

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF WARD

NORTH CENTRAL JUDICIAL DISTRICT

Montana-Dakota Utilities Co.,

A Division of MDU Resources

Group, Inc.,

Plaintiff,

v.

ORDER

Lavern Behm,

Ward County Civil No. 51 2016 CV 1678

Defendant.

[1] The above action was one for eminent domain.

[2] Following a bench trial, the Court issued its Order denying the proposed taking.

The Order was issued on May 29, 2018.

[3] The defendant, Lavern Behm, has made a motion to recover attorney's fees and costs incurred in defending this action. The plaintiff, Montana-Dakota Utilities

Company, hereafter MDU, has responded to the motion. Neither party requested a hearing in the matter.

[4] The Court hereby awards attorney's fees in the sum of \$22,100, plus costs of \$50, filing fee.

ANALYSIS

[5] Section 32-15-32, NDCC, provides in part:

The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include reasonable attorney's fees for all judicial proceedings.

Lavern Behm, as the defendant in this action, is entitled to the recovery of his attorney's fees and costs pursuant to this Section.

[6] The factors which the Court may consider when making an award of attorney's fees in an eminent domain proceeding are found in City of Bismarck v. Thom, 261 NW2d 640 (ND 1977); and North Dakota Department of Transportation v. Rosie Glow, LLC, 2018 ND 123, 911 NW2d 334. Both cases make clear that the predominant factors for determining reasonable attorney's fees are the number of hours spent, and the rate per hour charged for those fees. The hourly rate may be adjusted upwards or downwards based on an objective evaluation of the complexity and novelty of the litigation, the degree of skill displayed by the

lawyer, customary fees charged in the area, and other factors. All factors must be considered, and no single factor is determinative.

TIME SPENT

[7] Attorney Lynn Boughey, counsel for Lavern Behm, has submitted three billing statements which he presented to his client during the course of this litigation. The statements are broken down by date, followed by a brief description of the work performed, and lastly the amount of time spent on the task. The statements are reasonably detailed, and provide the Court with a fairly clear picture of the services rendered, and the time spent.

[8] MDU does not take serious issue with the work or the billing statements as presented. The Court however, will do its own independent review of the statements to determine if they are reasonable.

[9] At the outset, most of the itemizations appear to be reasonable, and related to the preparation of the case for trial. The itemizations include conferences with the client, drafting pleadings, reviewing applicable law, consultations with opposing counsel, and other efforts reasonably necessary to move the case forward. The Court does not note any item which might appear to have required an unreasonably excessive amount of time.

[10] There are, however, a number of entries which the Court will disallow.

[11] Entries 10-4-16, and 10-5-16, involve contacts between attorney Boughey and Robert Hale. Robert. Hale is a total stranger to these proceedings. Further, the contacts appear to have taken place before attorney Boughey had any contact with Lavern Behm. Contacts between attorney Boughey and a third person stranger to this litigation will not be allowed. .3 hours.

[12] Entry 10-10-16, involves a contact between attorney Boughey and a Minot law firm. While not entirely clear from the entry, it appears that Lavern Behm may have either been a client of the Minot law firm, or there was some question whether Lavern Behm would be retaining the Minot firm or attorney Boughey. Regardless, the contact between attorney Boughey and the Minot law firm to determine representation of Lavern Behm is not a legal service advancing the cause. The entry is disallowed. .5 hours.

[13] Entries 10-20, and 10-22, note communications between attorney Boughey and his staff regarding the payment of a retainer fee, and the deposit of that fee. Keeping track of retainers is a mere office function and is nothing more than part of an attorney's overhead. It does not constitute legal work.

[14] Fees are not recoverable for clerical or secretarial activities such as file review, file maintenance, scheduling, or other routine matters. Youngblood v. Youngblood, 91 So3d 190 (Ct of App., 2d Dist. Fla. 2012). Work by support staff

must be substantive. Copying and other secretarial tasks are not recoverable as attorney's fees. Taylor v. the Chubb Group of Insurance Companies, 1994 OK 47, 874 P2d 806. Routine office work is deemed overhead, and should already be reflected in a lawyer's hourly rate. Hawaii Ventures, LLC v. Otaka, Inc., 116 Hawaii 465, 173 P3d 1122 (2007). .2 hours or disallowed.

[15] For the reasons stated above, entries for 10-31-16, 11-to-16, 11-10-16, 12-5-16, 1-3-17, 3-14-17, 3-15-17, 4-11-17, 7-6-17, 12-3-17, and 4-3-18 likewise appear to be mere ministerial activities involving staff emails, routine filings, and other clerical or secretarial activities. 1.4 hours are disallowed.

[16] Attorney Boughey has billed four hours for travel time. Generally, attorney travel costs and expenses may not be taxed as costs. Braunberger v. Interstate Engineering, 2000 ND 45, 607 NW2d 904. Section 32-15-32, NDCC, allows reasonable attorney's fees for all judicial proceedings. One does not perform legal services when traveling. One is not engaged in a judicial proceeding when traveling. Further, attorney Boughey knew from the outset that he was taking a case beyond his home jurisdiction. He accepted the responsibility for travel when he took on the case. Regardless of any agreement attorney Boughey may have had with Lavern Behm regarding these costs, it is not appropriate to make MDU carry that burden and pay for the extra time attorney Boughey assumed when he agreed

to take the case outside of his home jurisdiction. The four hours of travel time, 4-16-18, and 4-17-18, are disallowed.

[17] After review of the billing statement submitted, the Court disallows 6.4 hours.

[18] Attorney Boughey has listed 74.4 hours. After the adjustments made above, the Court will approve 68 hours as attorney Boughey's reasonable time spent in this action.

HOURLY RATES

[19] The next step in the analysis is determine the hourly rate for attorney Boughey. This rate may be adjusted upwards or downwards depending upon the applicability of the factors set forth in the Thom and Rosie Glow decisions cited above.

Character of the Legal Services Rendered

[20] Attorney Boughey was the sole attorney working for Lavern Behm in this case. As a solo practitioner, everything that was done to prepare this case for trial was done by attorney Boughey. All pleadings, motions, briefs, and other submissions to the Court were handled by attorney Boughey. All Court appearances, and the trial itself were handled exclusively by attorney Boughey. All contacts with opposing counsel, the client, potential witnesses, and the Court had to be done by attorney Boughey alone.

[21] Attorney Boughey appears to have approached these duties and tasks in a highly professional and competent manner. The billing statements show that he attended to the tasks in a cost-effective and efficient fashion.

[22] The services provided by attorney Boughey were delivered with the highest level of professional skill. This factor weighs in favor of increasing attorney Boughey's hourly rate.

Results Obtained

[23] Justice Vogel wrote, in his dissent in Thom, that a lawyer may spend a lifetime working for that one magnificent hour. When that hour arrives he deserves more than piecemeal compensation. City of Bismarck v. Thom, 261 NW2d 640 (ND 1977), J. Vogel, dissent. While attorney Boughey may have had better days in Court, and his one magnificent hour may not yet have arrived, the result in this case would no doubt be considered a good day for attorney Boughey and Lavern Behm. The results obtained were positive and substantial.

Complexity or Novelty of the Litigation

[24] In most eminent domain cases the issue of necessity never arises. Generally, the sole issue in an eminent domain proceeding is just compensation for the taking.

[25] In his brief in support of his motion for fees, attorney Boughey cites to recent United States Supreme Court authority to support his argument that questioning the

necessity of a taking, and standing up to the often heavy-handed authority making the case for an eminent domain taking, is a relatively new and developing area of the law. The Court would tend to agree. Indeed, the Court had to reach back more than 100 years to find an obscure California authority which discussed a challenge to a private taking in any meaningful fashion. (This may be more of a reflection of the Court's limited research ability than anything else.)

[26] Counsel for MDU relied upon North Dakota authority in support of the taking. That authority likewise was decades, if not a century old.

[27] A challenge to the necessity of a taking may well be a newly developing area of the law. There is certainly a dearth of recent authority which stood out to support Lavern Behm's position. Attorney Boughey made a strong and positive argument based on limited to almost nonexistent legal authority. As President Theodore Roosevelt once said, the credit goes to the man in the arena; who spends himself in the worthy cause; who at best knows in the end high achievement, or at worst fails while daring; but, who is not numbered among the timid souls who neither know victory, nor defeat.

[28] Attorney Boughey was willing to take on a cause few have dared. Rather than simply focusing on just compensation, he chose to fight the taking armed with little legal authority, and not much more than Lavern Behm's unwillingness to bend.

Attorney Boughey, on behalf of Lavern Behm, prevailed. All credit to the man in the arena.

Customary Fees Charged in the Location

[29] Attorney Boughey agreed to charge Lavern Behm \$250 per hour. This is not an excessive fee in this area for an attorney with attorney Boughey's years of experience and reputation. The question is whether the Court should raise that fee. As noted above, attorney Boughey provided his legal services with the highest degree of professionalism and competence. He worked cost effectively and efficiently. He scored a total victory for Lavern Behm in a somewhat novel and evolving area law. When considering this, and the fees that others are charging in this area, the Court believes attorney Boughey is entitled to an increase in his overall hourly rate.

[30] Attorney Boughey argues that he should receive a "Lodestar" increase of 50%. He billed his time at \$250 per hour, but asked the Court to increase that to an hourly rate of \$375 (250×1.5).

[31] MDU does not object to the \$250 for our rate, but suggest that no addition to that hourly rate is necessary or appropriate.

[32] There is some recent evidence which the Court will take into account regarding the customary fees charged in this region for eminent domain proceedings.

[33] First, there is the North Dakota Department of Transportation v. Rosie Glow LLC, 2018 ND 123, 911 NW2d 334, decision cited by both parties. In that case, out-of-state attorneys from Oregon requested fees based on an hourly rate of \$300 per hour. The trial court did not see fit to question that rate, but did drastically reduce the number of hours approved for counsel's work. The North Dakota Supreme Court reversed the trial court on the number of hours, but no question was raised regarding the efficacy of the \$300 per hour figure.

[34] Irwin v. City of Minot, 51 2012 CV 691, see also, Irwin v. City of Minot, 215 ND 60, 860 NW2d 849, was an inverse condemnation action. At the conclusion of the case Irwin's counsel made a motion for attorney's fees. Counsel for Irwin, Minot attorney Richard P. Olson, sought fees of \$325 per hour. Judge Stacy J. Louser reduced this rate to \$275 per hour. She did so for a number of reasons. First, attorney Olson is not a litigator, nor is eminent domain his area of expertise. Attorney Olson is a well-known and highly respected banking and transactional attorney-not a litigator in the field of eminent domain. Further, the case dragged on for four years, required a trip to the North Dakota Supreme Court, and in the end

netted the Irwin's only \$12,500 above the original offer. As Judge Louser noted, this is far from a "strong victory."

[35] Attorney Boughey enjoyed significantly greater success in a substantially shorter period of time. His fees for services should be at least equal to those of attorney Olson under the circumstances.

[36] In another matter, *North Dakota Department of Transportation v. Pennington*, 31 2013 CV 94, attorney's fees were requested in an eminent domain action. In that case, attorney Dennis Johnson, Watford City, filed an affidavit regarding customary fees. Attorney Johnson stated that a fee of at least \$300 per hour was a customary and prevailing fee in Western North Dakota for an eminent domain proceeding.

[37] In that case, South Dakota attorney Mark Meierhenry appeared for the landowner. Attorney Meierhenry is a former Attorney General of South Dakota. Attorney Meierhenry has appeared and argued in the United States Supreme Court. He has broad litigation and appellate experience. He is a nationally recognized attorney in the field eminent domain. Attorney Meierhenry billed his time at \$360 per hour. His partner, Clint Sargent, billed his time at \$350 per hour. The Court reduced both fees to \$300 per hour, based primarily upon the abysmal results

obtained in that case. A first trial ended in a mistrial. After a second trial, the jury verdict was far below that which was sought.

[38] Attorney Boughey, who prevailed, should be at least equal to these attorneys given the results of the cases.

[39] In another cause, *North Dakota Department of Transportation v. Stubstad*, 31 2013 CV 105, attorneys Meierhenry and Sargent were again counsel for the landowner in an eminent domain proceeding. In that case, the Court allowed attorney Meierhenry's fees to be charged at only \$250 per hour. This was due to his limited role in the litigation. However, attorney Sargent's fees were allowed at \$325 per hour. This was primarily due to a significantly better outcome in the litigation.

[40] Attorney Boughey ought to be allowed an increase in his fees due to the factors noted above, and which would be further in line with the fees charged in this area by other attorneys in similar litigation. As the prevailing party, and keeping in line with the customary fees allowed in the area to a successful litigant in an eminent domain proceeding, the Court will allow an increase of attorney Boughey's hourly rate to \$325 per hour.

[41] Attorney's fees of \$22,100 are awarded ($\325×68 hours).

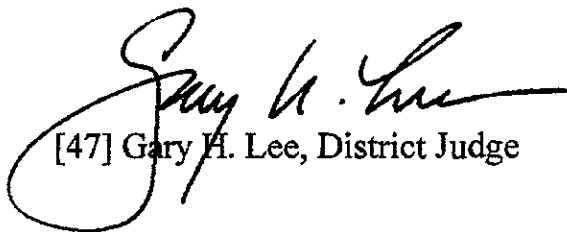
[42] IT IS THEREFORE ORDERED:

[43] Attorney's fees, pursuant to Section 32-15-32, NDCC, are allowed in the sum of \$22,100.

[44] Costs of \$50, filing fee, are approved.

[45] Counsel for Lavern Behm shall prepare the appropriate Judgment for entry.

[46] July 14, 2018

A handwritten signature in black ink, appearing to read "Gary H. Lee". The signature is fluid and cursive, with a large initial "G" and a long horizontal stroke at the end.

[47] Gary H. Lee, District Judge