COURT OF APPEALS
DECISION
DATED AND RELEASED

October 2, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2473

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAMES FERRON AND MAXINE FERRON,

PLAINTIFFS-RESPONDENTS,

v.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. The State of Wisconsin Department of Transportation (DOT) appeals from an order awarding attorney fees to James Ferron and Maxine Ferron in a condemnation proceeding. We affirm.

The facts are not disputed. This is a highway condemnation case. DOT presented the Ferrons with a jurisdictional offer of $8,000. After the State took title to the property, the Dodge County Condemnation Commission awarded the Ferrons $30,000. DOT appealed to the circuit court, and the jury awarded the Ferrons $9,360. The Ferrons then sought an award of litigation expenses. The court's award included attorney fees of $23,312. DOT appeals.

DOT does not dispute that the Ferrons are entitled to an award of attorney fees because they recovered an amount that was more than 15% and $700 higher than the jurisdictional offer. *See* § 32.28(3)(d), STATS. DOT argues only that the amount was not "reasonable," as required by § 32.28(1). The parties agree that the determination of fees is within the circuit court's discretion, and that we will affirm the circuit court's exercise of discretion if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson,*** 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

DOT first argues that we should apply the "lodestar" method for setting attorney fees which is used in cases brought under 42 U.S.C. § 1983. However, DOT cites no opinions in which this method has been used in Wisconsin condemnation cases. Section 32.28, STATS., does not require courts to apply this method and we decline to do so. If such a change in the fee method is necessary, it is more appropriately made by the legislature.

DOT argues that the circuit court's analysis of the fee amount did not adequately consider the amount of money that was at stake in the litigation and the result that was obtained. It argues that the Ferrons achieved only limited success by recovering a "meager" additional amount above the jurisdictional offer.

The circuit court acknowledged that the attorney fee award was high when compared to the additional amount recovered. However, the court also noted that the Ferrons had received an award of $30,000 by the condemnation commission, presumably based on the opinion of the Ferrons' appraiser. The court stated that DOT made no firm compromise offer after the commission's award, and the court concluded that under those circumstances the Ferrons "had no alternative but to vigorously defend."

DOT argues that the court erred in characterizing the Ferrons as defending, because it was they who were attacking the jurisdictional offer, and they bore the burden of proof. DOT also argues that the size of the commission's award cannot be used to support the Ferrons' decision to incur substantial attorney fees, because they "cannot assume that what the commission decided will in any way represent what a jury will do after a full and judicially supervised trial."

We conclude that the court's analysis was rational. The Ferrons received a substantial award from a presumably impartial decisionmaker. It was reasonable for them to conclude that such an award was a possible outcome from a jury trial. The fact that DOT appears to have vigorously prosecuted its own side of the trial suggests that it also thought such an outcome was possible. DOT argues that the Ferrons should have disregarded the commission's award and re-evaluated the strength of their case, but it provides no further analysis showing why a reasonable attorney or condemnee who did so would have concluded that the commission's award was erroneous or that the case was not worth taking before a jury. We also note that DOT does not point to any specific way in which the Ferrons' attorneys overtried the case or performed work that was not reasonably necessary to achieve their goal.

As presently structured, § 32.28(3), STATS., provides specific numerical standards which establish when a condemnee is entitled to recover litigation expenses. These standards provide guidance to condemnees, who must decide whether to pursue the matter by weighing the additional sum they might receive against the costs they might pay if their award does not reach the statutory threshold for recovery of litigation expenses. DOT's argument, if adopted, would complicate condemnees' decisionmaking by requiring them to attempt to determine precisely, in advance, what a court will consider the appropriate attorney fee to be. Without commenting on the practical and policy implications of that argument, we suggest that such a change should be sought in the legislature, which established the process in question, rather than in the courts.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.