

STATE OF MICHIGAN
COURT OF APPEALS

BOB TURNER, INC.,

Plaintiff-Appellant,

v

WALTER FRISBEE and LINDA FRISBEE,

Defendants-Appellees.

UNPUBLISHED
February 23, 2010

Nos. 287726; 290179
Oakland Circuit Court
LC No. 2008-DA8827-AV

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

In Docket No. 287726, plaintiff appeals by leave granted from a circuit court order affirming a district court's award of attorney fees to defendants, as prevailing parties in a lawsuit. In Docket No. 290179, plaintiff appeals by delayed leave granted the circuit court's order awarding defendants attorney fees in connection with plaintiff's appeal to the circuit court. We reverse in both appeals and remand for entry of an order consistent with this opinion.

We review de novo, as a question of law, a court's determination whether a party is entitled to attorney fees, but review for an abuse of discretion the court's award of actual attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). We also review de novo the interpretation of a court rule or a statute, as well as jurisdictional issues. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

We first address defendants' argument that this Court lacks jurisdiction to address plaintiff's claim in Docket No. 287726 that the district court was not authorized to award attorney fees because the circuit court's order remanding the case to the district court limited the issue on remand to the reasonableness of the attorney fees awarded. Defendants observe that a party's appeal after remand is necessarily limited to issues within the scope of the remand and, as such, any issue not within that scope is not properly presented. We agree. However, because we conclude that the legal basis for an award of attorney fees was within the scope of the circuit court's remand order and was properly addressed during the proceedings on remand, this issue is properly before this Court.

We have previously recognized that "when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

“It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court.” *Id.* at 544-545, quoting *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994).

Although the circuit court determined that the district court failed to conduct an assessment regarding the reasonableness of the attorney fees imposed, the language of the circuit court’s order remanded the case for reconsideration of the attorney fee award altogether. The circuit court did not limit the scope of the remand to an inquiry regarding the reasonableness of the particular amount of attorney fees awarded. On remand, the district court dramatically increased the amount of attorney fees awarded and plaintiff objected to defendants’ requested attorney fees on the basis that there was no determination that plaintiff’s claims were frivolous. In addressing plaintiff’s objection, the district court indicated that it was awarding \$10,279.88 in attorney fees based on *Windemere Commons I Ass’n v O’Brien*, 269 Mich App 681; 713 NW2d 814 (2006), as well as MCR 2.625(A)(1) and MCL 600.2401, which it believed gave it discretion to award such fees. The district court emphasized that it was not basing its award on a finding that plaintiff’s claims were frivolous. Thus, the record reflects that the legal basis for the attorney fee award was an issue that arose on remand pursuant to the district court’s determination of the reasonableness of the attorney fee award. The issue was within the scope of the circuit court’s remand order and defendants’ contention that this Court lacks jurisdiction to address plaintiff’s argument regarding the legal basis for awarding attorney fees lacks merit.

Having found jurisdiction, we consider plaintiff’s argument that both the district court and the circuit court erred by determining that a trial court may award a prevailing party attorney fees within its discretion. As plaintiff correctly contends, “[u]nder the American Rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award.” *Haliw v City of Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). The Legislature codified the American rule in MCL 600.2405(6), which provides:

The following items may be taxed and awarded as costs unless otherwise directed:

* * *

(6) Any attorney fees authorized by statute or by court rule.

Thus, only where a statute or court rule expressly authorizes attorney fees to be taxed as costs may such fees be awarded. Further, “the term ‘costs’ ordinarily does not encompass attorney fees unless the statute or court rule specifically defines ‘costs’ as including attorney fees.” *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004).

Both the district court and the circuit court opined that MCR 2.625(A)(1) permitted attorney fees to be taxed as costs. That court rule states:

Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

Contrary to the lower courts' determinations, this language does not expressly authorize attorney fees to be awarded as costs and the language of the rule does not define "costs" as including attorney fees. Cf. *Haliw*, 471 Mich at 707 (Noting that MCR 2.403(O)(6) "expressly authorizes recovery of 'a reasonable attorney fee' and 'costs'"); *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994) (Referencing various provisions of the no-fault statute "that do award attorney fees in limited situations"). Accordingly, MCR 2.625(A)(1) did not give the district court discretion to award attorney fees as costs.¹ The circuit court's order affirming the district court's attorney fee award on the same basis was likewise erroneous and requires reversal.

The circuit court exacerbated this error by relying on the same flawed reasoning in granting defendants' motion for costs and attorney fees in the circuit court. Because the circuit court's attorney fee order was based on its erroneous affirmance of the district court's order, which affirmance utilized the district court's flawed reasoning, the circuit court's order awarding attorney fees must also be reversed.

Accordingly, we reverse both the circuit court's affirmance of the district court's attorney fees award and the circuit court's order awarding defendants attorney fees in connection with the circuit court appeal, and remand for entry of orders consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro

¹ We note that although MCR 2.625(A)(2) and MCL 600.2591 authorized the district court to award attorney fees upon a finding that plaintiff's claims were frivolous, the district court specifically stated that its decision was not based on such a finding.