IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

OKLAHOMA TURNPIKE AUTHORITY,

Plaintiff/Appellant,

vs.

JOE KREDI aka JOSEPH KREKE, JR.; LORI BETH KREKE; JANE DOE KREKE, wife of Joe Kreke, Jr., if any; JOHN DOE KREKE, husband of LORI BETH KREKE, if any; OCCUPANT(S) OF THE PREMISES; OKLAHOMA GAS AND ELECTRIC CO.; ENOGEX, INC., successor of Mustang Fuel Corp.; AT&T CORP.; OKLAHOMA NATURAL GAS COMPANY, division of ONEGas Inc.; OKLAHOMA AND GULF RAILROAD COMPANY; OKLAHOMA COUNTY TREASURER; and BOARD OF COUNTY COMMISSIONERS OF OKLAHOMA COUNTY, OKLAHOMA,

Defendants/Appellees.

Case No. 121,979

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE C. BRENT DISHMAN, TRIAL JUDGE

AFFIRMED AS MODIFIED

Kelly F. Monaghan
W. Brant Warrick
Hunter McCullough
MONAGHAN, WARRICK, KING
Tulsa, Oklahoma

For Plaintiff/Appellant

Nicholas Atwood
RITCHIE ROCK & ATWOOD
Pryor, Oklahoma

For Defendant/Appellee
Joe Kreke, Jr. and
Lori Beth Kreke

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The Oklahoma Turnpike Authority (OTA or condemnor) appeals an award of attorney fees to the condemnees after a trial determining the just compensation for a taking. On review, we find no merit in the OTA's general allegations that the fee provisions of 27 O.S. § 11 and similar statutes are unconstitutional or are being improperly applied. Although we agree with the OTA that, when determining the total recovery for fee purposes, summing the compensation awarded for the initial taking and the compensation awarded for later tortious damage to untaken property is improper, we find no reversible error, as the correct procedure to use in this situation is clearly prescribed by law but was never requested by the OTA. Longstanding case law requires the value of negligence damages which are not anticipated or incidental to the proposed condemnation to be determined separately from the value of the anticipated taking. However, because the OTA did not request this procedure at trial, we find no error in the application of the fee statute.

The OTA further argues that a court may only award costs identified by 27 O.S. § 11 and 66 O.S. § 55 in condemnation cases. It challenges various aspects of the court's fee and cost award on this basis. We find the costs in a condemnation action are recoverable under both the referenced specific statutes, as well as the general costs statute, 12 O.S. § 942. We find no error in the challenged award, except the court's allowance of litigation expenses of

$6,087.41 and mediation expenses of $2,116.25. As such, the combined fee and cost award is modified by reducing it by $8,203.66. So modified, the appealed judgment is affirmed.

BACKGROUND

This fee appeal arises from the OTA's condemnation of approximately ten acres of the condemnees' approximately eighty-acre tract of land for use in the construction of the Kickapoo Turnpike east of Oklahoma City. The parties differed substantially on the reasonable value of the property to be taken. The OTA offered $150,503, and the condemnees countered at $1,481,459. The question was sent to appointed commissioners pursuant to 27 O.S. § 2. For reasons that are not clear from the record, the commissioners arrived a value of $31,000. The condemnees rejected this valuation. The commissioners' interim award was paid to the condemnees, construction began, and the question of final compensation was set for trial.

There were heavy rains during construction, and a substantial amount of silt was alleged to have washed from the construction area onto the untaken remainder of the condemnees' property. The condemnees alleged that this silt damaged an artificial pond created for aesthetic and recreational purposes that was to be the centerpiece of a development. After suit was filed, the OTA offered $225,000 plus "reasonable fees" as compensation for the taking and all damages, including those to the pond. The condemnees countered at $715,611. No agreement was reached, and the case proceeded to trial.

The condemnees sought the cost of remediation at trial as part of their allowable "damages to the untaken portion" of the property. The jury returned a general verdict finding the total damages to be $220,000. The instructions did not allow for a separate verdict on the value of the damage to the untaken property. Because this verdict exceeded the commissioners' award by more than ten percent, the condemnees sought attorney fees and costs pursuant to 27 O.S. § 11(3) and 66 O.S. § 55. The court awarded $187,840.72 in combined fees and costs, which the OTA timely appealed.

STANDARD OF REVIEW

The OTA challenges the award of fees and costs on various grounds. To the extent its challenge concerns the availability of fees as a legal matter, our review is *de novo. See Finnell v. Seismic,* 2003 OK 35, ¶7, 67 P.3d 339, 342. Challenges to the reasonableness of the award are reviewed for abuse of discretion. *Fleig v. Landmark Constr. Grp.*, 2024 OK 25, ¶ 13, 549 P.3d 1208, 1210. The OTA's constitutional challenge to certain applicable statutes is also reviewed *de novo. John v. Saint Francis Hosp., Inc.*, 2017 OK 81, ¶ 8, 405 P.3d 681, 685 ("A statute's constitutional validity, construction and application are legal questions this Court reviews *de novo.*").

ANALYSIS

In a condemnation proceeding, "[i]f the award of the jury exceeds the award of the court-appointed commissioners by at least ten percent (10%)," the landowner "may be paid such sum as in the opinion of the court will reimburse such owner for his reasonable attorney, appraisal and engineering fees, actually

incurred because of the condemnation proceedings." 27 O.S. § 11.[1] The OTA mounts several general constitutional challenges to this legislation and similar legislation, which govern fees in condemnation cases. *See* 66 O.S. § 55(D). We may dispose of all but one of these challenges summarily.[2]

The OTA argues that the current statutes, which allow fees to a condemnee when a jury's assessment of the value of the taking exceeds the commissioners' award by ten percent or more, creates arbitrary classes of condemnors that are impermissibly subject to disparate treatment. The condemnation fee structure, including its asymmetric application and the use of the commissioners' award as a benchmark for determining the prevailing party has been part of Oklahoma law for more than sixty-five years.[3] It has previously been examined many times

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[1] We cite the current version of the statute, which has been in effect since 1975. The statute was amended during the most recent legislative session. House Bill 2036 was signed into law by the Governor on May 21, 2025, with an effective date of November 1, 2025. 2025 Okla. Sess. Law Serv. Ch. 255 (H.B. 2036) (West). No party argues that the new version should be applied on appeal.

[2] Because we find no error here, we need not, and do not, address condemnees' argument that the OTA, as a creation of the legislature, has no standing to allege that the legislature has acted unconstitutionally towards it. Further the OTA appears to argue at points that the statutes violate the rights of the *condemnees*, as well as the OTA. We note however, the statement of *Carl v. Bd. of Regents of Univ. of Oklahoma*, 1978 OK 49, 577 P.2d 912:

> Substantive due process and equal protection guarantees run to "persons," not the state. Their purpose is to protect persons from the abuses of the state's power. Thus, it has been held that a municipal corporation being a creature of the state, cannot invoke the equal protection clause of the Fourteenth Amendment against an act of the state legislature. *Williams v. Baltimore*, 289 U.S. 36, 77 L.Ed. 1015, 53 S.Ct. 431 (1933).

Id. ¶ 15, 915.

[3] As early as 1959, 11 O.S. § 1663(f) provided: "[I]f the verdict of the jury exceeds the award of the court appointed commissioners, the court may reward a reasonable attorney fee to the defendant or defendants which shall be paid by the condemner." 11 O.S. 1971 § 1663; *McAlester Urban Renewal Auth. v. Hamilton*, 1974 OK 50, ¶ 4, 521 P.2d 823, 824.

by the Supreme Court in various forms and no constitutional infirmity has been found. In *Root v. Kamo Elec. Co-op., Inc.*, 1985 OK 8, 699 P.2d 1083, the appellant argued that "the classification which allows an award for costs if the jury's verdict exceeds the commissioner's award by ten percent or more is arbitrary and capricious, and that the allowance of such an award takes appellant's property without due process of law." *Id.* ¶ 38. The court, however found these provisions "reasonable." *Id.* ¶ 39.

The OTA argues that the subsequent statement of *State ex rel. Dep't of Transp. v. Post*, 2005 OK 69, 125 P.3d 1183, that "[t]he constitutional rights established under the Okla. Const. art. 2, § 24 are as much the right of one party as they are of the other," necessarily changes this analysis. *Id.* ¶ 17 (footnote omitted). *Post,* however, has no connection to the practice of using the commissioners' award as a benchmark for whether a condemnee is entitled to fees.[4] We find no constitutional infirmity in the general operation of the fee statute in question.

The OTA's second argument is that awarding a fee based on a recovery greater than the commissioners' award, rather than a recovery greater than the amount offered in "settlement negotiations made during the course of litigation"

That law (repealed along with all of Title 11 in 1977, *see* 1977 Okla. Sess. Laws 697 (ch. 256, § 1-106) (HB 1100) was enacted in 1959. 1959 Okla. Sess. Laws 53 (tit. 11, ch. 36, § 13(f)) (HB 685).

[4] The question in *Post* was whether a taking legally occurred on the date the commissioners' award was paid, or on the date the condemnor actually took possession of the property. The condemnees asserted that the condemnor had never actually taken possession of the property, and hence the proper measure of the taking was the value of the property at the time of trial, rather than at the time the commissioners' award was paid. *Id.* ¶ 16. The Court disagreed. *Id.* ¶ 17.

is somehow unconstitutional, or that offers versus recovery should be considered as an element when awarding fees under the relevant statutes. We presume that the OTA argues that the last settlement offered by the OTA should be the benchmark for determining if the condemnee has prevailed at trial.

In this case, the offer of the OTA before the matter was sent to the commissioners was $150,503 and the commissioners' award was $31,000. After litigation commenced, the OTA offered $225,000 and the condemnees counteroffered $715,611. Hence, the condemnees recovered less than the OTA's final offer, but still received fees. This may indeed appear unfair. "Unfair" and "unconstitutional" are not synonymous, however. Although benchmarking against the OTA's final offer before the commissioners' report may be a viable and equitable method for determining if a condemnee prevailed at trial for fee purposes, the legislature did not choose to use it.[5] Comparison with the commissioners' award has been the accepted method of determining if a condemnee is the prevailing party for fee purposes for some sixty-five years, and it is not within the appointed power of this Court to rewrite legislation simply because there may be "a better way to do it." This complaint is properly addressed to the legislature, not the courts.[6]

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[5] Further, *McAlester Urban Renewal Auth. v. Watts*, 1973 OK 120, 516 P.2d 261, holds that evidence of unaccepted offers to purchase a landowner's property are generally inadmissible in condemnation proceedings. *Id.* ¶ 7.

[6] We note that the 2025 revision, *see supra*, note 1, appears to address the OTA's concerns. 2025 Okla. Sess. Law Serv. Ch. 255 (H.B. 2036) (West) (modifying the relevant language to allow fees when "the award of the jury exceeds the greater of the award of the court-appointed commissioners or the last timely written offer of just compensation made by the condemning authority").

The OTA does raise one question that does not appear to have been addressed by *Root* and similar cases, however. This question arises when the condemnor negligently damages the untaken portion of the property after taking possession of the condemned portion. Oklahoma's Constitution requires the commissioners to consider the value of the property taken, *and "any injury to any part of the property not taken."* Okla. Const. art. II, § 24 (emphasis supplied). The Supreme Court has recognized that "a landowner is entitled to full compensation for damages including those for a condemnor's tortious conduct." *Curtis v WFEC R.R. Co.* 2000 OK 26, ¶ 17, 1 P.3d 996 (citing *Cities Serv. Gas Co. v. Huebner,* 1948 OK 77, 197 P.2d 985 and *Andrews v. Proctor,* 1945 OK 359, 165 P.2d 610). Hence, a condemnee can seek both a determination of the value of the property originally taken *and* compensation for any negligent damages to the remaining property after the taking. The OTA argues, however, that basing the availability of a fee on the commissioners' award versus the recovery at trial is arbitrary if the jury verdict includes damages for subsequent negligence that were not appraised by the commissioners. *Brief-in-Chief,* 12.

The scenario that arose in this case is possible in any situation where construction begins before compensation is finally settled and unanticipated damages to the remaining property occur. The condemnor may not anticipate future tortious damage to the remainder not taken and none may be evident from the plans presented. The commissioners may therefore assign, for example, a value of $100,000 to the taken property that includes little or no contemplated damages to the remainder. By the time of trial, however, tortious damages to the

remainder may have arisen due to construction. Although the jury may find the *intended* taking to have been worth only the $100,000 found by the commissioners, the later negligence damages may increase the total taking to, say, $120,000 by the time of trial. Hence, the condemnee is entitled to fees even though the commissioners' award did not undervalue the *intended* taking. The OTA argues that, for fee purposes, mixing claims of the value of the proposed taking with claims of subsequent tortious damage to the property not taken is arbitrary and unconstitutional. A survey of case law shows, however, that this situation should not arise at trial in the first instance.

Curtis v. WFEC R.R. Co., 2000 OK 26, 1 P.3d 996, examines the question of how subsequent negligence damages to the remaining property should be tried. Quoting a 1935 case, the Court stated:

> "The remedy for an injury to the land, which injury is not a necessary incident to the construction and operation of the public service for which the land is taken, but is due to willful or negligent construction or operation, is not such remedy as is given by the statutes relating to eminent domain. The landowner in such case has ***a separate and distinct cause of action***, such as trespass, and is not entitled to have such injuries considered in awarding damages under condemnation proceedings."

Id. ¶ 15 (*quoting Oklahoma Gas & Electric Co. v. Miller Bros. 101 Ranch Trust*, 1935 OK 669, 46 P.2d 570) (emphasis supplied).

If this procedure is used, the OTA's constitutional concerns evaporate because separate verdicts are reached on the value of the initial taking (which includes anticipated damage to the property not taken) and the unanticipated damages to the property not taken. This principle can be found in a long line of

cases typified by *Cities Serv. Gas Co. v. Huebner,* 1948 OK 77, 197 P.2d 985, wherein the Court similarly held:

> [T]he condemnor may not urge its own negligence and trespass in order to mitigate the damages and thus require the condemnee to commence a tort action to recover for the portion of the damages caused by the negligence of the condemnor or its independent contractor, where such wrongful acts and resultant damages were incidental to the construction of the works.

Id., ¶ 0 (syllabus of the Court).

The well-established case law therefore turns on whether the damages are "incidental to the construction of the works" (*Cities Serv.*) and part of the condemnation case, or "not a necessary incident to the construction" (*Curtis*) and constitute a separate tort claim. In this case, both parties' briefs agree that the damage to the pond was neither contemplated nor a necessary incident to the planned construction. As such, the rule of *Curtis*—that the negligence damages should have been tried as a separate issue—was applicable here. If it had been followed, the problems raised by the OTA would not have arisen.

The only remaining unresolved question is whether the negligent damage to the pond should have been tried as an entirely separate case, or as a separate claim within the same case. *Ward Petroleum Corp. v. Stewart,* 2003 OK 11, 64 P.3d 1113, examined this question in relation to the Surface Damages Act, 52 O.S. §§ 318.2 *et seq.* The Court found that, because proceedings under the Surface Damages Act are to be tried in the same manner as condemnation proceedings, it was appropriate to look to condemnation procedure for guidance

in determining whether a related tort claim may be properly joined in a surface damages case. Examining condemnation procedure, *Ward Petroleum* held:

> For purposes of judicial convenience and efficiency, a surface owner may file a related tort claim in the same case in which a party has initiated a proceeding under the Surface Damages Act. However, the trial judge assigned to the case must assure that the statutory proceeding and the related tort claim are kept on two distinct procedural tracks, one track governed by the Act itself, the other governed by the Oklahoma Pleading Code. The procedural tracks must remain distinct throughout the entire case, including the trial phase.

Ward Petroleum, 2003 OK 11, ¶ 11.

This procedure clearly answers the OTA's constitutional concerns. If it is followed, the damages due to negligent injury of the remaining property are determined separately by the jury and do not impact the question of whether a condemnee is entitled to fees for the condemnation proceeding. It does not appear that this procedure was followed, or requested, in the current case. We further find no appeal of this apparent procedural error in the OTA's brief, and no objection to the procedure used at trial. As such, we find that, if there was any error below on these issues, it was invited error that cannot be remedied by appeal. *See Texas Petroleum v. Corporation Comm'n of the State of Oklahoma,* 1981 OK 86, ¶36, 651 P.2d 652 ("Parties to an action on appeal are not permitted to secure a reversal of a judgment upon error which they have invited and acquiesced in ...."). Use of the procedure outlined in *Cities Serv., Curtis,* and *Ward Petroleum* in which the initial taking and subsequent tortious damages to the remainder are treated as separate claims will prevent a recurrence of this situation.

Fees and Costs

The OTA also argues that the court awarded fees and costs that are not statutorily available in a condemnation proceeding.[7] Fees and costs in a condemnation proceeding can present a difficult problem because two separate and sometimes conflicting legal principles are involved. The first is that fees and costs are only recoverable if strictly authorized by statute. The second is that Oklahoma's Constitution requires just compensation for the state action of a taking. The line between these two requirements is not easily drawn.

The first question here is what costs are specifically allowed. The OTA argues that the court awarded certain litigation costs which are not recoverable under 66 O.S. § 55(D). Section 55(D) allows an owner "reasonable attorney, appraisal, engineering, and expert witness fees actually incurred because of the condemnation proceeding." *See also* 27 O.S. § 11(3). The OTA argues that these sections offer the exclusive list of the costs available in a condemnation proceeding, rather than an overlay to the general cost statute, 12 O.S. § 942.

We disagree. Section 942 provides:

> A judge of any court of this state may award the following as costs:
>
> 1. Any fees assessed by the court clerk or the clerk of the appellate court;

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[7] This question is further complicated by the fact that, as we previously noted, a condemnation claim and an unanticipated tortious damage to property claim were tried together as a simple condemnation claim. The negligent damage to property claim would have been independently fee-and-cost-bearing if properly tried according to the rule of *Curtis* and *Ward*. If, as the OTA appears to argue, some normal items of costs recoverable under 12 O.S. § 942 are not recoverable in a condemnation proceeding, two segregated cost applications were necessary. However, neither party followed this procedure.

2. Reasonable expenses for the giving of notice, including expenses for service of summons and other judicial process and expenses for publication;

3. Statutory witness fees and reasonable expenses for service of subpoenas;

4. Costs of copying papers necessarily used at trial, limited to the amount authorized by law. If no amount is specified, costs of copying papers shall be limited to ten cents ($0.10) per page;

5. Transcripts of the trial or another proceeding that the court determines are necessary to resolve the case;

6. Reasonable expenses for taking and transcribing deposition testimony, for furnishing copies to the witness and opposing counsel, and for recording deposition testimony on videotape, but not to exceed One Hundred Dollars ($100.00) per two-hour videotape, unless the court determines that a particular deposition was neither reasonable nor necessary; and

7. Any other expenses authorized by law to be collected as costs.

12 O.S. § 942 (emphasis added). Section 942(7) makes it clear that any court may award § 942 costs *and* any other expenses authorized by law to be collected as costs. Hence, costs in a condemnation proceeding are available pursuant to the specific statutes, being 27 O.S § 11(3) and 66 O.S. § 55(D), *in addition* to the general cost statute, being 12 O.S. § 942.

As to the constitutional requirement, *Oklahoma Tpk. Auth. v. New*, 1993 OK 42, ¶ 11, 853 P.2d 765, 767, holds that "where a party receives a jury verdict in a condemnation case in excess of the commissioners' award that party is entitled to recover costs of the jury trial ...." *Id.* (*citing Oklahoma City Urban Renewal Auth. v. Lindauer*, 1975 OK 58, 534 P.2d 682). *Lindauer*, in turn, states that "[a]s indicated in [*Grand River Dam Authority v. Jarvis*, 124 F.2d 914 (10th

Cir. 1942)] the cost of the original proceeding falls on the condemnor. Otherwise, there would be denial of just compensation." *Lindauer,* 1975 OK 58, ¶ 11.

Finally, *Grand River Dam Authority* states that:

> Without exception, the decisions hold that in an original proceeding for the condemnation of land the costs arising in that proceeding fall on the condemnor. The reason therefor is that to take the land against the landowner's wishes and then charge him for the cost of taking would violate the constitutional prohibition against the taking of private property without just compensation. Lewis on Eminent Domain, 3rd Ed., Sec. 812, states the rule as follows: "It seems to us that courts should be guided by the following principles and consideration in the matter of costs: By the Constitution the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before his property is taken or his possession disturbed. If the parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional.

124 F.2d at 916 (emphasis supplied). The Supreme Court's citation of *Grand River Dam Auth.* raises the point that statutes restricting the costs recoverable by a landowner are subject to the constitutional overlay and that full compensation is not provided if the landowner has to pay substantial expenses in order to obtain proper compensation.

The OTA relies primarily on two cases to argue that certain costs were not available in this case: *Oklahoma Tpk. Auth. v. New*, 1993 OK 42, 853 P.2d 765, and *Oklahoma Tpk. Auth. v. Horn*, 1993 OK 123, 861 P.2d 304. Both cases broadly state that "litigation costs" were not recoverable as a separate item

because they were part of the "overhead" of the provider. This statement must be carefully parsed because § 942 clearly allows for some "litigation costs." The OTA, however, proposes an interpretation that *all* litigation costs are inherently part of "overhead," and hence not recoverable. This interpretation cannot be squared with the constitutional requirement of full compensation, the fact some litigation costs are recoverable under § 942, or the generally accepted definition of "overhead."[8]

Neither *New* nor *Horn* gives any definition of what constitutes overhead in a legal setting, but we find the word has an accepted meaning in a business context. It is generally defined as "business expenses (such as rent, insurance, or heating) not chargeable to a particular part of the work or product." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/overhead (last accessed June, 27, 2025). Thus, we view "overhead" as referring to all the expenses a company incurs that do not directly contribute to the production of goods or provision of services. When a professional hourly fee is charged, some portion of that fee, whether calculated or not, is inherently dedicated to paying the overhead of the business. The client pays a share of the overhead through the fee, and it cannot be claimed a second time as a "cost." We will approach the OTA's objections with reference to these principles, examining each category of challenged expense.

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[8] Further, if the Supreme Court had intended to rule that only the costs stated in § 55(D) are recoverable, it would simply have said so, without introducing the concept of "overhead."

Paralegal Fees

Turning to the OTA's specific objections, it first argues that paralegal fees were improperly claimed, relying on the rule of *Taylor v. Chubb Grp. of Ins. Companies*, 1994 OK 47, 874 P.2d 806. *Taylor* holds that "there is no reason to exclude charges for the time of legal assistants in computing statutorily mandated attorney fees where such charges are customarily made to clients and the legal assistant's services are useful to the client." *Id.* ¶ 12. It also holds that the time of paralegals that is includable "is limited to charges for work performed, which otherwise would have had to have been performed by a licensed attorney at a higher rate." *Id.* ¶ 13. *Taylor* identified some paralegal tasks that would otherwise be performed by an attorney. These include:

—interview clients
—draft pleadings and other documents
—carry on legal research, both conventional and computer aided
—research public records
—prepare discovery requests and responses
—schedule depositions and prepare notices and subpoenas
—summarize depositions and other discovery responses
—coordinate and manage document production
—locate and interview witnesses
—organize pleadings, trial exhibits, and other documents
—prepare witness and exhibit lists
—prepare trial notebooks
—prepare for the attendance of witnesses at trial
—assist lawyers at trials

Id. ¶15. This list was not exclusive, however, but was prefaced with the caveat: "among other tasks, a legal assistant may ...." *Id.* On appeal, it is the OTA's burden to show that the court-awarded paralegal fees specifically do not fall within the rule of *Taylor*. Instead, the OTA cites to the opinion of its fee expert,

Tom Gann, that he had reviewed the paralegal time and found that some work was done by "clerical types" and that 70% of this work "represented administrative type work." Tr. (November 29, 2022), 89-91. We find this insufficient to demonstrate an error on appeal. This testimony identified no specific entry and made no reference to the examples listed in *Taylor*. As such, the question was a matter of the credibility of Mr. Gann's overall assessment as to who was a "clerical type," and his characterization of the work that was performed. The court was not required to accept this opinion. We find no error in the court's allowance of paralegal fees.

Mediation Costs

This case also featured a court-ordered mediation, which was unsuccessful, and condemnees were awarded $2,116.25 for costs associated with this mediation. The OTA argues that there is no statutory basis for claiming mediation costs. We agree with OTA that no statutory or common law provision classifies mediation costs as a recoverable cost, even when the mediation is court-ordered. We note that although the condemnees characterize the mediation as "court-ordered," they point only to the scheduling order for this claim. They do not point to any place in the record where they objected to the attempted mediation. Nor do they point to any authority generally allowing mediation or other costs related to settlement attempts to be recoverable under § 942. As such we find the mediation costs to be in line with the sorts of "litigation

expenses" disallowed in *New*. *See Oklahoma Tpk. Auth. v. New*, 1993 OK 42, ¶ 10.[9]

Other Litigation Costs

The OTA next argues that an invoice of $3,685 paid to ProLegalTech, R. 477, for unknown costs related to the jury trial, as well as various costs paid to the law firm (primarily consisting of mileage, postage, copying, and parking, and totaling $2,402.41, R. 478-81) are not recoverable pursuant to § 942 or *New*. We again agree. These costs represent the types of "litigation expenses" disallowed in *New* as "overhead."[10] As such, we find these costs were not recoverable.[11]

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[9] The condemnees argue that such costs are allowable pursuant to *New Life Pentecostal*, 1994 OK 9, and *State ex rel. Dep't of Transp. v. United Commercial Properties, Inc.*, 2008 OK CIV APP 109, 214 P.3d 810. *New Life Pentecostal,* however, concerns how a contractually incurred *attorney fee* should be awarded in a condemnation case, rather than contractually incurred costs not otherwise recoverable by statute. *United Commercial Properties* examines how contractually incurred *appraisal fees* should be approached. Appraisal fees were specifically authorized in that case by 27 O.S. § 1. Neither case stands for the proposition that any fee or cost that a litigant agrees contractually to pay is recoverable without other statutory or common-law authority.

[10] We note the law firm's invoice reflects $109.25 in transcripts, as well as various copying costs. While some of these charges *could* be recoverable under § 942, if, for example the copies were "necessarily used at trial" or if the transcripts were "necessary to resolve the case," 12 O.S. § 942, we find no specific showing that these requirements were proven on this record. We further note that the copy cost of twenty-five cents a page is two-and-half times the allowable statutory rate.

[11] We note the condemnees concede that the contract in question specifically warns that these expenses may not be legally recoverable, and yet condemnees argue that they made them recoverable simply by agreeing to pay them. And indeed, the trial court specifically declined to reduce the requests "since they were part of the attorney-client fee agreement in this case." Tr. (ruling only, Nov. 29, 2023), 4. We reject the broad argument that there is no limit to the recovery of costs if they are contractually charged to the condemnee. The various condemnation statutes are rooted deeply in policy considerations, and this argument, if successful, would strip the legislature of its power to regulate condemnation proceedings. We do not find that the constitutional requirement of full compensation extends universally to such an agreement. A client could, for example, agree to a contract requiring the client to buy the attorney a new suit if the attorney recovers more than ten percent above the commissioners' award. This may indeed be a cost required by the litigation contract, but it is not a cost properly incurred in determining just compensation.

Engineering and Appraisal Fees

The OTA objects to the reasonableness of certain engineering and appraisal fees awarded pursuant to § 55(D). *Oklahoma Tpk. Auth. v. Little*, 1993 OK 116, 860 P.2d 226, establishes factors similar to the *Burk* factors to assess these fees:

1. Time and labor required.
2. The uniqueness of the property.
3. The skill necessary to appraise the particular property.
4. The usual fee charged for similar appraisals.
5. The urgency of getting the appraisal submitted.
6. The value of the property involved.
7. The experience, reputation and ability of the appraisers.

Id. ¶ 14. Oddly, having specifically listed the *Little* factors, the OTA's appellate brief makes no attempt to apply them in this case. Instead, it argues that the fees should have been denied or reduced for "block billing," citing *Silver Creek Investments, Inc. v. Whitten Const. Mgmt., Inc.*, 2013 OK CIV APP 49, ¶ 17, 307 P.3d 360, 366 as authority. *Silver Creek* is an attorney fee case dealing with attorney time being "round[ed] to the nearest hour." *Id.* The OTA inherently argues that the standards applicable to attorney time, often billed in intervals of six or ten minutes to a specific task, apply to all professional fees claimed as costs. We find no authority for this position in Oklahoma law, and the OTA brings no specific arguments that the fees charged were unreasonable.

OTA next argues that fees charged by an allegedly unretained expert are not available under the applicable statutes. Condemnees claimed $2,500 in fees paid to an appraiser or engineer identified as "Lett."[12] The OTA argues that Lett provided no formal opinion to the condemnees and they did not use his work; hence, the $2,500 is not recoverable as "expert" costs. We have extensively searched the one-hundred-plus pages of the record cited to support this fact but have not found support for it.[13] Oklahoma Supreme Court Rule 1.11(e)(1) provides in part that facts stated must be supported by citation to the record where such facts occur. Consistent with that requirement, we are not required to search the multiple volumes of this record to find where those facts were demonstrated in the evidence. Under such circumstances an appellate court is justified in ignoring assignments of error dependent upon those facts. *Patzkowsky v. State ex rel. Oklahoma Bd. of Agric.*, 2009 OK CIV APP 18, 217

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[12] Page twenty-eight of the OTA's brief-in-chief refers to Lett as an "appraiser," and page twenty-nine refers to him as an "engineer."

[13] The OTA's brief cites to "Pl's resp to Def.'s Application for Fees at Exhibit 'K' at Def's Response To Interrog No. 15, ROA at 503-609" to support this fact. Attempting to decode this cryptogram, the OTA's response to the fee application is found at record 503-609. An "exhibit K" does appear at R. 547 but this is an aerial picture of part of the subject property. A second "exhibit K" appears at R. 577 but this is a financial statement of the condemnees.

The OTA's trial court objection to fees states that this information can be found in a different place—"Krekes' Supplemental Responses to Plaintiff's First Set of Interrogatories and Requests for Production 4/30/21, Response to Interrogatory No. 15, attached as 'Exhibit M.'" *See* R. 523. There are also two exhibits marked 'M' in R. 503-609. One of these is a photograph at R. 549, but the other *is* the supplemental responses, which are found at R. 594.

Having found the answer to interrogatory 15 in exhibit 'M,' however, it simply refers to answer # 4 and "attached Exhibit F." Answer # 4 states condemnees' personal valuation of the property. Exhibit F is found at R. 608 and shows a bathymetric survey of lake depth with the notation "3286 CY SILT" in the center. No evidence regarding the non-use of Lett's work in the case is found on any of these pages.

P.3d 146 (citing *Peters v. Wallace*, 1927 OK 279, 260 P. 42). We find no support in the record for the allegation that Lett's work was not used in the case. As such, we find no error on that basis.

CONCLUSION

We find no general constitutional infirmity in the fee provisions of the Oklahoma condemnation statutes. Existing law is quite clear that claims for damages to land not taken that were not anticipated or inherent to the planned operations of the condemnor must be tried as a separate issue from that of the value of the intended taking. If this procedure had been followed, the concerns of the OTA expressed in their brief would not have arisen. That such a procedure was not followed cannot be laid at the feet of the trial court, but rests solely with the OTA itself. As such we decline to reverse on this basis or declare any statute unconstitutional.

We find it clear that the recoverable costs identified in 66 O.S. § 55(D) and 27 O.S. § 11 are not exclusive, and the general costs statute, 12 O.S. § 942, is also applicable. Some of the recovered costs in this case are permitted by these statutes; however, we find no statutory basis for the recovery of general litigation expenses totaling $6,087.41 and mediation expenses totaling $2,116.25. As such, the combined fee and cost award is modified by reducing it by $8,203.66. In all other respects, the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

WISEMAN, P.J., and FISCHER, J., concur.

August 29, 2025