STATE OF MICHIGAN

COURT OF APPEALS

TCG DETROIT, Plaintiff-Counterdefendant/ Appellee,	FOR PUBLICATION March 4, 2004 9:10 a.m.
v	No. 232609 Wayne Circuit Court
CITY OF DEARBORN, Defendant-Counterplaintiff/ Appellant.	LC No. 98-803937-CK Updated Copy May 21, 2004

Before: Smolenski, P.J., and White and Wilder, JJ.

WILDER, J. (*concurring in part and dissenting in part*).

I concur and join with the majority in finding that the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, specifically § 253, MCL 484.2253, does not violate the Michigan Constitution, Const 1963, art 7, § 29. I disagree, however, with the majority's conclusion that the trial court properly interpreted and applied § 253 to require a substantial nexus between the fee defendant charged plaintiff and the costs incurred by defendant to maintain its rights-of-way, easements, or public places attributable to use by plaintiff. Accordingly, I respectfully dissent from sections III, IV, and V of the majority opinion.

Article 2A of the MTA, before its repeal, provided in part:

> (1) Except as provided in subsections (2) and (3), a local unit of government shall grant a permit for access to and the ongoing use of all right-of-ways, easements, and public places under its control and jurisdiction to providers of telecommunication services.
>
> (2) This section shall not limit a local unit of government's right to review and approve a provider's access to and ongoing use of a right-of-way, easement, or public place or limit the unit's authority to ensure and protect the health, safety, and welfare of the public.
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> (3) A local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place. A provider's right to

> access and use of a right-of-way, easement, or public place shall not be unreasonably denied by a local unit of government. A local unit of government may require as a condition of the permit that a bond be posted by the provider, which shall not exceed the reasonable cost, to ensure that the right-of-way, easement, or public place is returned to its original condition during and after the provider's access and use. [MCL 484.2251.]

"Any conditions of a permit granted under section 251 shall be limited to the provider's access and usage of any right-of-way, easement, or public place." MCL 484.2252. "Any fees or assessments made under section 251 [MCL 484.2251] shall be on a nondiscriminatory basis and shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right-of-ways, easements, or public places used by a provider." MCL 484.2253.

Statutory interpretation is a question of law that is considered de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Ross v Michigan*, 255 Mich App 51, 54; 662 NW2d 36 (2003). The rules of statutory interpretation are well-established: The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Danse Corp v Madison Hts*, 466 Mich 175, 181-182; 644 NW2d 721 (2002). The Legislature is presumed to intend the meaning it plainly expressed. *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 276-277; 621 NW2d 233 (2000). "In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). However, when the statute's language is clear and unambiguous, judicial construction is neither required nor permitted. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

As an initial matter, I note my disagreement with the majority's conclusion that plaintiff did not have the burden to prove that the proposed fee, four percent of plaintiff's gross revenues, plus $50,000, exceeded the fixed and variable costs to defendant "in granting a permit and maintaining the right-of-ways, easements, or public places used by a provider." It is well-settled that the "plaintiff has the burden of proof (risk of nonpersuasion) for all elements necessary to establish the case." *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976). Plaintiff alleged that defendant was in violation of the MTA because "[t]he franchise fees [defendant] seeks . . . exceed the fixed and variable costs it would incur as a result of granting a permit to plaintiff . . . and in maintaining the . . . right of way to be used by plaintiff." Contrary to the finding by the majority, I would conclude that precisely because the statute does not shift the burden of proof to defendant, plaintiff bears the traditional burden of proof of a plaintiff and must establish by a preponderance of the evidence that the fee was in violation of the MTA. I would find that the trial court erred as a matter of law by imposing the burden of proof on the wrong party. *Pickering v Pickering*, 253 Mich App 694, 697; 659 NW2d 649 (2002), citing *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

The majority also concludes that the trial court properly applied the language of § 253 by accepting the proposition advanced by plaintiff that § 253 required defendant to establish a substantial nexus, or at least a reasonable relationship, between the actual maintenance costs

incurred by defendant and plaintiff's use of specific public rights-of-way located in defendant city. In finding this interpretation of § 253 to be credible, the majority rejects, as did the trial court, defendant's argument that this interpretation improperly limits the fee to "incremental" or "marginal" costs. I agree with the argument asserted by defendant and would conclude that application of the statute by the trial court was erroneous.

In the business context and in the context of this case, fixed costs are accurately described as costs that do not vary with output. Butler, Economic Analysis for Lawyers, p 920; see also McCain, *Essential Principles of Economics: A Hyperlink Text* <http://william-king.www.drexel.edu/top/prin/EcoToC.html> (1998), ch 8, and <http://william-king.www.drexel.edu/top/prin/txt/cost/cost2.html> (stating that "[f]ixed costs are the costs of the investment goods used by a firm, reflecting a long-term commitment that can only be recovered by earning out the investment in the production of goods and services for sale"). Thus, fixed costs continue to be incurred as long as the entity incurring the costs remains ongoing and the assets of the entity have alternative uses. See Butler and McCain. Variable costs are defined as costs that vary with the rate of output, and include items such as wages paid to workers and payments for raw materials. Butler, p 936; see also McCain <http://william-king.www.drexel.edu/top/prin/txt/cost/cost2.html> (stating that "[v]ariable costs are costs that can be varied flexibly as conditions change," such as labor costs).

Applied in the context of this case, maintenance of the rights-of-way, easements, and public places in defendant city is a fixed cost. In other words, whether plaintiff (or any other specific company) does business in defendant city, defendant *will* (or at least should) incur certain costs in the maintenance of its rights-of-way, easements, and public places. Because these maintenance costs will be incurred separately and distinctly from any particular additional costs incurred only because plaintiff (or some other provider) chooses to do business in defendant city, these fixed costs may or may not have a particular nexus or relationship to plaintiff's use of the rights-of-way, easements, and public places. Nevertheless, if the subject rights-of-way, easements, and public places in defendant city *are used* by plaintiff in any manner, under the language of § 253 a fee may properly be charged to plaintiff because of this usage. The statute requires that the fee be nondiscriminatory, suggesting that the costs reflected in the fee may not be unfairly allocated among the various users of the rights-of-way, easements, and public places. The statute contains no language, however, that requires the fee to be based solely on the costs directly incurred because the provider seeks a permit or uses the rights-of-way, easements, and public places. In my judgment, the statutory scheme allows the charging of a fee that is based not just on the *cost attributed to* a particular use of the rights-of-way, easements, and public places by a particular provider, but more broadly encompasses the *costs of maintaining* the rights-of-way, easements, and public places used by the provider.

Defendant argued in this Court and at the trial court that as a matter of economics, accounting, and statutory application, the fixed costs it incurred to maintain rights-of-way, easements, and public places are properly allocated on a proportional basis to plaintiff under § 253. The trial court rejected this assertion, and the evidence to support it, on the ground that "those costs that make up that amount really have no relationship to the *cost brought about by TCG*." (Emphasis added.) While the majority affirms this conclusion, I would find that the trial court erred. The trial court's ruling is inconsistent with the language of § 253, which does not limit the fee to only an amount having a specific nexus or relationship to the additional costs

incurred when the provider seeks a permit. As contended by defendant, such a fee reflects only the marginal costs in processing the permit, i.e., the cost of the additional inputs needed to produce the new output, Butler, *supra,* p 927, and not the fixed and variable costs designated in the statute.

The majority acknowledges that the term "fixed and variable costs" entails more than the incremental or marginal costs attributed to plaintiff's use of the rights-of-way, easements, and public places maintained by defendant city, but concludes nonetheless that defendant's proofs failed to show how all its costs incident to maintaining its rights-of-way, easements, and public places could be properly attributable to plaintiff. As I stated previously, however, the burden of proof should rest with plaintiff, and not defendant. Additionally, the trial court accepted as credible expert testimony presented by plaintiff that the majority acknowledges is suspect. Unlike the majority, I would find that the trial court clearly erred in finding on the basis of this testimony that defendant's fixed and variable costs attributable to plaintiff, "w[ere] de minimis."[1]

Moreover and equally as important, the trial court precluded by way of a ruling in limine relevant expert testimony on the subject of cost apportionment through which defendant purported to explain why and how all defendant's fixed and variable costs, including costs attributable to the police and fire departments and the district court, should be considered when determining whether the fee exceeds defendant's fixed and variable costs. Defendant's theory of the case was that its proposed fee, based on a percentage of plaintiff's revenues, did not exceed the fixed and variable costs of maintaining its rights-of-way, easements, and public places, and that the fee appropriately reflected costs properly apportioned to plaintiff. I would find that the trial court abused its discretion in excluding the relevant evidence that defendant offered in support of this contention.

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). Ordinarily, we find that the trial court has abused its discretion "only in the extreme case where the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003) (citations

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[1] In agreeing with the trial court's finding on this issue, the majority notes that under the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, 2002 PA 48, MCL 484.3101 *et seq*., the fees providers such as TCG may be charged for use of public rights-of-way are a small fraction of the fees Dearborn sought in this case. The majority further cites the comments of Laura Chappelle, former Michigan Public Service Commission Chairperson, that, in her view, the fees charged by certain municipalities sought to thwart the legislative intent of § 253 of the MTA that fees be based on actual costs. However, perhaps it is instructive in our construction of § 253 that the Legislature did *not* use the term of art "fixed and variable costs" when it enacted MCL 484.3108, but rather established by statute a fixed price to be charged by the municipality.

omitted). A trial court's erroneous decision to admit or exclude evidence will not warrant reversal unless a substantial right of a party is affected, MRE 103, and it affirmatively appears that the failure to grant such relief is inconsistent with substantial justice. MCR 2.613(A); *Lewis, supra*.

In the present case, I would conclude that the exclusion of the evidence warrants reversal. The excluded evidence is highly relevant to: (1) the calculation of defendant's fixed and variable costs within the meaning of the statute; (2) whether costs attributed to the police and fire departments and the courts are properly included in this calculation; and (3) whether the proposed fee exceeds those fixed and variable costs properly attributable to plaintiff. The trial court's exclusion of the evidence prevented defendant from presenting critical evidence in support of its theory of the case. I would find that it is inconsistent with substantial justice, and thus significantly affecting defendant's substantial rights, to affirm the trial court's ruling on the basis that there was insufficient evidence to support defendant's assertion of its fixed and variable costs, the insufficiency of which stems from the trial court's ruling precluding the admission of such evidence.

For the reasons stated above, I join with the majority opinion in finding that the Michigan MTA, specifically § 253, does not violate the Michigan Constitution, Const 1963, art 7, § 29. I would reverse and remand for a new trial with regard to, and therefore respectfully dissent from, sections III, IV, and V of the majority opinion.

/s/ Kurtis T. Wilder