COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0190 **Cir. Ct. No. 01-CV-001052**

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

IN RE THE ACQUISITION OF REAL ESTATE OF POUNDER BROTHERS, INC., COMMUNITY BANK DELAVAN, AND UNKNOWN OTHERS WITH INTEREST BY GUARDIAN PIPELINE, LLC:

POUNDER BROTHERS, INC.,

PETITIONER-APPELLANT,

V.

GUARDIAN PIPELINE, LLC,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 BROWN, J. This appeal arises out of an effort by a condemnee's attorney to collect preaward attorneys' fees pursuant to the fee-shifting statute, WIS. STAT. § 32.28(3) (2001-02).[1] Subsumed in this effort is a correlative claim for all postaward attorneys' fees expended in order to obtain the preaward fees. All told, the claim was for $15,162 in preaward fees and approximately $22,000 in postaward collection fees in a case where the ultimate just compensation award was only $17,300, a 39% increase over the jurisdictional offer of $12,446.72, but in reality amounting only to $4853.28. One of the condemnor's attorneys hit the proverbial nail on the head when she remarked to the trial court that there has "been too much time put into it; too much testimony; just simply, you know, too much energy and money expended on an issue that could have been and really was fairly simple." The trial court laid the blame on the condemnee's attorney for this predicament. But the facts of record point the finger the other way, as we will show. We affirm in part and reverse in part the trial court's decision on attorneys' fees and costs to the condemnee and remand with specific directions.

¶2 The case began simply enough. Guardian Pipeline, LLC sought permanent easements on property owned by Pounder Brothers, Inc. The two parties could not agree on a price, and Guardian made a good faith, jurisdictional offer of $12,446.72. Pounder Brothers rejected the offer and hired Stephen W. Hayes of the Schroeder Group, S.C. as its attorney. The law firm of Foley & Lardner represented Guardian. The dispute moved to the circuit court pursuant to WIS. STAT. ch. 32. The court referred the dispute to the Waukesha County Condemnation Commissioners. On June 5, 2002, the commissioners

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

made an award for reduction in the market value of the property in the amount of $17,300, which included loss of crops. This amount represented an increase over the jurisdictional offer that exceeded $700 and at least 15%.

¶3 WISCONSIN STAT. § 32.28(3)(d) states that the condemnee shall be awarded reasonable attorney fees plus costs, disbursements and expenses where the award of the commission exceeds the jurisdictional offer by at least $700 and at least 15%. Pursuant to this statute, on July 8, 2002, Hayes submitted a letter addressed to Steven A. Heinzen of Foley & Lardner. Attached to the letter was an unitemized bill for $17,225 in fees and $278.91 in disbursements for a total of $17,503.91.

¶4 Having received no word back from Heinzen, Hayes e-mailed Heinzen on July 18 about the subject. Heinzen responded the same day by e-mail denying payment and saying the issue was premature because Guardian had not yet decided whether to appeal. Hayes e-mailed back, asking Heinzen if Guardian really had plans to appeal and, if not, asked why the fee issue could not be resolved "now." Hayes got back a letter faxed to him from Heinzen. The letter basically reiterated Heinzen's position that the fee issue was premature because the appeal time had yet to run and a statement that the "amount claimed—particularly the fees—is not reasonable, and you have provided no documentation in support of your claim to the fees."

¶5 Hayes obtained a release from his client so that he could send Heinzen a detailed, itemized billing record. On August 19, he mailed a copy of the itemized bill to Heinzen. He got no response. On August 28, Hayes filed a motion for payment of costs and attorneys' fees and for distribution of the award proceeds. Accompanying the motion was an unitemized bill for $17,503.91,

which included $278.91 in disbursements. Also attached to the motion were the bills from the appraiser and an affidavit in support of the motion. The motion and affidavit noted that there was time being spent in collection of the fees and requested an additional award for the time spent collecting the original bill for fees and costs.

¶6 At roughly the same time, Hayes had also submitted to Heinzen a demand that Guardian admit or deny and a request for the production of documents. The demand asked Guardian to admit or deny that the preaward fees of $17,225 plus disbursements of $278.91 plus the appraiser costs were reasonable and necessary. The request for documents consisted of any and all itemized bills for fees submitted to Guardian by Foley & Lardner on this case from July 1, 2001, to July 31, 2002, in preparation of both the condemnation and the condemnation hearing plus the appraiser bills. Guardian responded on October 9, 2002, by simply entering the word "deny" in response to all but one question—which it neither admitted nor denied—without giving any specific reasons for the denials.

¶7 Faced with the general denial, Hayes still had no idea what was unreasonable about the fees and expenses from Guardian's point of view. Therefore, he filed a notice of motion and motion to compel discovery on October 25. The motion was based on Guardian's denial of the demands to admit or deny the reasonableness of costs, disbursements and appraisal services incurred by Pounder. The motion also sought to compel discovery following Guardian's failure to permit inspection of its time and billing records in response to the document production requests served by Pounder.

¶8 The motion to compel was heard by Judge John R. Race on November 1. For the first time, Hayes heard the basis for Guardian's objection to

his bill. Heinzen explained that his firm handled a total of eighty condemnation cases involving this particular venture by Guardian. Heinzen asserted that Hayes' bill was "remarkably a larger request than others that we had seen to that point." Heinzen castigated Hayes for refusing to discuss "our objections" in an attempt to resolve the dispute before filing a motion. Heinzen then launched into the second reason for denial. He stated:

> One other reason why we thought that the fees were unreasonable and excessive as a matter of course the jurisdictional offer in this case was for $12,446. The award that the commission ended up with was $17,300, so in effect the fees expended for recovery of just under five thousand dollars was about twenty-two thousand dollars.

¶9 Hayes responded: "I want to address the fact that we didn't call him and say what are you objecting to. We sent him the total bill with the appraiser's bill. I'm shocked they're objecting to the appraiser's bill.… He charged four hundred dollars for the day of trial." Hayes continued, "I'm thinking we're talking about wasting a lot of money …. He asked for and I sent him after I got a release the detailed bills. I heard nothing from them."

¶10 Judge Race then addressed Heinzen and informed him that he had to address the bills that Hayes had submitted and state what, in particular, he objected to and why. Heinzen asked: "On a specific line-by-line basis[?]" Judge Race responded that while it was not necessary to respond line-by-line, if Heinzen had an objection to a billing for a particular date, he had to address it and provide "some rationale." Judge Race then told Heinzen "with that then I think we can hone these issues down."

¶11 Judge Race and the parties also discussed the motion to discover Foley & Lardner's billing records for this case. In sum, Hayes argued that since

Heinzen had received his detailed bill, then it would only be fair that Heinzen forward Foley & Lardner's itemized bill. Hayes explained the logic behind his request. He asserted that if the records showed Foley & Lardner's lawyers spending the same amount of time on the date of the commission hearing as his firm did,

> then they can't very well argue that our time is unreasonable. If their billing rate for the case was two hundred twenty five dollars an hour, then they couldn't very well argue that two hundred and twenty five dollars an hour was unreasonable for me …. So it seemed to us as though that would be a fair way to measure whether these are reasonable and necessary fees.

¶12 Heinzen objected to discovery of these records based on work-product privilege and attorney-client privilege. The record also reflects that Guardian was doing most of its other condemnation cases in a "bulk" manner; most of the other condemnees involved in the pipeline project had formed into groups pursuing common representation.

¶13 Judge Race decided that an evidentiary hearing was going to be necessary. The judge repeated that Heinzen would have a duty to explicitly state Guardian's objections to the bills before the hearing. Judge Race told Hayes that as part of the contested hearing, he should present an attorney experienced in condemnation matters who is familiar with Hayes' firm and who is also familiar with billing procedures of the bar generally in condemnation matters. Judge Race held the discovery of Foley & Lardner's bills in abeyance "at this juncture." A written order memorializing the outcome of the hearing was entered on November 12.

¶14 On November 27, pursuant to Judge Race's order, Heinzen, for the first time, submitted detailed answers as to why Guardian was objecting to Hayes'

bill. The document listed the following: (1) two itemized bills had been submitted but with different figures and Guardian could not identify the true request; (2) the fees were excessive because the award was less than $5000 and, correlatively, the fees for the hearing were excessive because the hearing only lasted one day; (3) the request included fees and costs involved in collecting the preaward fees and were not allowable under WIS. STAT. § 32.28; (4) the fees and costs associated with Hayes having submitted a reply brief to the commissioners was not reasonable because the commissioners had not asked for a reply brief; (5) there were two appraisals and the second appraisal was not necessary; (6) many of the itemized fees and costs had nothing to do with the condemnation itself. The document also stated that Guardian did not have enough information to determine whether a rate of $225 an hour was reasonable.

¶15 The year 2002 came and went, and the next recorded action on this case did not occur until well into 2003. By this time, Judge James L. Carlson had succeeded to the case by order of rotation. Both parties exchanged the names of expert witnesses. On September 16, 2003, as the evidentiary hearing was about to begin, Hayes notified Judge Carlson that Judge Race had initially held his discovery request of Foley & Lardner's billing records in abeyance but subsequently ordered Guardian's counsel to draft an order denying the motion. Because this order never actually materialized and Hayes wanted an appealable record, Hayes asked for a ruling memorializing Judge Race's decision before the evidentiary hearing began.

¶16 Judge Carlson ordered Guardian's lawyers to produce an order reconstructing to the extent possible Judge Race's decision and reasons, if any. Judge Carlson signed the order denying Pounder Brothers' discovery request on September 29. In stating its rationale, the order incorporated by reference Judge

Race's concerns that Foley & Lardner's charges and Hayes' charges were "apples and oranges" because Foley & Lardner had assumed "bulk" representation.

¶17 As mentioned, the hearing before Judge Carlson took place on September 16, 2003. The transcript consists of 229 pages. It is not necessary at this juncture to repeat in detail the sequential history of that hearing. We will refer to certain portions of that hearing, but only as needed while discussing the specific issues in this case. Hereinafter, we will refer to Judge Carlson as the trial court.

¶18 We begin with the trial court's bench decision. First, it allowed fees expended preparing for the hearing before the condemnation commission as being reasonable and necessary. Second, it allowed the fee of the second appraiser because a second appraisal was reasonable and necessary due to circumstances which became known to Hayes regarding the serious credibility problems of the first appraiser. Third, it declined to allow the thirteen hours in fees expended in drafting a reply brief before the condemnation commission. The court opined that a formal reply brief was "overkill." The trial court reasoned that if Hayes needed to point out disparities in the factual recitations existing in Guardian's brief, he should have sent a letter instead of writing a brief. The court thought that a letter pointing out the factual discrepancies in Guardian's brief would have taken three hours and ordered that ten hours be deducted from the bill.

¶19 Fourth, as to the issue of whether the law allows fees expended to collect fees, the court neither accepted nor rejected Guardian's view that WIS. STAT. § 32.28(3)(d) does not contemplate an award of fees expended to collect preaward fees under the statute. Rather, the court expressed dismay that this dispute had progressed to the point that an evidentiary hearing was necessary or

that an evidentiary hearing was even the proper method of resolving a fee dispute. We quote the court, in pertinent part, as follows:

> Most of the cases that I see here were presented on affidavit, normally that's the way costs are done. There's a bill of costs, and there's an objection to it. Usually, it's stated, and then the court makes a decision. I think the cases you both cited, it was done by affidavit, and there was a telephone conference. Why this took place as it did, it doesn't seem right to me either…. I don't know why this was presented this way to the court, or took a year to do it. I just cannot buy, and I won't allow any costs on your motion to discover their attorney fees, or their costs …. [It didn't look like they were so much doing discovery of your bills and that type of thing, as your effort to get their bills. I don't know.... I'm really going to limit this…. I don't like the fact that it was handled this way. I'm going to give you the cost of this hearing today at your billing rate, at eight hours time [at] [$]225. Any witness fees would be pursuant to 814, not actual per hour, or anything like that ….

¶20 The order was reduced to writing, and from that judgment, Pounder Brothers has appealed. We note that Guardian has not cross-appealed the fees which were awarded. Consequently, our review is limited to the fees that were not awarded. We address each of these issues in turn.

1. *The Decision to Disallow Most of the Fees in Preparation of a Reply Brief Before the Waukesha Condemnation Commission.*

¶21 Guardian objected to fees expended for drafting a reply brief. At the evidentiary hearing, Guardian presented the testimony of Benjamin A. Southwick as its expert on condemnation matters and, presumably, the fees and costs usually associated with condemnation legal work. Regarding Hayes' decision to file a reply brief before the condemnation commission, Southwick opined that because the commission had asked for simultaneous brief filing, a reply brief was neither contemplated by the commission nor requested. Therefore, in Southwick's

opinion, the reply brief should never have been filed. Alternatively, he opined that thirteen hours in fees spent to draft a reply brief was excessive. In its oral pronouncement from the bench, the court found that thirteen hours for replying to factual discrepancies in Guardian's brief was excessive and further opined that a letter to the commission could have said the same thing with three hours of time expended. It reduced the amount claimed by ten hours but did allow three hours.

¶22 Now on appeal, the briefs of both parties appear to state the issue as being whether fees for a reply brief are reasonable and necessary when a reply brief was neither contemplated nor requested by a tribunal. Hayes argues that when there are factual inaccuracies, a good lawyer must bring those inaccuracies to the attention of the tribunal even if the tribunal has only ordered simultaneous briefs. Guardian responds that if the tribunal has not ordered a reply brief, then attorney time spent on the matter is neither reasonable nor necessary, and it should not have to pay for attorney time spent on that subject.

¶23 The trial court, however, did not rule out fees for a reply brief altogether. Rather, it appeared to accept Hayes' premise that if the opposing brief has factual inaccuracies, a good lawyer has an obligation to his client to bring those inaccuracies to the attention of the decision-maker. Thus, it is not accurate to state that the court rejected Hayes' position. Therefore, we refuse to reach the issue debated by the parties—whether fees for drafting a reply brief are reasonable and necessary when the tribunal had ordered simultaneous briefs.

¶24 Rather, we will only review the actual order of the trial court—whether the thirteen hours expended for preparing a reply brief was excessive. As both parties must know, whether the fee for certain work performed by an attorney is excessive is subject to the discretion of the trial court. *See* ***Beaudette v. Eau***

Claire County Sheriff's Dep't, 2003 WI App 153, ¶31, 265 Wis. 2d 744, 668 N.W.2d 133. We will sustain a discretionary determination if made and based upon the facts appearing in the record and in reliance upon the appropriate and applicable law. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). "Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id***.

¶25 The decision to allow only three of the thirteen hours is supported by the facts in the record. Hayes testified that he felt the Guardian brief had not accurately acknowledged how the easement would sever the property such that two residential lots would no longer be able to be developed, which loss would affect property values. He also mentioned that a case cited in the brief was misinterpreted. These two instances were the only reasons given by Hayes for the need to reply to the Guardian brief.

¶26 Based on this factual record, it was certainly reasonable for the trial court to conclude that thirteen hours of time spent to point out just two instances of alleged "discrepancies" was excessive. After all, judges are lawyers, and the law gives judges the discretion to make the calls regarding the reasonableness of fees precisely because they have the expertise to know the amount and quality of work that needs to be performed on any particular legal issue. *See* ***Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co.***, 2001 WI App 129, ¶46, 246 Wis. 2d 579, 629 N.W.2d 329. Discretion was properly exercised with respect to this issue.

2. Postaward Fees and Expenses Incurred to Collect Preaward Fees and Litigation Expenses

¶27 Again, the parties have overstated the trial court's position on the relevant issue. Pounder Brothers claims that the trial court denied most of Hayes' postaward collection efforts because of a belief that the fee-shifting statute of WIS. STAT. § 32.28 only allows payment by the condemnor to the condemnee of preaward fees and expenses. Taking up the same theme, Guardian propounds the view that the statute limits fees and expenses to just that. However, the trial court did not deny or reduce fees based on a determination that the statute did not allow postaward fees. In fact, the trial court *awarded* such fees. What the trial court did, however, was to award only the fees expended for the postaward hearing itself and nothing more. Thus, we will not indulge the parties by addressing the issue they want us to decide other than by a short footnote below.[2] Rather, we will address what is really before us. The trial court held that the claimed postaward fees and expenses were excessive because Hayes was at fault in overtrying the fee issue.

[2] Even if we were to address the issue, we would hold that Guardian's view is preposterous. In ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 349 N.W.2d 661 (1984), our supreme court explained the rationale for the fee-shifting statute in WIS. STAT. ch. 32. The court observed that the power of eminent domain is an extraordinary power and involves property being taken by the owner against his or her will. ***Id.*** at 742-43. To counterbalance this involuntary taking of property, the legislature decreed that the owner be justly compensated. The court noted that an owner cannot be justly compensated, however, if forced to litigate in order to obtain the full value of land. ***Id.*** at 744. Hence, the legislature fashioned a fee-shifting statute which would come into play whenever it was determined that a "low-ball" offer forced litigation. In such a situation, the property owner could be made "whole." *See* ***id.*** at 744-45. If Guardian had its way, condemnors could make low-ball offers thereby forcing litigation. Then, instead of paying fees and expenses pursuant to the fee-shifting statute, the condemnor could simply "hold out" thereby forcing the condemnee to make a Hobson's choice. One choice is that the condemnee could fight for the statutorily mandated fees, thus incurring a debit of out-of-pocket costs which would be set off against the credit of the fee award. The other choice would be to capitulate to the hold out and accept a less-than-whole award. Surely, that cannot be what the legislature intended.

We will review whether this determination was made and based upon the facts appearing in the record and in reliance upon appropriate and applicable law such that the trial court's discretion was properly exercised.

¶28 The trial court concluded that the majority of claimed postaward expenses were excessive and amounted to "overkill." The trial court was disturbed by the way the issue was joined, and it blamed Hayes for creating and exacerbating the problem. The trial court remarked that most of the fee cases it sees are first presented to the court when the condemnee's attorney presents a bill of costs to the court accompanied by an affidavit. If there is an objection to the bill, the objection is "stated," and then the trial court makes a decision. The trial court noted that in two of the cases cited by the parties, the court resolved the disputes after a telephone conference. The trial court stated that it did not "know why this was presented this way to the court, or took a year to do it." The court appeared to find that most of the fees and costs incurred were the result of an effort, which the trial court obviously held in low regard, to get Foley & Lardner's bills. This was the extent of the court's reasoning.

¶29 First, we address the trial court's view that submitting a bill for fees and costs, accompanied by an affidavit, and if met by objection, perhaps a telephone conference to help resolve the issue, was the proper and less expensive way to handle this fee dispute. The unstated but obvious meaning of the trial court's statement is that it believed Hayes had eschewed the route preferred by the trial court in favor of formal court litigation preceded by demands to admit or deny and requests for discovery. The trial court concluded that Hayes' way of bringing the matter to the attention of the court amounted to "overkill."

¶30 As we have already stated, one of the key components in the exercise of a discretionary call is that the determination be made and based upon the factual record. Here, the trial court's determination is contrary to the factual record. When Hayes could not get Guardian's attorneys to at least state specific reasons for not paying the bill, he presented a motion for payment of fees and costs and for distribution of the award proceeds and filed an affidavit in support, on August 28, 2002, a year before the evidentiary hearing. The motion did not ask for an evidentiary hearing. It simply asked for payment. Thus, the record shows that Hayes did exactly what the trial court faulted him for not doing—trying to resolve the issue of fees without court intervention, and if intervention was necessary, then by submitting an affidavit in support of fees and costs.

¶31 It is true that at about the same time as he filed the motion and affidavit, Hayes also submitted a demand to admit or deny and a request for documents. But we cannot fault Hayes for this. Taken in its historical context, Hayes already knew that Guardian was objecting to the bills, but he did not know why. He simply wanted to find out why. He had tried informal methods such as phone calls and e-mails but got nowhere. Certainly, the resultant action of submitting a demand to admit or deny cannot be considered "overkill" or an attempt to formally litigate what the trial court thought could be handled more informally. If anything, what Hayes was attempting to do was join the issues—an action designed to *save* scarce judicial resources, not burden those resources. The trial court's rationale is simply contrary to the record and cannot stand.

¶32 A second reason why the court refused to grant all the requested postaward fees was its belief that "it didn't look like [Guardian was] so much doing discovery of your bills and that type of thing, as your effort to get [its] bills." We assume by this statement that the trial court thought the majority of

time Hayes spent in postaward legal work was for the purpose of accessing Foley & Lardner's bills on the case. Indeed the court remarked that "there [are] tremendous lumps of billings that have to do with that." We have reviewed the record and there is support for the trial court's view that "lumps of billings" have to do with Hayes' attempt to gain access to Foley & Lardner's billing records. Still, what the trial court did was to reject nearly *all* the postaward fees plus the fee of the attorney expert who appeared at the evidentiary hearing. The only fees allowed were for the time spent at the evidentiary hearing itself. There is no specific reason given by the trial court as to why all such fees and costs should have been rejected rather than just those fees associated with the discovery of billing records.

¶33 However, we are mindful that if the trial court fails to provide reasoning for its discretionary decision, we should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W. 2d 698. Reviewing the record as we must, we conclude that the trial court rejected most of the postaward fee request because it felt that the case had been "overtried" and it was all Hayes' fault.

¶34 It was not Hayes' fault. Much of the blame lies at the feet of Guardian's attorneys. Shortly after the commission award, Hayes sent his bill and requested payment to close the case. He got no answer. What was he supposed to do? He e-mailed opposing counsel and got back an answer that the issue was premature because the appeal time had not run. Hayes had no idea that an appeal was actually a serious consideration and e-mailed back asking if Guardian really had plans to appeal and, if not, asked why the issue could not be resolved "now." In response, he got back a cryptic note saying that the appeal time had not run and

the fees were unreasonable and no documentation supported the claim. Again, a reasonable attorney must ask, what is one supposed to do? Hayes did the logical next thing. He obtained a release from his client and sent a detailed bill asking for response. He got nothing in response. Yet again, we ask what a reasonable attorney must do in this instance. Surely, if making a party whole means anything, the time spent by an attorney attempting to collect from a recalcitrant condemnor should be recompensed by the condemnor. Yet, the trial court's decision disallows such fees.

¶35 After receiving nothing in response, Hayes had to spend the time to draft a motion and affidavit in support of fees. He did not ask for an evidentiary hearing at this point, but it was the next best thing he could do to get a response. He submitted a demand to admit or deny the reasonableness of the fees so that he could get a more particularized answer from Guardian's attorneys and be able to find out what the exact issues were. All he got back was a general denial. The same refrain calls out: what else is he supposed to do?

¶36 Hayes had no choice but to engage the court at this point. He brought a motion to compel more definite answers from Guardian's attorneys. He also sought discovery of the billing records of Guardian's lawyers. We do not understand why this was not a reasonable and necessary action.

¶37 At the hearing, Judge Race admonished Guardian's lawyers to be more forthcoming in their denials. Moreover, it was Judge Race who ordered the evidentiary hearing. How Hayes can be blamed for the evidentiary hearing taking place when it was ordered by the predecessor judge is beyond us. Not only that, it was Judge Race who told Hayes to have an expert attorney testify at the hearing.

How Pounder Brothers should not be recompensed for having an expert testify in the face of a court order is beyond us.

¶38 Probably most telling of Guardian's attitude toward being more forthcoming without court intervention is the statement of its attorney at the evidentiary hearing. After Hayes had established on direct examination that he had sent the bill to Guardian's attorneys and had received no response, counsel for Guardian asked Hayes on cross-examination whether he then called Foley & Lardner to offer to negotiate his fees. In other words, counsel for Guardian believed that if a lawyer submits a bill for fees pursuant to a fee-shifting statute and receives no response, that lawyer is duty bound to call the nonresponding party and attempt to negotiate the fees. That lawyer again expressed that view at closing argument when she stated:

> This is a two way street. It is true that Guardian did not offer to pay Pounder Brothers a lesser amount for their attorney fees until last Friday. But neither did Pounder Brothers call up and indicate that they were willing to negotiate about the bill. They did not indicate that they wanted to talk about what the offer, or what we felt … [the] unacceptable amounts were.

¶39 The problem with this reasoning is that its factual predicate is missing. Guardian *never* let Hayes know what was unacceptable until forced to by Judge Race. In other words, it never "joined the issues" until that time. We doubt there is any lawyer in Wisconsin who thinks that he or she is duty bound to call a condemnor's attorney and unilaterally offer a lesser fee amount when the fees requested have been met by stony silence from the other side or, at best, a general denial of the fees as being unreasonable. As aptly answered by Hayes, when he never got a response from Foley indicating if there was a problem and what the problem was, he "was not about to call Foley and begin to negotiate down from

my own figure." Second, Hayes *did* ask Guardian's lawyers to indicate what Guardian felt the unacceptable amounts were. Guardian never said until forced to by court order.

¶40 We conclude that the trial court's blanket refusal to allow postaward fees for Hayes, except for the evidentiary hearing itself, is an unreasonable exercise of discretion. It is contrary to the factual record and is without any rationale justifying the discretionary choice, at least so far as those fees relate to everything but work on the discovery of Foley & Lardner's legal bills. We further hold that the blanket denial—without explanation—of the expert's fee for appearing at the evidentiary hearing is unreasonable, especially since Judge Race insisted on Hayes having an expert appear at the hearing.

¶41 We acknowledge that the fee for this postaward work, when combined with the preaward work, dwarfs the amount recovered by Pounder Brothers over and above the jurisdictional offer. That said, all of this work could have been avoided if Guardian's lawyers had not been so recalcitrant. The trial court is right about one thing. This postaward history never should have happened. We disagree about who was at fault, however. The record shows that it is not Hayes, but Guardian's lawyers who must bear the guilt. We reverse the trial court and remand with directions that it compute and grant all postaward fees as they relate to everything but the production of Foley & Lardner's billing records and the excessive ten hours spent on drafting the reply brief. We specifically order that the time spent appearing at the hearing before Judge Race be included even though a portion of that hearing dealt with the billing records issue. We will deal with the billing records issue next.

3. Fees Related to Obtaining the Billing Records of Guardian's Attorneys Relative to this Case.

¶42 As we wrote earlier, while Judge Race held in abeyance the issue of whether Hayes could obtain Foley & Lardner's billing records, Judge Carlson later issued an order denying the discovery.[3] This occurred after Hayes requested a ruling prior to the evidentiary hearing. After the evidentiary hearing, when the trial court was rendering its bench decision, it rejected any fees in connection with the discovery of these records. We quoted the trial court earlier and quote the court again: "I just cannot buy, and I won't allow any costs on your motion to discover their attorney fees, or their costs, and there [are] tremendous lumps of billings that have to do with that." No other explanation was given. While Foley & Lardner had defended against discovery of the records on work-product and attorney-client privilege grounds, the trial court never discussed these issues, much less ruled on them. Again we cite ***Martindale*** for the proposition that if the trial court fails to provide reasoning for its evidentiary review decision, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. ***Martindale***, 246 Wis. 2d 67, ¶29. We will make that attempt here.

¶43 The record shows the following: First, Guardian's lawyers initially rejected Hayes' bills because they were undocumented. In response, Hayes obtained a release from Pounder Brothers and sent an itemized bill to Guardian's lawyers. So, Guardian did have Hayes' bill. Second, all Hayes knew, prior to

[3] As we mentioned above, Judge Race ultimately decided to deny the motion and told Guardian's counsel to draft an order, but the order never got reduced to writing until Judge Carlson ordered Guardian to write the order, reconstructing Judge Race's decision.

trying to discover Foley & Lardner's billing records on the case, was that Guardian had simply claimed that these itemized fees were "not reasonable." He had no inkling about what items were considered not reasonable. He did not know if the amount he charged per hour was considered not reasonable, the amount of time he spent on certain matters was not reasonable or something more. Third, Guardian's first answers to Hayes' requests to admit or deny shed no light on Guardian's actual objections or the reason for the objections.

¶44 In the hearing before Judge Race, Hayes explained exactly why Foley & Lardner's billing records on this case were relevant and material to this case. Guardian's lawyers had, after all, objected to the time Hayes spent on the case and also claimed "insufficient knowledge" about the hourly rate he charged. Hayes said:

> We thought that the quickest and simplest way to verify our fee issue was to determine what the other side had done in the case.
>
> If they had the same amount of time on the date of [the] condemnation commission hearing as we had then they can't very well argue that our time is unreasonable. If their billing rate for the case was two hundred twenty five dollars an hour, then they couldn't very well argue that two hundred and twenty five dollars an hour was unreasonable for me unless they could show that whoever litigated the case, in this case Mr. Heinzen, had substantially more experience in the field. Or I was … a young kid out of law school just doing my first case, which is not the case here. So it seemed to us as though that would be a fair way to measure whether these are reasonable and necessary fees.

¶45 Fourth, in response to Foley & Lardner's work product and attorney-client privilege objections, Hayes said he was not after the confidential communications between Guardian and its lawyers. He wanted only what was relevant to his theory. To that end, Hayes wanted only the time and rate. He said

"I think we are entitled to get the bills because the time and rate stuff is not confidential." Hayes also cited federal cases for the proposition that the court could tailor or redact those portions of the bills in order to protect confidential communications. Fifth, Heinzen, one of Guardian's lawyers, actually agreed that case law allows discovery of billing hours as they relate to "number of hours and the amount of time." Sixth, when Judge Race asked why fees for doing defense work was relevant to the fees for doing the plaintiff's work, Hayes responded, "Because what we are looking at is a reasonable fee in the community. What is a … rate charged by a lawyer that performs services in this area with some level of experience in similar work to mine." Seventh, when Judge Race pointed out that Foley & Lardner was handling this matter as part of one "mass production" and suggested that Hayes was comparing "apples and oranges," Hayes responded:

> That would suggest that Foley if it has a huge contract would be discounting its rates which they [sic] might well have done. Let's assume that they have discounted their rates and for an attorney of equivalent experience the rate is still substantially greater than mine[;] that would be relevant to the reasonableness of my charge.

¶46 To this argument, Heinzen had several responses. First, he claimed that the work-product privilege should only be pierced if the party seeking such materials shows substantial need in preparing the case and cannot obtain the substantial equivalent of the materials by other means. Heinzen remarked, "And this is a perfect example where Mr. Hayes doesn't need our bills in order to establish whether or not his fees are reasonable. He has numerous opportunities to …." At this point, Judge Race interjected and said:

> His bills have to [rise] or fall on the basis of the testimony that he adduces in court. I'm not so certain that Foley and Lardner's hourly billing to Guardian Pipeline is relevant or will lead to discoverable information.

> I'm not going to order at this juncture—but I think that they should address your particular billing and state their reasons for their denial [of] the reasonableness of your bills[;] I'm not foreclosing—I'm not closing discovery off as of this juncture. I'm just trying to get the case moving without any drastic ruling by this court.

¶47 When Hayes remarked that he did not hear Judge Race say that the time records would not be relevant, he asked that Heinzen produce the time records that showed the time spent on Pounder Brothers' matters, redacting out the confidential information. Judge Race asked Heinzen if that would be acceptable to him, but Heinzen replied that his client would not want to disclose any of its materials. At this point, Judge Race indicated again that the court was going to withhold a ruling pending receipt of more information.

¶48 Therefore, at the conclusion of the hearing before Judge Race, we know that the parties had reduced the issue to whether Hayes could discover the amount of time Foley & Lardner had spent on each pertinent legal matter in the Pounder case and the hourly rate it charged. Guardian's position, via Foley & Lardner, was that Hayes could not discover it because it was protected by work-product privilege and attorney-client privilege. In the alternative, even if not so protected, it was not relevant to Hayes' theory. Even if relevant, if there were other means by which Hayes could meet his burden of proof, Hayes would not be entitled to discover the records, even in its redacted form. That is where the issue lay. As we already said above, the trial court ultimately ruled that the records could not be discovered and, without explanation, that all fees in connection with discovering the records were not compensable. We assume that the trial court meant to say that the attorney time spent in this regard was neither reasonable nor necessary.

¶49 We will initially state what we are not deciding and what we are deciding. We are not deciding whether the trial court erred in refusing to *allow discovery* of these records. Rather, we are deciding whether Hayes is allowed to be compensated for his time in regards to the discovery issue.

¶50 The reason why Hayes wanted the records was to prove that his hourly rate was reasonable and that the time spent on each matter in the case was a reasonable amount of time. We will discuss the hourly rate first. Up to the evidentiary hearing, Guardian had put it in issue. But at the evidentiary hearing, Guardian never made an issue of the hourly rate. Not only that, it never asked one question of its expert witness about the hourly rate. Now, had Guardian informed Hayes in the middle of 2002 that his hourly rate was not an issue, that would have taken away one of the two reasons why Hayes believed that discovery of Foley & Lardner's billing records on the case was relevant and necessary. Instead, Guardian had the issue in play until "crunch time."

¶51 The second reason why Hayes wanted the records was to show that Foley & Lardner spent the same amount of time on the same matters as he did. For a long period of time, Hayes knew only that Guardian considered his fees to be unreasonable. He did not know any more than that. He sought Foley & Lardner's billing records for comparison purposes. It was not until Guardian's supplemental answers to the requests to admit or deny, signed by Attorney Heinzen on November 27, 2002, that Hayes found out, for the first time, how Guardian's unreasonableness arguments were limited to the following areas of legal work: (1) fees associated with filing a reply brief, (2) fees associated with noncondemnation issues, (3) and fees associated with preparation for and participation in the hearing before the condemnation commission.

¶52 Of these issues, the only possible area where a comparison with Foley & Lardner's fees would be relevant would be the time spent in preparing for and participating in the hearing before the condemnation commission. Since Foley & Lardner's records would have been irrelevant to the issue of whether Hayes should or should not have filed a reply brief, discovery of Foley & Lardner's records would not have been necessary on that issue. Moreover, once Guardian distilled its objections into a complaint that Hayes had included noncondemnation matters in the bill, Foley & Lardner's billing records could not have been relevant to that issue either. In short, if Foley & Lardner had simply joined these issues early on, the only possible reason for comparing Foley & Lardner's time with Hayes' time would have been in regards to the time spent preparing for and participating in the condemnation hearing.

¶53 Thus, what it comes down to is this. Had Hayes known that the only relevant issue for which he wanted Foley's records was the time spent preparing for and participating at the hearing, we doubt he would have bothered with the discovery of Foley & Lardner's billing records. The problem is, he never knew because the issues were never distilled until Judge Race ordered them distilled. The onus of all that occurred must be placed on Guardian's lawyers. By obfuscation and general denial, they forced a lawyer to try and obtain discovery so that the issues could be more defined, more specific.

¶54 The law does not allow discovery of billing records containing detailed descriptions of legal services tendered to a client as they are protected by attorney-client privilege. ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶41, 251 Wis. 2d 68, 640 N.W.2d 788. But the court in ***Lane*** remarked that this rule pertains only so long as "production of the documents reveals the substance of lawyer-client communications." ***Id***., ¶¶40-41. Similarly, the Ninth Circuit has

stated that simple inquiry into the parties' fee arrangement or costs and fees paid would not constitute privileged information. *See* ***Phaksuan v. United States***, 722 F.2d 591, 593 (9th Cir. 1983). So, Hayes was on solid ground in pursuing discovery of the records. He should be allowed the fees associated with this pursuit up to the date Guardian filed its supplemental answers, November 27, 2002.

¶55 We affirm the trial court's subtraction of the fees regarding the reply brief. We reverse the trial court's refusal to honor most of the postaward fees spent in collecting preaward fees. We reverse the trial court's refusal to allow the expert witness fees and expenses for his appearance and testimony at the evidentiary hearing. We reverse the trial court's refusal to allow fees for discovery of Foley & Lardner's billing records on the Pounder Brothers case up to November 27, 2002. We remand with directions that the fees be recomputed to accomplish these ends. We further order that Guardian pay the fees and expenses associated with this appeal, which fees and expenses shall be determined on remand to the trial court.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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