

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UNPUBLISHED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.

GRIFFIN, P.J. (*dissenting*).

The majority concludes that the statutory term “costs” contained in MCL 280.160 and MCL 280.161 includes a discretionary award of actual attorney fees. I disagree and therefore respectfully dissent. It is well established that Michigan follows the “American rule” regarding the award of attorney fees. Under this rule, attorney fees are not recoverable as an element of costs or an item of damages unless *expressly* authorized by statute or court rule. *Popma v Auto Club Ins Ass’n*, 446 Mich 460, 474; 521 NW2d 831 (1994); *Clute v General Accident Assurance Co*, 177 Mich App 411, 417; 442 NW2d 689 (1989).

In the context of the Michigan Environmental Protection Act, MCL 324.1703(3), our Supreme Court has ruled that the statutory term “costs” does not include an award of attorney fees. *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 37-44; 516 NW2d 641 (1998). In *Nemeth*, the Supreme Court ruled that the term “costs” has a technical meaning known to the Legislature not to include an award of attorney fees:

. . . the Legislature is the entity that defined “costs” in § 2405. Thus, to charge the Legislature, the body that defined costs in § 2405 and enacted the MEPA using the term “costs,” with knowledge of the American rule and with the technical meaning of the word “costs” is the only logical result. Moreover, it is a well-established principle that the Legislature is presumed to be aware of all existing statutes when enacting new law. *Walen v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993).

Perhaps it is true that the inability of a trial judge to award attorney fees to the MEPA plaintiffs may impede the enforcement of the MEPA. However, the proper forum for this public policy debate is the Legislature. The language of the

statute is clear and unambiguous. We cannot create ambiguity where there is none by looking to the legislative history or by *assuming* the Legislature codified a not-so-“well-established” common-law doctrine. Thus, we cannot and should not unduly expand the meaning of the term “costs.” The Legislature has spoken, in accordance with RJA, § 2405, regarding which costs are apportioned in the interests of justice in an action under the MEPA, and it has *not* included attorney fees. [*Id.* at 42-43 (emphasis in original).]

For the reasons stated in *Nemeth*, I would similarly hold in the present case that the statutory term “costs” has technical meaning known by the Legislature that does not include an award of attorney fees.

I would reverse the award of attorney fees.

/s/ Richard Allen Griffin