

NO. A11-1273

State of Minnesota
 In Court of Appeals

The County of Dakota,

Respondent,

v.

George W. Cameron, IV,

Appellant.

**BRIEF OF AMICUS CURIAE
 MINNESOTA EMINENT DOMAIN INSTITUTE**

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INTRODUCTION

The Minnesota Eminent Domain Institute (hereinafter “MEDI”) is an organization comprised of Minnesota attorneys who practice primarily in the area of eminent domain. The purpose of MEDI is to promote legislation and to advance case law that will protect the rights of property owners, tenants and displaced persons throughout the state. MEDI is intended, in part, to serve as a counterbalance to the extensive lobbying and litigation efforts currently conducted by a wide variety of government-sponsored organizations, such as the League of Minnesota Cities.

MEDI’s interest in this appeal is primarily private in nature and is intended to promote the fair treatment of property owners who are having their property taken from them by an acquiring authority.¹ However, MEDI also believes there is a strong public interest in ensuring that property owners that must relocate receive sufficient compensation to allow them to purchase comparable replacement properties.

MEDI respectfully submits this *amicus* brief in this case to address issues of particular importance to property owners that must relocate, which include: the importance of being adequately compensated to ensure that they are able to acquire a comparable property within their community. For the foregoing reasons, MEDI respectfully submits this brief as *amicus curiae* in support of Appellant.

¹ Pursuant to Minn.R.Civ.App.P. 129.03, MEDI certifies that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to its preparation or submission.

ARGUMENT

I. IN ADOPTING MINNESOTA STATUTE § 117.187, IT WAS THE INTENT OF THE MINNESOTA LEGISLATURE TO PROVIDE AN ALTERNATIVE MEASURE OF DAMAGES, IN ADDITION TO THE THREE TRADITIONAL APPROACHES TO VALUE, TO DETERMINE THE DAMAGES SUFFERED BY A PROPERTY OWNER WHO MUST RELOCATE.

As part of the Eminent Domain Reform Bill passed by the Minnesota legislature in 2006, the legislature adopted Minnesota Statute §117.187, which addresses a new way to calculate the damages for owners whose property is acquired by the government. Under this statute:

[w]hen an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community and not less than the condemning authority's payment or deposit under section 117.042, to the extent that the damages will not be duplicated in the compensation otherwise awarded to the owner of the property. For the purposes of this section, "owner" is defined as the person or entity that holds fee title to the property.

Minn. Stat. § 117.187.²

This statute clearly and unambiguously provides that, in calculating the damages property owners who must relocate will suffer as a result of having their property taken from them, the owners must now be paid the higher of:

1. The appraised fair market value for their property; or
2. The cost to purchase a comparable property located in their community.

The underlying purpose of Minnesota Statutes § 117.187 is clear, but the details of how the statute is to be implemented are more uncertain. Despite the significant

² To date there are no appellate cases, which interpret this statute.

implications of the statute, there is little record as to legislative intent. Some changes were made to the original draft version of the statute as it passed through the legislative process, but the final version of the statute is not much different than the original version.³ Even though there is little evidence regarding the legislature's intent with regard to the details of the minimum compensation statute, there is much we can glean from the atmosphere in which that statute was passed to provide this Court with guidance as to why the legislature determined there was a need to provide property owners with a significant new remedy that was a radical addition to the existing notions of just compensation.

The minimum compensation statute, as well as the other eminent domain reform legislation passed during the 2006 Minnesota legislative session, grew out of the almost nationwide public backlash with the decision by the United State Supreme Court in the 2005 case, *Kelo v. City of New London*, 545 U.S. 469 (2005). In the past, eminent domain had traditionally been used by governmental entities to acquire property from landowners for public projects such as roads, schools, hospitals and airports. As the law evolved, more and more governmental entities began using eminent domain to benefit private interests for the purposes of redevelopment. In the *Kelo* case, the Supreme Court concluded that this practice was legally permissible and that it was constitutional for the

³ The original version introduced as S.F. No. 2750 was worded, "When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a similar house or building of equivalent size in the community and not less than the condemning authority's payment or deposit under section 117.042."

government to take private property from one landowner and transfer it to another private landowner solely for the purposes of economic redevelopment.⁴ *Id.*

Following *Kelo*, thirty nine states reacted to that decision by making sweeping changes to limit the government's power of eminent domain and to provide additional benefits to property owners. *Eminent Domain*, (visited April 18, 2011) <<http://www.ncsl.org/default.aspx?tabid=13252>>. Minnesota was one of the states in which legislators responded to the public's concern over the abuse of the power of eminent domain.⁵

In addition to limiting the government's power of eminent domain to certain public uses, the Minnesota legislature passed other legislation to provide new benefits to property owners that had not previously existed under Minnesota law.⁶ These additional benefits in Chapter 117 included:

⁴ One 2006 public opinion poll by the Minnesota Automobile Dealers Association revealed that 91% of Minnesotans opposed the use of eminent domain for private development. *The Polls Are In* (visited April 18, 2011) <<http://www.castlecoalition.org/polls>>. That site also contains references to numerous other polls regarding the public's reaction to the *Kelo* decision.

⁵ In a publication from the Minnesota Legislative Reference Library, the staff noted "[c]oncern over the [*Kelo*] ruling – and especially the interpretation of the phrase 'public use' – led to calls for clarification of Minnesota's existing laws. The 2006 Minnesota Legislature responded by passing *Laws of Minnesota 2006, chapter 214*." *Resources on Minnesota Issues Eminent Domain*, (visited March 10, 2011) <<http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=eminentdomain>>.

⁶ Condemning authorities throughout the state had an opportunity to provide input on the crafting of this legislation, including the Minimum Compensation Statute. In particular, the League of Minnesota Cities was quite active in its lobbying efforts in this regard. For condemning authorities such as Dakota County and the League of Minnesota Cities to now claim the Minimum Compensation Statute is so unclear that it is rendered meaningless, is totally disingenuous and should be disregarded by this Court.

1. Increased appraisal cost reimbursement allowances. Minn. Stat. § 117.036, Subd. 2(b).
2. Mandatory good faith negotiation requirements. Minn. Stat. § 117.036, Subd. 3.
3. Mandatory payment of attorneys' fees in certain cases. Minn. Stat. § 117.031(a).
4. Statutory recognition of loss of going concern claims. Minn. Stat. § 117.186.
5. The right of first refusal to allow the property owner to buy back their property if it is no longer needed. Minn. Stat. § 117.226.
6. Increased relocation compensation. Minn. Stat. § 117.52, Subd. 1(a).
7. Fair hearings for disputed relocation claims. Minn. Stat. § 117.036, Subd. 4.
8. Payment of minimum compensation to property owners. Minn. Stat. § 117.187.

Again, the legislature's intent to create a new measure of damages in appropriate cases involving relocation appears to be clear and unambiguous. The details as to how the process is to be implemented are more uncertain, however, which is why there may be a need to resort to statutory construction based on legislative intent.

In *Haage v. Steies*, 555 N.W.2d 7, 9 (Minn.App. 1996), the Minnesota Court of Appeals noted that when trying to ascertain the intent of the legislature, one must consider "among other things, the contemporaneous legislative history of the statutes. Contemporaneous legislative history may include events leading up to the introduction of the act, the history of the act's passage, and any modifications made during the course of the bill's passage." If we view the words and phrases in the Minimum Compensation Statute in the context in which the statute was passed, which was part of the overall reaction to the *Kelo* decision and the fact that the language in the statute did not change much from its original version to its final version, it seems clear the legislature sought to

provide property owners with a very significant benefit not previously available to them under Minnesota law.⁷

Additionally, when it comes to construing these types of remedial laws “[i]t is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefit of the statute.” *Blankholm v. Fearing*, 22 N.W.2d 853, 855 (Minn. 1946). In the case *Spicer v. Stebbins*, 237 N.W. 844, 845 (Minn. 1931), the Minnesota Supreme Court noted “[w]hen the Legislature amends a practice, the presumption should be and is that it intends to aid the administration of justice, to better the practice, or to remedy some defect discovered in the operation of the existing law.”

This is what occurred with the passage of the Minimum Compensation Statute. The legislature saw that in certain cases property/business owners were being left in a far worse position than they occupied before their property was taken, so it provided those persons with a new remedy that was not previously available to them.

It is undeniable that prior to passage of the Minimum Compensation Statute, the only remedy for which a property owner like Mr. Cameron was eligible in eminent domain cases was the fair market value of the property that was taken. In many cases,

⁷ Prior to 2006, when property was taken by the government, property owners were compensated based upon the three traditional approaches to value. *Ramsey County v. Miller*, 316 N.W.2d 917 (Minn. 1982). Those owners that wanted to acquire a replacement property upon which they could relocate their business may not have received enough compensation for their displacement site to be able to purchase a replacement site without taking on a significant amount of debt. This often left those property owners with the choice of not purchasing a replacement property or being far worse off after the acquisition than they were in prior to the acquisition because of their increased debt load.

however, a fair market value payment does not compensate an owner sufficiently to allow them to purchase a suitable replacement property. Increased land prices, new zoning laws, lack of acceptable replacement sites and increased construction costs are often the reasons why this may occur. In these cases, a property owner would have to involuntarily spend significant amounts more than what they were paid in order to reestablish at a new location. The Minimum Compensation Statute serves to remedy this type of situation.

This is also why Judge Spicer's decision regarding the calculation and the amount of Mr. Cameron's compensation was erroneous. When one analyzes the wording in Minnesota Statute § 117.187, it appears that only one property can serve as the basis for determining minimum compensation, and the "middle ground" approach taken by Judge Spicer does not result in Mr. Cameron receiving minimum compensation. The reason for this is that in order to determine minimum compensation, the statute requires that the damages awarded to the property owner must be sufficient for them "*to purchase a comparable property in the community . . .*" Minn. Stat. § 117.187 (emphasis added).

As noted above, the legislature's intent in passing the Minimum Compensation Statute is clear: property owners that are forced to relocate were given the opportunity to purchase a replacement property. When Judge Spicer chose to not award damages based upon either the one replacement property offered by Dakota County or the one offered by Mr. Cameron, it did not allow Mr. Cameron "to purchase a comparable property"; it only identified the potential cost of a hypothetical property that does not actually exist. Such

an amount is not an adequate measure of the minimum compensation damages suffered by Mr. Cameron as it would not allow him “to purchase” a replacement property.

Additionally, the decision of Judge Spicer was arbitrary and capricious in that there is no basis in the record to support his conclusion regarding the amount of damages he awarded to Mr. Cameron.⁸ This Court cannot allow such an approach as it does not satisfy the requirements of the Minimum Compensation Statute, which requires the identification of the one property that is most comparable to the subject property to serve as the basis of the landowner's damages.

Had the legislature intended a result such as the one reached by Judge Spicer, it could have worded the statute in a different way. The legislature could have worded the statute in the manner that it worded Minnesota Statutes § 117.085 and § 117.175, to give the fact finder the discretion to determine what it would cost, in their judgment, for the property owner to purchase a comparable property in their community.⁹ However, in the Minimum Compensation Statute the legislature did not do so. The legislature used the phrase “to purchase a comparable property” for a reason. Presumably, that reason was to ensure that at the conclusion of the taking of their property, the property owner would

⁸ One primary reason why Judge Spicer’s minimum compensation damage calculation is arbitrary is that he took the sale of the South Robert Trail land AND building and divided that amount by the square footage of the building alone. He then used that number, which was \$224.36 and multiplied it by the square footage of Mr. Cameron’s building, with no consideration for the size of the parcel upon which that building sat.

⁹ Minnesota Statute § 117.085 allows commissioners to use their discretion to make an “award of the damages which *in their judgment* will result to each of the owners of the land by reason of such taking and report the same to the court.” Minnesota Statute § 117.175 gives judges and juries the discretion to “reassess the damages *de novo* and apportion the same as *the evidence and justice may require.*”

receive sufficient compensation to allow them to actually purchase at least one comparable replacement property located in their community.

Additionally, it appears from his decision that Judge Spicer seemed to understand that the replacement property offered by Dakota County was not truly comparable. Had he thought that property met the requirements of a comparable replacement property he would have selected that property to serve as the basis of Mr. Cameron's damages instead of making significant adjustments to that property. It seems as if Judge Spicer was concerned with the possibility of Mr. Cameron receiving some sort of windfall if he selected Mr. Cameron's comparable property to serve as the basis of his damages.

Despite Judge Spicer's apparent concerns, a landowner's damages are what they are under the Minimum Compensation Statute. Under the Minimum Compensation Statute the factfinder has the duty of selecting the one comparable property that should serve as the basis of the landowner's damages. If that property is the one offered by the acquiring authority, then that is the amount of compensation for which the landowner is entitled to receive.

However, if that property is the one offered by the landowner, then that is the amount of compensation for which they are entitled to receive even if that amount is several times higher than the appraised fair market value of the subject property or the comparable property offered by the acquiring authority. Rendering such a decision would not result in the landowner receiving a windfall; it would actually be an accurate measure of their damages under the Minimum Compensation Statute. It would also allow that landowner to be able to purchase a comparable replacement property within their

community without having to take on the significant burden of additional debt in relocating and reestablishing at a new location.

The passage of the Minimum Compensation Statute has brought us into a new world in terms of compensation that must be paid to property owners who are forced to relocate. It appears that Judge Spicer was uncomfortable with fully providing this new benefit to Mr. Cameron, because his decision does not effectuate the requirements of the Minimum Compensation Statute. However, when one considers the remedial nature of this statute and the context in which it was passed, it becomes clear that the Minnesota legislature wanted to provide a benefit to persons like Mr. Cameron in those cases in which the three traditional approaches to valuation did not provide them sufficient compensation to actually be able to purchase a comparable replacement property.

II. THE DETERMINATION AS TO WHAT CONSTITUTES A BUSINESSES' COMMUNITY UNDER MINNESOTA STATUTE § 117.187 IS A FACT-BASED DETERMINATION THAT MUST FOCUS ON SEVERAL FACTORS WITH THE PRIMARY FOCUS BEING ON THE LOCATION OF THE BUSINESS.

In rendering his decision, Judge Spicer disregarded the evidence and testimony presented regarding Mr. Cameron's community and identified a potential replacement property that violates the fundamental rule of real estate, which is location, location, location.

In these minimum compensation cases location is going to be a fact-based determination that has to be made on a case-by-case basis. For an internet-based business that conducts all of its sales online, the community could possibly be anywhere they can have access to high-speed internet service. However, for a small business with a devoted

clientele like Mr. Cameron's, the difference in just a few miles in selecting a comparable property may mean the survival of his business or it may mean that his customers shift to one of his rival competitors necessitating the creation of an entirely new going concern.

The Minimum Compensation Statute specifically requires that any potential comparable property must be located within the landowner's "community." By ignoring the evidence and testimony on the record regarding Mr. Cameron's community, Judge Spicer ignored that word in violation of the rules of statutory construction. According to those rules, "the legislature intends the entire statute to be effective and certain" Minn. Stat. § 645.17(2). By selecting a comparable property not located within Mr. Cameron's community, Judge Spicer voided that word out of the Minimum Compensation Statute.

Contrary to the process used by Judge Spicer, it is the position of MEDI that the selection of a comparable replacement property within the landowner's applicable community can be objectively determined. For that reason, MEDI urges this Court to adopt the following multi-step process, which would lead to an objective determination of the most comparable property within the landowner's community:

1. Analyze the Subject Property—In this step we must engage in an analysis of the defining characteristics of the subject property. Those defining characteristics should include:
 - a. Location;
 - b. The size of the subject property;
 - c. Use, zoning and permitting issues;
 - d. Structural attributes;
 - e. Condition of existing improvements;
 - f. Parking requirements;
 - g. Aesthetics;

- h. Demographic characteristics of the area;
 - i. Traffic counts;
 - j. Visibility;
 - k. Access to abutting road infrastructure; and
 - l. Any other essential characteristics.
2. Determination of the Applicable Community—In this second step, we must take the information obtained in Step #1 and, based in part upon those defining characteristics of the subject property, we should determine the applicable community of the owner's property.

In determining the community, one would need to also consider:

- a. Type of business;
 - b. Service area;
 - c. Location of customer base;
 - d. Accessibility for clientele;
 - e. Competition in the area; and
 - f. Current land use, licensing, permitting and zoning requirements within the applicable community.
3. Availability of a Comparable Property—According to the Minimum Compensation Statute the damages payable to a property owner must be, at a minimum, the amount to purchase a comparable property within their community when they relocate. This would seem to suggest that in order to determine the damages payable to the landowner, the comparable property selected must be available to purchase on the date of taking. In this step we would take the information obtained in Step #1 and Step #2 and begin the process of locating potential comparable properties that are available for purchase on the market.
4. Comparable Properties—After doing that initial search, it may be revealed that all comparable properties are equal to or superior to the subject property. If that is the case then the property deemed as being the most comparable of those properties must be identified to serve as the basis of minimum compensation.
5. Inferior Properties—If we find that only inferior properties with previously constructed improvements are available, we may need to take this next step to review whether those inferior properties can be made comparable through additional investment. If we determine that is the case, then those costs of additional investment must be added to the listing price of the property to serve as the basis of minimum compensation.

6. No Comparable Available—After doing our search based on Steps #1-#5, we may find that no comparable properties with existing improvements are available for purchase on the date of taking. If we find that this is the case, it may be necessary to use a replacement cost analysis. This approach would involve establishing the replacement cost of land and buildings. A deduction for depreciation would not be included in the replacement cost analysis as it is impossible to construct a depreciated building.

At the conclusion of this process we should find the one property that is most comparable to the subject property and was available on the market on the date of taking.¹⁰ That property may already exist on the market with previously constructed improvements or it may be a vacant property that requires the construction of comparable improvements to what the landowner had at the subject property. Rather than the subjective process used by Judge Spicer in reaching his conclusion, this will result in an objective process that takes into account all of the relevant factors in determining the defining characteristics of the subject property. It will also result in the identification a comparable replacement property that is in a location that is similar to or better than the subject property.

III. WHETHER THE FEE AGREEMENT BETWEEN AN ATTORNEY AND A CLIENT IS AN HOURLY RATE OR CONTINGENT FEE AGREEMENT, IF THE CLAIM FOR REIMBURSEMENT UNDER MINNESOTA STATUTE § 117.031 DEMONSTRATES THAT THE FEES CONSIDERED ARE REASONABLE IN LIGHT OF WHAT IS REGULARLY CHARGED IN THE COMMUNITY, THAT FEE SHOULD BE DETERMINED TO BE REASONABLE UNDER THE.

¹⁰ This process should be applicable to either the internet-only based retailer or the corner grocery store. The purpose of this process is to identify those objective factors that are essential to the success of the landowner on the subject property and to replicate those factors in a replacement property.

Minnesota Statute § 117.031(a) governs the award of reasonable attorney fees and litigation expenses for the prevailing party in a condemnation action. That section provides in relevant part:

If the final judgment or award for damages, as determined at any level in the eminent domain process, is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition, the court shall award the owner reasonable attorney fees, litigation expenses, appraisal fees, other experts fees, and other related costs in addition to other compensation and fees authorized by this chapter. If the final judgment or award is at least 20 percent, but not more than 40 percent, greater than the last written offer, the court may award reasonable attorney fees, expenses, and other costs and fees as provided in this paragraph. The final judgment or award of damages shall be determined as of the date of taking. No attorney fees shall be awarded under this paragraph if the final judgment or award of damages does not exceed \$25,000. For the purposes of this section, the "final judgment or award for damages" does not include any amount for loss of a going concern unless that was included in the last written offer by the condemning authority.

“Recovery of attorney fees must be based on either a statute or a contract.”

Schwickert, Inc. v. Winnebago Seniors, Ltd., 680 N.W. 2d 79, 87 (Minn. 2004). In this case, there is both a statute and a written contract that pertains to attorneys’ fees. The Minnesota Court of Appeals has held that “attorneys for successful civil rights plaintiffs should recover a fully compensatory fee.” *Shepard v. City of St. Paul*, 380 N.W.2d 140, 143 (Minn.App. 1985). Fees are to be awarded to a plaintiff when he or she prevails. *New York Gaslight Club v. Carey*, 447 U.S. 723 (1980).

Perhaps the most common method of setting fees between attorneys and clients in Minnesota condemnation cases is a contingent fee based on the recovery over the offer made by the condemning authority. A fee of one-third (1/3) to 40% of the amount

recovered in excess of the acquiring authority's offer is typical. We do not believe that the County questions these statements nor that the Minnesota legislature did not know this when adopting Minnesota Statute § 117.031. However, this fee must be "reasonable" pursuant to the statute. Applying the "reasonable" test is a discretionary matter for the district court. Hennepin County did not question the reasonableness of the one-third fee in the recent Court of Appeals case of *County of Hennepin v. Fitzgerald*, 2010 WL 1966191. It only took issue with the fact that the landowner wanted reimbursement for a fee based on a total taking *that he requested* based on an offer from Hennepin County for a partial taking. *Id.* The Court of Appeals stated, “[t]he county does not dispute the district court's discretionary decision to award attorney fees under section 117.031(a). Nor does the county dispute the reasonableness of the contingent-fee agreement between appellants and their attorney.” *Id.* *3.

The Court in *Fitzgerald* also quoted the 1980 case, *Minnetonka v. Carlson*, 298 N.W.2d 763 (Minn. 1980). That case involved a dismissal of the condemnation by the City of Minnetonka, after the commissioners' award, with the result that the landowner did not suffer a taking and was not entitled to compensation. The Minnesota Supreme Court construed Minnesota Statute § 117.195, subd. 2, which provided for the award of attorneys' fees and costs as a result of the dismissal of the condemnation.

In that case, the attorney could not collect his contingent fee from the landowner since there was no recovery because of the dismissal. There have been a number of district court decisions awarding reimbursement of fees since Minnesota Statutes § 117.031 was adopted in May of 2006 that cite the *Carlson* case, even though we are now

dealing with an entirely different statute and situation. *Carlson* was simply a case of a statutory form of quantum meruit since the contingency fee contract between attorney and client could not be applied. If the threshold of a 40% increase over the condemnor's offer is reached pursuant to Minnesota Statute § 117.031, then the award of fees is mandatory and the landowner is entitled to reimbursement for a fee for which he has *paid or is contracted to pay* according to his contract with his attorney.

The Supreme Court in the *Carlson* case did enunciate the following tests to be applied when it decided that case: (1) the time and labor of the attorney required; (2) the nature and difficulty of the responsibility assumed; (3) the amount involved and the results obtained; (4) the fees customarily charged for similar legal services; (5) the experience, reputation, and ability of counsel; and (6) whether the fee arrangement is fixed or contingent.

Minnesota Statutes § 117.031 provides landowners whose recovery meets the 40% threshold with the right to a mandatory award of attorney's fees based upon a "reasonable" fees test. We do not believe the word "reasonable" depends on how much more the landowner is awarded than 40% over the government's offer, i.e. whether the award is closer to the landowner's number than to the condemnor's. If the 40% threshold is reached, then the landowner is entitled to recover. We do not believe the word "reasonable" contemplates whether the final result is "good or bad" according to the feelings on the subject by the condemning authority. That is a subjective test that will be different with every attorney representing condemning authorities in Minnesota.

We believe a modified *Carlson* test can be applied. First, we believe "reasonable" means, in part, whether the contract between attorney and client is reasonable on its face. If the contingent fee is for a reasonable percentage acceptable in the legal community, and not "excessive" as referred to in the Rules of Professional Conduct, the courts should honor the agreement when reimbursing fees. That is relatively easy to establish by affidavits from condemnation attorneys in the legal community. Whether the fee is contingent or hourly, we also believe "reasonable" means whether the attorney is skilled in the area of eminent domain and has put considerable time in getting to the 40% threshold.

A reasonable hourly rate charged by lawyers in the community is also easy to establish, and should be a prong of the *Carlson* test that the district courts would have no trouble determining. A typical hourly rate, as well as the attorney's skill, reputation and experience could easily be demonstrated by affidavits from the attorney's peers. The attorney's time spent can be demonstrated by time records and the affidavit required pursuant to Rule 119.02 of the Rules of Practice for District Courts. If the attorney has a contract for a contingent fee and/or an hourly rate, the above tests would determine whether both methods were reasonable, and if both were, the landowner could recover on one of them, so long as the attorney's retainer with the client provided for that method of payment.

The United States Supreme Court allows attorneys' fees requested by a prevailing party by analyzing several well-recognized factors. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). These factors include the billing of the attorney's rates, as well as the rates

charged by attorneys of “like skill and for similar work in the general locality in which the litigation takes place.” *Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1313 (8th Cir.1981). The “result obtained” by a plaintiff is also a “crucial factor” in determining the reasonableness of an award of attorneys’ fees. *Hensley*, 461 U.S. at 434. However, the Minnesota legislature has prescribed the necessary *result* in this situation, which is simply to reach the 40% threshold. Once that is reached, then the “reasonableness” of the fee can be easily determined by the contract between attorney and client and by the method we have outlined in this brief.

The standards regarding attorney’s fees set forth in *Hensley* were intended to apply generally to all cases in which a prevailing party is authorized to receive an award of attorney’s fees. *Hensley*, 461 U.S. at 433. One way to determine a “reasonable” fee, commonly referred to as the “lodestar” method, arrives at a fee by calculating “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley*, 461 U.S. at 433; *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 250 (Minn. 1986); *See also Blanchard v. Bergeron*, 489 U.S. 87 (1989). This amount is presumed to be a reasonable fee. *City of Riverside v. Santos, Rivera*, 477 U.S. 561, 568 (1986).

Courts have historically approved compensation for a broad range of litigation tasks, including the following: (1) time spent prior to filing a lawsuit, *Dowdell v. City of Apopka*, 698 F.2d 1181, 1188 (11th Cir. 1983); (2) time spent in conference and organization of a case file, *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 378 (3rd Cir.1987), *aff’d in part, rev’d in part, on other grounds*, 888 F.2d 975 (1989); (3) travel

time, *Rose Confections, Inc. v. Ambrosia*, 816 F.2d 381, 396 (8th Cir.1987), *Craik v. Minnesota State University Board*, 738 F.2d 348, 350 (8th Cir.1984); (4) time spent preparing a fee application, negotiating fees, and litigating fees, *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir.1982) (citations omitted); and (5) time of law clerks. *Missouri v. Jenkins*, 491 U.S. 274 (1989).

As noted above, Minnesota Statute § 117.031 was part of the larger eminent domain reform legislation of 2006. Wisconsin's eminent domain statutes were looked to for guidance in drafting the Minnesota legislation. In Wisconsin, the courts have held that "a contingent fee of 40% is reasonable" when the statute allows reimbursement. *Kluenker v. State*, 327 N.W.2d 145 (Wis. Ct. App. 1982).

In a leading Wisconsin case, the government objected to an award of attorneys' fees in the amount of \$108,867.00 pursuant to the contingency fee agreement that called for a one-third (33%) fee over the offer. The Wisconsin Supreme Court held that the award of fees was reasonable even though the case took only three days before an administrative body. In that case, the increase in compensation was over 80%, even though the Wisconsin statute only required a 15% increase for an award of fees. The Court put great emphasis on the result obtained. *Village of Shorewood v. Steinberg*, 496 N.W.2d 57 (Wis. 1993). The Wisconsin Supreme Court discussed how even though the contingent fee is not conclusive as to the fee award, there was nothing unreasonable about an award of fees not based on an hourly rate. The Court relied on the time and labor involved, the novelty and difficulty of the questions involved, the skill requisite to

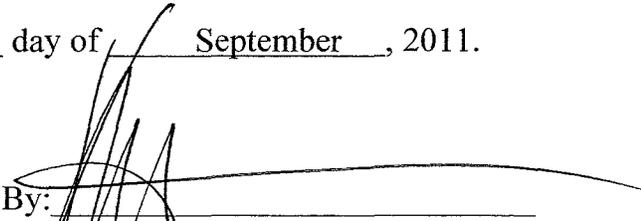
perform the legal skill properly, the custom in the locality, whether this custom includes contingency fees, the amount involved, and the results obtained. *Id.*

In summary, this brief on behalf of MEDI is submitted to this Court in support of establishing a simple test for attorney's fees pursuant to Minnesota Statute § 117.031(a), which relies on the customs that have been established between landowners and attorneys over a long period of time as to reasonable and fair fee arrangements. Whether the fee is contingent or hourly, these fee arrangements are not new but are time tested, and it will be easy for the condemning authorities and the district courts to apply. If the claim for reimbursement and/or the affidavits presented in court by attorneys or others demonstrate that the fees considered are reasonable in light of what is regularly charged in the community, the fee is should be held to be *prima facie* "reasonable" under the statute.

CONCLUSION

For the foregoing reasons, MEDI respectfully requests that this Court reverse the decision of Judge Spicer and determine that Mr. Cameron's damages should be based upon the comparable property identified in his minimum compensation analysis.

Respectfully submitted, this 7th day of September, 2011.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Minnesota Rules of Appellate Procedure for a brief produced using the following fonts: Times New Roman, 13 point.
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