

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH E. FRY,

Plaintiff-Appellant,

v

CARMAN DRAIN NO. 323 and EATON
COUNTY DRAIN COMMISSIONER,

Defendants-Appellees.

UNPUBLISHED

November 15, 2002

No. 233744

Eaton Circuit Court

LC No. 00-000282-AV

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants' motion for costs and attorney fees. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's property is served by two drains, including Carman Drain No. 323. The drain commissioner conducted a review of apportionments, and assessed 0.2934 percent of any future assessment to plaintiff's property. A board of review upheld the assessment.

Plaintiff claimed an appeal to circuit court. Defendants moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that because MCL 280.155 gave the probate court exclusive jurisdiction to hear drain apportionment appeals, the circuit court lacked subject matter jurisdiction over plaintiff's appeal. MCL 600.605. The circuit court granted the motion. The court observed that MCL 280.161 provides that proceedings establishing a drain or levying taxes therefore are subject to review on certiorari.¹ The circuit court found that plaintiff did not properly file the case as one seeking superintending control. Furthermore, the circuit court stated that no evidence supported plaintiff's allegation that the board of review's decision was unreasonable.²

Defendants sought costs and attorney fees pursuant to MCL 280.160, MCL 280.161, and MCR 2.625(A)(2). They emphasized that plaintiff relied on MCL 280.161 in bringing his appeal

¹ A superintending control order has replaced a writ of certiorari. MCR 3.302(C).

² Plaintiff does not challenge this decision on appeal.

in circuit court, and noted that the statute provided that if the proceedings were sustained, the party bringing certiorari was liable for costs. Defendants asserted that even if MCL 280.161 did not apply to the issue of costs and fees, MCL 280.160, which provided that if the decision of the drain commissioner was sustained the party appealing the decision was liable for costs, supported an award. The circuit court granted the motion. The court noted that in granting defendants' motion for summary disposition it held that MCL 280.161 did not apply; nevertheless, it concluded that defendants were entitled to costs and attorney fees under that statute. The court awarded defendant \$2,032.50 in costs and attorney fees.

We review an award of costs and attorney fees for an abuse of discretion. *Citizens Ins Co v Juno Lighting, Inc*, 247 Mich App 236, 245; 635 NW2d 379 (2001); *Michigan Educational Employees Mut Ins Co v Turow*, 242 Mich App 112, 118; 617 NW2d 725 (2000). Attorney fees are not generally recoverable as an element of costs or as an item of damages unless expressly allowed by a statute or court rule. *DeWald v Isola (After Remand)*, 188 Mich App 697, 699; 470 NW2d 505 (1991).

Plaintiff argues the trial court abused its discretion by awarding defendants costs and attorney fees. We disagree and affirm the circuit court's award of costs and attorney fees.³ Plaintiff sought appellate relief in the form of an appeal to circuit court, and relied on MCL 280.161 in doing so. The circuit court concluded that plaintiff did not properly file his case as one seeking superintending control, and dismissed the case on that basis. The circuit court observed that plaintiff could not have prevailed even if he had brought a proper case seeking superintending control because no evidence supported plaintiff's argument that the board of review's decision was unreasonable.

MCL 280.161 provides that if the board of review's decision is sustained the party seeking certiorari (superintending control) is liable for "costs." MCL 280.158 and MCL 280.160 provide that in a case in which the drain commissioner's decision is sustained by the board of review, the appellant shall pay "the whole costs and expenses" and "all costs," respectively. This language suggests that attorney fees are recoverable as an element of costs.

Furthermore, this Court has held that in certain instances appellate attorney fees are recoverable even when not specifically provided for by statute or court rule. See *Solution Source, Inc v LPR Assoc Ltd Partnership*, ___ Mich App ___, ___ NW2d ___ (Docket No. 226991, pub'd July 30, 2002 at 9:05 a.m.), slip op at 3 (and cases cited therein). The circuit court did not abuse its discretion by awarding costs and attorney fees.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter

³ Plaintiff did not raise the specific issue of the lack of a statutory basis for an award of attorney fees in the circuit court. The issue is not properly preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, we will address it.