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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1431**

In Re: Court Ordered MSA 103E.715 Subd 6 - Repair Matter.

**Filed April 3, 2017
Affirmed
Stauber, Judge**

Sibley County District Court
File No. 72-CV-15-185

Kirk Schnitker, Jon W. Morpew, Schnitker Law Office, P.A., Spring Lake Park, Minnesota (for appellants Shane and Sarah Anderson)

John C. Kolb, Anna K. B. Finstrom, Rinke Noonan, St. Cloud, Minnesota (for respondent Joint Ditch Authority #18)

Considered and decided by Stauber, Presiding Judge; Ross, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant-landowners challenge the amount of attorney fees awarded in a dispute over repair of a drainage ditch that runs across their property. We affirm.

FACTS

Appellants Shane and Sarah Anderson appeal from a judgment that awarded them \$3,574 in damages and \$7,704 in attorney fees for their action against respondent Joint Drainage Authority for the Sibley-McLeod Drainage Ditch No. 18. The damages were

primarily awarded for a 1.1-acre use restriction on appellants' 14-acre property that expanded the right-of-way of a portion of Ditch No. 18, known as Lateral G, which crosses their property.

When established in 1958, Lateral G was constructed within specifications that required a four-foot deep trench with sloped banks leveled to a ratio of ten horizontal to one vertical. The original construction of Lateral G was consistent with these specifications and "resulted in an area of approximately 1.4 acres" of clearance through a grove of trees on the property now owned by appellants. In the 1990's, trees were again removed "from the area in and immediately adjacent to" Lateral G, but no other equipment was used to "remove accumulated sediment or obstructions from the ditch channel" until the repairs were made that led to the current litigation.

In 2012 and 2013, Sibley County received complaints about the function of Lateral G that included requests for repair work. The county ditch officer inspected appellants' property and determined that the ditch was "obstructed with accumulated debris, sediment, and vegetation." The ditch officer instructed a drainage company to "clean the ditch," which a company employee "understood . . . to mean restore the channel of ditch to original construction by removing accumulated debris, sediment and vegetation, and to restore the side slopes of the ditch in areas where they may have sloughed or eroded." After the drainage company began cutting trees and doing related ditch work, appellants objected. The drainage company then stopped work, and another company eventually completed the project.

Appellants sought the legal services of attorneys Kirk Schnitker and Jon Morphey of the Schnitker Law Office, signing a fee agreement with the firm on April 23, 2014. Appellants agreed to pay Schnitker \$400 per hour and Morphey \$360 per hour; the case type was described as “Eminent Domain/Inverse Condemnation.” Sarah Anderson later testified that she and her husband were financially unable to pay the attorneys and that appellants had an understanding with the attorneys that included their making alternate “monetary arrangements” if appellants did not prevail. Sarah Anderson also testified that from the period after signing the fee agreement until the time of trial, appellants never received a fee estimate, bill, or demand for payment from their attorneys.

On appellants’ behalf, the attorneys initially petitioned for a writ of mandamus seeking an order directing Sibley County to initiate condemnation proceedings on the property in accordance with the eminent-domain statute, Minnesota Statutes chapter 117 (2016). The district court dismissed the petition, noting that the county was the wrong named party in the action, which concerned the repair of a joint drainage system. The dismissal was consistent with Minn. Stat. § 117.012, subd. 3, which provides that the eminent-domain statute

does not apply to the taking of property under laws relating to drainage . . . when those laws themselves expressly provide for the taking and specifically prescribe the procedure. The taking of property . . . for a project undertaken by a drainage authority under chapter 103E may be carried out under the procedure provided by those chapters.

The attorneys petitioned a second time for a writ of mandamus, again seeking an order directing respondent to initiate condemnation proceedings under chapter 117. The

district court issued an order on October 30, 2014; the order informed appellants again that Minnesota Statutes chapter 117 was the incorrect statutory scheme upon which to base appellants' request for a writ, and identified Minnesota Statutes chapter 103E (2016), as the proper chapter under which to proceed. This chapter controls property "[a]ffected . . . by a drainage system or project." Minn. Stat. § 103E.005, subd. 2. The district court order also directed respondent to consider whether appellants were entitled to damages under section 103E.

Respondent held a damages hearing on April 28, 2015, and, consistent with the district court directive, considered whether appellants should be granted attorney fees under Minn. Stat. § 103E.645. Respondent awarded appellants \$3,574 in damages to their property from the ditch repair work, including \$3,054 for "buffer strip¹ damages" and \$520 for crop damage. Although appellants had claimed attorney fees of \$79,984, respondent awarded appellants attorney fees of only \$1.

Appellants filed a notice of appeal to the district court, and on December 8, 2015, the district court issued an order limiting appellants' challenge to damages caused by the ditch repair work and attorney fees. The district court held a court trial on those issues in April. At trial, Schnitker submitted an hourly billing statement for the period from March 3, 2014, to April 24, 2015. He also testified that the amount of claimed fees was reasonable; he stated that the mandamus-type remedy he pursued was "difficult," he

¹ Buffer strips of one rod or two rods were added to the sides of Lateral G, consistent with the requirements of Minn. Stat. § 103E.021. Under current law, drainage-ditch maintenance is mandatory. See Minn. Stat. § 103E.705, subd. 1.

needed two attorneys to work on the case, and he spent 87.6 hours for total claimed fees of \$35,040. He did admit that he was initially confused about which governmental entity had jurisdiction over the drainage ditch.

On cross-examination, Schnitker conceded that he billed appellants for time incurred before they had signed the fee agreement, that any prior mandamus cases he had worked on were right-of-way cases under chapter 117, and that he had never worked on a ditch case involving chapter 103E. Schnitker was questioned closely about his research tactics, including “how researching of a basic case, which a condemnation expert would probably know off the top of his head, was relevant to a drainage matter,” and he conceded that he found it difficult to identify the proper drainage authority in this case, even though his first petition acknowledged that the drainage system at issue was controlled by two counties, putting it squarely within the purview of chapter 103E. He was also questioned about billing time for calling several other attorneys for advice and could not remember the principles of law associated with the cases he billed time for reading. When asked what assistance a third attorney who billed time on the file and who specializes in criminal and family law could have provided in this matter, Schnitker said, “I don’t know. Go out and try to find any associate attorney who is an expert in ditch law.”

The second employed attorney, Morphey, testified that he works primarily in the areas of relocation-benefits law, eminent-domain law, and real-estate law. Morphey stated that he charged appellants \$360 per hour and that he spent 122.4 hours on the case (valued at \$44,064) through May 26, 2015. Morphey acknowledged that the case

required significant attorney time and that submission of the first writ of mandamus was “an error.”

On cross-examination, Morpew admitted that he charged his customary hourly rate even when doing administrative work, that he spent time “doing online research on tree damage appraisals and valuation issues” for over a year before engaging an appraiser to do them, and that it may have been less expensive to engage an appraiser rather than conduct valuation research himself. He also admitted that he ceased working for Schnitker Law Office in April 2014, and he had no fee agreement with appellants and no fee-sharing agreement with Schnitker after that time.

Following trial, the district court determined that the work performed on appellants’ property “was a repair of the ditch, not an original establishment or improvement.” The district court affirmed the joint drainage authority’s damages award of \$3,574, finding that there was “a partial taking by way of a use restriction on an additional 1.11 acres of land used to create grass buffer strips.”

As to attorney fees, the district court ruled that appellants should be awarded fees but found that the requested amount of the fees was not reasonable and that only “[l]imited attorney[] fees [were] justifiable in this case.” The district court then set attorney fees at \$7,704.

The sole issue raised by appellants in this appeal is whether the district court abused its discretion in setting the amount of attorney fees.

DECISION

“The reasonable value of [an attorney’s] work is a question of fact, and [an appellate court] must uphold the district court’s findings on that issue unless they are clearly erroneous.” *Northfield Care Ctr. v. Anderson*, 707 N.W.2d 731, 735-36 (Minn. App. 2006). An appellate court reviews a fees award for an abuse of discretion. *County of Dakota v. Cameron*, 839 N.W.2d 700, 711 (Minn. 2013).

Fees for actions brought under chapter 103E “are allowed and must be paid.” Minn. Stat. § 103E.645, subd. 1. The statute provides that “the attorney for the petitioners must . . . be paid reasonable compensation for services actually provided as determined by the drainage authority.” *Id.*, subd. 5.

The test for determining the reasonableness of attorney fees is the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.

Cameron, 839 N.W.2d at 736 (quotation omitted).

Applying the reasonableness test for establishing attorney fees, the district court specifically found that “[a]ppellant[s]’ attorneys obtained results not commensurate with the amount of their fees.” In addition, the district court found that although appellants’ attorneys had no experience in drainage law, they “continued to charge a premium hourly rate based on their expertise in condemnation law.” And in considering the fee arrangement, the district court found that the “attorneys were actually operating under a contingency fee arrangement,” as evidenced by Sarah Anderson’s testimony and the

attorneys' failure to send appellants "any monthly invoices." Finally, the district court also found it "highly probable" that appellants would have discontinued engaging their attorneys' services "when after the second month [of representation] the attorney[] fees . . . exceeded \$7,700[.]"

The district court's findings apply the reasonableness factors and support its ultimate decision, and the underlying record fully endorses those findings. It is apparent that the district court carefully reviewed the claimed fees, and its award corresponds to the services provided, considering the reasonableness factors. *See Northfield Care Ctr.*, 707 N.W.2d at 735-36 (listing reasonableness considerations for determining attorney fees). Further, as the party moving for fees, it was appellants' duty to establish the factual basis for the award. *See Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001) (in marital-dissolution action, stating that as movant, party seeking attorney fees "had the burden of showing" the factual basis to support award an award of attorney fees). Appellants offered no evidence regarding standard fees for attorney work in this area of law. Because Minn. Stat. § 103E.645 mandates an award of reasonable attorney fees and because the district court's findings on the reasonableness of the fees are not clearly erroneous, the district court acted within its discretion in setting the amount of attorney fees at \$7,704. For the reasons discussed, appellants have failed to establish a factual basis for an award of fees in excess of that amount.

Appellants also offer a strained argument to support their claim for attorney fees in addition to those awarded under chapter 103E.645. They acknowledge that their damages were awarded under Minn. Stat. § 103E, but argue that there were separate

“constitutional implications of the deprivation of [appellants’] fundamental right to property,” that purportedly support an award of additional attorney fees due to these constitutional violations.

Typically, the recovery of attorney fees is based on either a statute or contract provision. *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). Consistent with the district court directive that the case proceed under chapter 103E, the damages awarded were for a violation of that chapter, and not for any other legal reason. Allowance of attorney fees under Minn. Stat. § 103E.645 is consistent with the typical legislative purpose for a statutory award of attorney fees, which is “to encourage parties with potentially modest damages to bring their claims.” *Kvidera v. Rotation Eng’g & Mfg. Co.*, 705 N.W.2d 416, 424-25 (Minn. App. 2005). We therefore reject appellants’ argument for an award of attorney fees in addition to those awarded under Minn. Stat. § 103E.645.

Affirmed.