowa case held that the general eminent domain statute providing for taxing of attorney fees did not entitle landowner, who on appeal had increased highway condemnation award of damages, to tax his attorney fees, since highway condemnation procedure was specifically provided for in another chapter which did not provide for taxing of attorney fees.

The only question involved in this appeal is whether attorney fees are allowable in county condemnation proceedings instituted under section 306.21 et. seq., Code, 1966, when the amount of damages is increased on appeal to the district court. The trial court denied the landowner's motion for an allowance for attorney fees; the landowner appealed; the Supreme Court affirmed the ruling and order of the trial court.

The facts are not in dispute. Defendant Cedar County caused 0.731 acres of plaintiff-landowner's land to be condemned for the purpose of constructing shoulders on the secondary road adjacent to plaintiff's farm. On plaintiff's appeal the district court jury fixed the award at $4,000 which was a substantial increase of the amount determined by the appraisers.

Under section 306.21 boards of supervisors are authorized, on their own motion, to change any secondary road in the county - including widening the road. Section 306.22 provides if the board and the landowners are unable to agree on the amount to be paid for the land for the road improvement then the board selects one appraiser, the owner selects one appraiser, and these two select a third appraiser. Under section 306.25 these appraisers are required to take an oath before the county auditor and to assess the damages and make a written report thereof to the board of supervisors. Under sections 306.26, 306.27 and 306.28, hearings are held on objections by interested parties and damages are awarded by the board for land to be taken. Under section 306.29 claimants for damages are permitted to appeal to the district court from this award of damages.

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However, under Chapter 472, Code, 1966, the procedure under eminent domain requires appointment of a commission of six freeholders to assess damages for land to be taken. This appointment of the commissioners is made by the sheriff of the county where the land is situated, except when the damages are to be paid out of the State treasury the Chief Justice of the Supreme Court makes the appointment. Also, section 472.18 et seq., provides in detail the manner and time for appeal to the district court by landowners who are not satisfied with the commission's award. Under section 472.33 the applicant is required to pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless at the trial the same or a less amount of damages is awarded than was allowed by the tribunal from which the appeal was taken.

The Supreme Court of Iowa found that the reference in section 306.29 relates only to time and manner of taking appeals from orders establishing highways generally, noting that the method of taking land for limited purposes under chapter 306 is vastly different than that provided by the legislature under chapter 472.

The right to recover attorney fees as part of the costs of litigation does not exist at common law and such fees are not allowable in the absence of a statute or agreement expressly authorizing taxing attorney fees in addition to the statutory costs. Harris v. Short, 253 Iowa 1206, 1208-1210, 115 N.W.2d 865, 866, 867; Thorn v. Kelley, 257 Iowa 719, 726, 134 N.W.2d 545,548; England v. Younker Brothers, Inc., 259 Iowa 48, 51, 142 N.W.2d 530, 531; 20 C.J.S. Costs section 218a; 20 Am. Jur. 2d, Costs, section 72.

The Supreme Court of Iowa has followed this rule in many condemnation cases. In Wormley v. Mason City & Ft. Dodge Railway Company, 120 Iowa 684, 685, 95 N.W.203, for example, the Supreme Court of Iowa said: "As a general rule, attorney's fees are not awarded either as damages or as a part of the costs of a proceeding in court. * * * When taxed as costs, it is by reason of some special statutory provision. In order that they be so taxed, the case must come clearly within the terms of the statute."

In Jones v. School Board, 140 Iowa 179, 118 N.W. 265, land was condemned for school purposes. On appeal to the district court the award was increased and plaintiff filed a motion for allowance of attorney fees. The statute under which condemnation was made contained no provision for payment of attorney fees. It did provide that "either party may appeal to the district court by giving notice thereof, as in the case of taking private property for works of internal improvement." The statute referred to contained a provision for payment of attorney fees in event the award was enlarged on appeal. In affirming the trial court's refusal to allow attorney fees the Supreme Court of Iowa said, at 140 Iowa 181, 118 N.W. 265, 266: "This points out only the method of taking the appeal. * * * It is the rule in this State that attorney's fees are not taxable as costs against the opposite party, except by express statutory provision."

The facts and code sections involved in Nichol v. Neighbor, 202 Iowa 406, 210 N.W. 281, are almost identical with this condemnation proceeding against defendant Frost. The Supreme Court of Iowa therein stated that the reference to

"in the manner and time for taking appeals from the orders establishing highways generally" says nothing, in express language, about the method of procedure after appeal is taken. After quoting its Wormley and Jones cases the Supreme Court of Iowa therein affirmed the trial court's refusal to allow attorney fees.

The plaintiff-appellant landowner Frost pointed out that in section 472.33 the term tribunal is used rather than commissioners and assert that the legislature intended this section to cover all condemnation proceedings whether under section 306.21 et seq., or the general eminent domain provisions of the Code, Chapter 472. The same wording was in the statute construed in Nichol v. Neighbor. The landowner thus sought a strained construction of this statute in an effort to show an expressed statutory provision for allowance of attorney fees.

The Supreme Court of Iowa, however, found no merit in this contention and affirmed the trial court's ruling and order.

204-2 IN THE CONSTRUCTION OF AN INTERSTATE FREEWAY THE STATE CAN CONDEMN INTERESTS IN REAL PROPERTY TO PROVIDE ACCESS TO OTHERWISE LANDLOCKED PARCELS. Department of Public Works and Buildings v. Bozarth, 242 N.E.2d 54 (Appellate Court of Illinois, Fourth District, November 18, 1968).

This is an action of eminent domain by the State of Illinois in connection with Federal-aid Interstate Route No. 74 in McLean County. At a point about four miles southeast of Bloomington, the State sought to acquire an easement of a 30-foot strip across a farm tract of defendant Bozarth which would provide access to Township Highway 296 from a 46.7-acre farm tract of Harris Trust and Savings Bank. The Harris tract is bordered on the north and east by that of Bozarth. The Interstate goes on a diagonal across the Harris tract and cuts through the Harris tract. Before construction of the Interstate, the entire Harris tract had access onto Township Highway 296, which after construction is no longer available to the parcel of the Harris tract north of the Interstate.

The circuit court dismissed the petition and suit as to the proposed easement-taking, holding it was not for a public use but to provide access to private property. As a result of this appeal, the Appellate Court of Illinois reversed the trial court's verdict and remanded with directions.

The question as stated in this appeal is whether the State can condemn interests in real property to provide access to parcels landlocked by the construction of an interstate highway which was designated a freeway. The Appellate Court held that the State can, saying that it is the right of the public to use, not its exercise of the right, that constitutes a public use. Under the Eminent Domain Statute, the State may acquire the fee or a lesser estate. In the case at bar, the State deemed that an easement is sufficient for the intended use. The Appellate Court felt that there was nothing arbitrary in the State's position.

The Appellate Court observed that in 1965 the State's legislature amended chapter 121, section 8-105, of the statutes with reference to laying out local service drives in connection with the development of freeways so as