

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DEPARTMENT OF CIVIL RIGHTS,

UNPUBLISHED  
October 25, 2016

Petitioner,

and

MAZYN BARASH,

Petitioner-Appellant,

v

No. 326928  
Oakland Circuit Court  
LC No. 2012-127264-AV

SUBURBAN MOBILITY AUTHORITY FOR  
REGIONAL TRANSPORTATION,

Respondent-Appellee.

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Before: BECKERING, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Petitioner Mazyn Barash appeals as of right from the circuit court's March 18, 2015 order denying his motion for costs and appellate attorney fees. For the reasons stated below, we vacate the circuit court's order and remand the matter for further proceedings.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

Barash filed a charge of discrimination against the respondent, Suburban Mobility Authority for Regional Transportation (SMART), with the Michigan Department of Civil Rights. (the "department"). The department brought the charge to the Michigan Civil Rights Commission ("the commission"), and on May 25, 2012, the commission found SMART liable for violating the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 USC 2000, *et seq.* Accordingly, the commission awarded Barash \$218,016.00 in damages (\$150,000 in noneconomic damages and \$68,016 in economic damages), as well as \$121,250.75 in attorney fees and \$3,348.97 in costs. SMART appealed the commission's decision to the Oakland Circuit Court, which affirmed the decision, determining, among other things, that the commission properly awarded costs and attorney fees to Barash. The circuit court issued its final opinion and order on June 10, 2014.

SMART filed an application for leave to appeal with this Court, raising arguments related to the commission's ultimate determination in Barash's favor and its awards of economic

damages and costs and attorney fees. Shortly after SMART filed its application with this Court, Barash filed a motion with the circuit court seeking appellate costs and attorney fees for having to defend the appeal of the commission's final order to the circuit court. On July 9, 2014, the circuit court held a hearing on appellant's motion, and on July 11, 2014, it entered an order denying Barash's motion without prejudice "for want of research."

On January 20, 2015, this Court denied SMART's application for lack of merit in the grounds presented. *Dep't of Civil Rights v Suburban Mobility Auth for Regional Transp*, unpublished order of the Court of Appeals, entered January 20, 2015 (Docket No. 322497). SMART did not seek reconsideration or file an application for leave to appeal to our Supreme Court.

Subsequent to the Court's denial of SMART's application, Barash filed a renewed motion for appellate costs and attorney fees with the circuit court, seeking \$84,094.29 on the basis that he was "entitled to recoup all of his appellate costs and attorney fees incurred in having to defend SMART'S appeal and leaves to appeal" related to the commission's final order. SMART replied that the statutory authority relied upon by Barash required him to request fees and costs *before* the circuit court issued its final opinion and order on June 10, 2014, which Barash did not do. Further, SMART claimed that under MCR 7.115(B), Barash was required to file a certified bill of costs with the court clerk within 28 days after the June 10, 2014 decision, which Barash also did not do.

At the March 18, 2015 hearing on the matter, the circuit court agreed with SMART that Barash's request for appellate attorney fees was untimely because it was not made "prior or at the time of the rendering of the judgment," and entered a corresponding order denying Barash's request. Barash filed a motion for reconsideration, which the circuit court denied. This appeal followed.

## II. ANALYSIS

Pursuant to the ELCRA, a claimant seeking a remedy to an alleged violation of the act has two options. Under Article 6, MCL 37.2601 *et seq.*, a claimant may file a complaint with the civil rights department, which can then bring such charge to the commission. See MCL 37.2602(c). If the commission, after a hearing on a charge issued by the department determines that the respondent has violated the ELRCA, the commission must issue an order reflecting that fact and may award damages for injury or loss to the complainant, including a reasonable attorney's fee. MCL 37.2605(1), (2)(i) and (j). A complainant and a respondent have a right of appeal from a final order of the commission before the circuit court. MCL 37.2606(1). Such appeal is reviewed *de novo*, MCL 37.2606(1), and the circuit court may "enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the commission, or may remand the case to the commission for further proceedings," MCL

37.2606(2). The final judgment or decree of the circuit court is then appealable to this Court in the same manner and form as other appeals from the circuit court. MCL 37.2606(3).<sup>1</sup>

Alternatively, a claimant may skip the filing of a complaint with the civil rights department and simply commence a civil action in the circuit court pursuant to Article 8, MCL 37.2801 *et seq.* A final judgment or order of the circuit court in such an action is appealable by right to this Court. MCR 7.203(A)(1).

As noted above, in the instant case Barash filed his complaint with the department, which was brought to and ruled on in Barash's favor by the commission, and SMART's appeal of right was handled in the circuit court. This Court denied SMART's application for leave to appeal due to lack of merit. In requesting appellate attorney fees for having to defend his victory on appeal, Barash relies on MCL 37.2802, a statute found in Article 8 of the ELCRA, and argues that the circuit court abused its discretion in denying his request.<sup>2</sup> SMART contends that, because Barash sought his remedy under Article 6, he cannot now rely on Article 8 to support his claim for appellate attorney fees. SMART further contends that Barash is not entitled to a discretionary award of appellate fees under Article 6 because he has already requested and received attorney fees under this article for pursuit of his claim before the commission. Finally, SMART asserts that Barash waived any right he might have to appellate attorney fees under MCL 37.2802 by failing to request such before the circuit court issued its order affirming the commission's final order, or by filing a timely bill of costs with the court clerk.

We review a circuit court's decision to grant or deny an award of attorney fees under the ELCRA for an abuse of discretion. *King v Gen Motors Corp*, 136 Mich App 301, 307; 356 NW2d 626 (1984). A court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). In addition, an error of law necessarily constitutes an abuse of discretion. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012). To the extent that the attorney fee decision involves underlying questions of law, such as the proper interpretation and application of a statute, this Court reviews those underlying legal questions *de novo*. *Id.* at 216-217.

"A court may award costs and attorney fees only when specifically authorized by statute, court rule, or a recognized exception." *In re Waters Drain Drainage Dist*, 296 Mich App at 217. Barash asserts that the circuit court was authorized to award him costs and attorney fees pursuant to MCL 37.2802, which states:

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<sup>1</sup> An appeal to this Court from the circuit court's ruling is by leave in such circumstances. See MCR 7.103(A),(4), MCR 7.203(A)(1)(a) and (B)(1).

<sup>2</sup> Barash does not challenge the circuit court's denial of his request for costs. Because he does not raise this issue on appeal, we assume that he has abandoned it. *Chrysler Corp v Nohmer*, 319 Mich 153, 164; 29 NW2d 149 (1947) (deeming abandoned a claim raised by a party in the trial court but not mentioned in the party's brief).

A court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.

The “article” referred to in the statute is Article 8, which, as indicated above, permits a complainant to seek injunctive relief, damages, or both, for an alleged violation of the ELCRA by means of a civil action filed in circuit court. MCL 37.2801. Thus, MCL 37.2802 authorizes a court to exercise its discretion by granting an award of reasonable attorney fees to a plaintiff in such an action.

Further, this Court has determined that, in addition to supporting a grant of attorney fees at the trial court level, MCL 37.2802 also supports a discretionary award of attorney fees at the appellate level. *McLemore v Detroit Receiving Hosp and Univ Med Ctr*, 196 Mich App 391, 402-403; 493 NW2d 441 (1992). Moreover, in subsequent decisions we broadened our conclusion in *McLemore* to acknowledge that an award of appellate attorney fees is proper under the act itself. See *Schellenberg v Rochester Elks*, 228 Mich App 20, 56; 577 NW2d 163 (1998) (acknowledging that recovery of appellate attorney fees incurred in defending an appeal and prosecuting a cross appeal “is proper under the [civil rights] act”); *Grow v WA Thomas Co*, 236 Mich App 696, 720; 601 NW2d 426 (1999) (“[T]his Court has held that an award of appellate attorney fees is proper under the C[ivil] R[ights] A[ct].”).<sup>3</sup> Our prior decisions addressing the availability of appellate attorney fees under the ELCRA have pertained to actions brought under Article 8. This is the first time we have been called upon to consider the availability of appellate attorney fees under the ELCRA in actions brought under Article 6.

The Legislature has provided a separate provision authorizing attorney fees in civil rights proceedings initiated under Article 6. MCL 37.2605. If, after a “hearing on a charge issued by the department, “the commission determines that the respondent has violated the ELCRA, MLC 37.2605(1), the commission may order actions that include, “but [are] not limited to”

(i) Payment to the complainant of damages for an injury or loss caused by a violation of this act, including a reasonable attorney’s fee.

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<sup>3</sup> See also *Miles v TGI Friday’s*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 1997 (Docket No. 191337); *Allen v United Ambulance Serv*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 1998 (Docket No. 191706); *Putnam v GMIS, Inc*, 65 F3d 169 (1995) (noting that, under Michigan law, “a prevailing Plaintiff under the Elliott-Larsen Civil Rights Act may recover appellate attorney fees”). Although we are not bound by unpublished opinions, MCR 7.215(C)(1), we may consider them instructive or persuasive, *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 416, 432; 648 NW2d 205 (2002). Likewise, “[a]lthough the decisions of lower federal courts are not binding precedents, federal decisions interpreting Michigan law are often persuasive.” *Omian v Chrysler Group, LLC*, 309 Mich App 297, 307 n 6; 869 NW2d 625 (2015)(quotation marks and citation omitted).

(j) Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees, if the commission determines that award to be appropriate. [MCL 37.2605(2)(i) and (j).]

MCL 37.2605(2)(j) authorizes a discretionary award of some or all of the litigation costs, “including reasonable attorney fees,” incurred by the complainant in pursuit of his or her complaint “before the commission.” The complainant and respondent have a right of appeal from a final order of the commission before the circuit court. MCL 37.2606(1). With appeals being “before the circuit court” and not “before the commission,” MCL 37.2605(2)(j) arguably does not provide the authority for an award of appellate attorney fees incurred in the circuit court.

However, MCL 37.2605(2)(i) speaks more broadly of ordering payment for “an injury or loss caused by a violation of this act, including a reasonable attorney’s fee.” The language of the subsection does not specify or limit the type of injury or loss sustained, except to say that it is “caused by a violation of [the ELCRA].” Nor does the language of the subsection prescribe when or how the injury or loss was sustained, other than that it was caused by a violation of the ELCRA. In light of these considerations, appellate attorney fees incurred by a complainant in defending a favorable ruling from the commission before the circuit court undoubtedly constitute an economic loss caused by the respondent’s initial violation of the ELCRA and would appear to be recoverable at the trial court’s discretion under MCL 37.2605(2)(i).

Given this Court’s well-established precedent interpreting the provision of reasonable attorney fees as set forth in MCL 37.2802 to mean all attorney fees, including appellate attorney fees, we interpret the provision of a reasonable attorney fee as set forth in MCL 37.2605(2)(i) to mean all attorney fees, including appellate attorney fees. First, there is no reason to interpret the same language in one statute of the act more narrowly than the other. See *The Cadle Co v City of Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009) (In finding that the term “prosecuted” in MCL 600.8407(1) should be interpreted in the same manner as the term “prosecution” has been interpreted in MCL 600.8408(1), namely that it includes postjudgment proceedings given that the word is used without limitation to any stage of the proceedings, this Court held that “[i]dentical terms in different provisions of the same act should be construed identically”). Second, as noted above, this Court in *Schellenberg* and *Grow* held that an award of appellate attorney fees is proper under the ELCRA act itself, and did not limit such holding to which method the complainant chose in order to pursue relief for an ELCRA violation. Third, that appellate attorney fees are recoverable in Article 6 proceedings serves the same purposes as an award of appellate attorney fees under Article 8. “The purpose of the attorney fee provision of the Civil Rights Act is to encourage persons deprived of their civil rights to seek legal redress, to ensure that victims of discrimination have access to the courts, and to deter discrimination.” *Meyer v City of Center Line*, 242 Mich App 560, 576; 619 NW2d 182, 191 (2000). See also *The Cadle Co*, 285 Mich App at 249 (“the language of the statute should be interpreted with regard to the purpose of the act.”) Recognizing the possibility of recovering reasonable appellate attorney fees under Article 6 ensures a victim of discrimination access to courts to defend a favorable or challenge an unfavorable decision of the commission. Thus, consistent with our interpretation of MCL 37.2802, we determine that the broad language of MCL 37.2605(2)(i) and the purposes of the ELCRA’s attorney fee provisions support a discretionary award of appellate attorney fees

incurred by a complainant in defending the commission's favorable ruling in the circuit court in actions brought under Article 6 of the ELCRA.

In the instant case, Barash filed his complaint alleging violations of the ELCRA with the civil rights department in accordance with the provisions of Article 6. Although he received an award for attorney fees pursuant to MCL 37.2605(2)(j), as SMART correctly notes, Barash nevertheless incurred appellate attorney fees in defending the commission's favorable ruling before the circuit court. In denying without prejudice Barash's June 26, 2014 motion for attorney fees, the circuit court expressed uncertainty regarding whether it had the authority when acting in an appellate capacity to hold an evidentiary hearing to determine the reasonableness of the appellate attorney fees requested. The circuit court erred by conflating its decision to grant or deny Barash appellate attorney fees under the ELCRA with that of determining whether the requested fees were reasonable, and by ignoring its authority under MCL 37.2606(2) to remand the case to the commission for further proceedings as necessary.

When the circuit court acts in an appellate capacity, MCR 7.115 governs the taxation of costs and fees. MCR 7.115(A) provides that "the prevailing party in a civil case is entitled to costs." Statutory attorney fees are included in costs for taxation purposes. MCL 600.2405(6). Although reasonable attorney and appellate attorney fees are authorized by the ELCRA, whether to award said fees rests with the sound discretion of the appellate court. See *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 482; 442 NW2d 705 (1989). In responding to Barash's initial motion for appellate attorney fees, the circuit court subordinated the decision whether to grant or deny the fees at issue to the question of whether the requested fees were reasonable. MCR 7.115 does not expressly authorize a circuit court acting in an appellate capacity to hold an evidentiary hearing to determine the reasonableness of contested attorney fees, nor does the analogous rule applicable to this Court expressly authorize the Court to hold similar evidentiary hearings. See MCR 7.219. Nevertheless, just as this Court remands matters to a circuit court for "determination and award of reasonable appellate attorney fees," *McLemore*, 196 Mich App at 403,<sup>4</sup> MCL 37.2606(2) authorizes the circuit court to remand the matter to the commission should such further proceedings be necessary.<sup>5</sup> Accordingly, we conclude that the circuit court

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<sup>4</sup> See also *Schellenberg*, 228 Mich App at 56; *Grow v WA Thomas Co*, 236 Mich App at 720.

<sup>5</sup> A circuit court reviewing a final order of the commission performs its review de novo, MCL 37.2606(1), and it has the authority to "enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the commission, or [it] may remand the case to the commission for further proceedings[.]" MCL 37.2606(2). Hence, a circuit court presiding over an appeal has the power to remand a case to the commission for determination of a reasonable attorney fee caused by the appeal, should it choose to do so. Further, we note in response to our colleague's thoughtful dissent that MCL 37.2605(2)(i) does not limit payment of a complainant's damages and attorney fees to those suffered at a particular stage of the proceeding. Thus, the circuit court's authority to "modify" the commission's ruling reasonably encompasses the authority to adjust the attorney fee damages to account for the additional attorney fees incurred by the respondent's decision to appeal.

legally erred when it denied Barash's motion for appellate attorney fees as a result of conflating the separate inquiries and failing to appreciate its statutory authority under MCL 37.2606(2).

In addition, the circuit court denied Barash's March 18, 2015 renewed motion for appellate attorney fees based on its ruling that MCL 37.2802 required Barash to request such fees before the circuit court entered its final judgment. SMART maintains this position on appeal. However, we do not believe that the plain language of MCL 37.2802 and MCL 37.2605(2)(i), both quoted above, necessarily require a litigant to request appellate attorney fees prior to entry of the circuit court's judgment on the merits of the appeal. Asking for appellate attorney fees before one has prevailed on appeal is both presumptuous and has never been expected of litigants. Further, nothing in MCR 7.115 states that the prevailing party is entitled to costs only if he or she requested them in his or her pleadings. Moreover, MCR 2.601(A) provides that every final judgment may grant the relief to which the prevailing party is entitled, even if the party has not requested that relief in his or her pleadings. See *Greater Bible Way Temple of Jackson v City of Jackson*, 268 Mich App 673, 687-688; 708 NW2d 756 (2005), judgment rev'd on other grounds, 478 Mich 373; 733 NW2d 734 (2007) (showing that the prevailing plaintiff was entitled to an award of statutory attorney fees under the Religious Land Use and Institutionalized Persons Act despite not having demanded them in its complaint and in drafts of the final order). For the foregoing reasons, we conclude that the trial court erred as a matter of law when it denied Barash's renewed motion for appellate attorney fees because Barash did not request the fees prior to entry of the circuit court's June 10, 2014 order.

SMART further argues on appeal that Barash waived whatever right he had to appellate attorney fees by failing to submit a certified or verified bill of costs within 28 days of the circuit court's June 10, 2014 dispositive order. MCR 7.115(B) ("Failure to file a bill of costs within the time prescribed waives the right to costs). We find this argument unpersuasive under the circumstances of this case.

Barash filed his motion for attorney fees with the clerk of the court 16 days after the circuit court's dispositive order affirming the commission's final order in favor of Barash. Attached to the motion was a detailed "work-in-progress report" showing the date work was performed, a description of the work, the name and hourly rate of the attorney who performed the work, and the total amount billed for the time spent on each task. Accompanying the report was the affidavit of one of the partners in the law firm verifying that the services for which fees were charged were "actually and necessarily performed." To determine that Barash has waived his chance to obtain appellate attorney fees simply because he filed his verified bill of costs as a motion for appellate attorney fees would be a strict application of MCR 7.115 that would elevate form over substance. This is particularly true where the circuit court had to determine whether to grant appellate attorney fees sought under the ELCRA before addressing whether such fees were reasonable. Given that Barash filed his motion within 28 days of the circuit court's dispositive order, accompanied by a verified bill of costs, and considering that an act of the court's discretion was required before the reasonableness of the fees could be considered, we conclude that Barash's motion for appellate attorney fees complies substantively with MCR 7.115, and that he has not waived his right to appellate attorney fees, subject to the circuit court's discretion.

We conclude that the circuit court committed legal error by subordinating the question of whether to grant or deny Barash appellate attorney fees under the ELCRA to that of whether the

requested fees were reasonable and ignoring its statutory authority under the ELCRA to remand the case to the commission for any necessary proceedings. The circuit court further erred by making consideration of Barash's request for appellate attorney fees contingent on whether he asked for such fees prior to entry of the court's dispositive order. While we do not conclude that the circuit court's decision to deny Barash appellate attorney fees under the ELCRA necessarily constituted an abuse of discretion, we do find that the circuit court relied on improper reasoning. *King*, 136 Mich App at 307. Therefore, we vacate the circuit court's March 18, 2015 order denying Barash's request for appellate attorney fees, and remand this matter to the circuit court for further consideration in light of our decision. In addition, we exercise our discretion to award Barash appellate attorney fees under the ELCRA, *McLemore*, 196 Mich App at 402, and further instruct the circuit court to arrive at a determination and award of reasonable appellate attorney fees for Barash's appeal to this Court, or to remand the matter to the commission for such determination.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Mark J. Cavanagh