

STATE OF MICHIGAN
COURT OF APPEALS

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UNPUBLISHED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.

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

GADOLA, J. (*dissenting*).

In this case, we address the question whether a circuit court, acting in its appellate capacity under Article 6 of the Elliott-Larsen Civil Rights Act, MCL 37.2601, *et seq.*, is authorized to award appellate attorney fees to a claimant. Because I disagree with the conclusion of the majority opinion that a circuit court acting in its appellate capacity under Article 6 is so empowered, I respectfully dissent.

A person alleging a violation of the Elliott-Larsen Civil Rights Act (the “ELCRA”), MCL 37.2101 *et seq.*, may file a complaint with the Michigan Department of Civil Rights (the “MDCR”). Under Article 6 of that act, the MDCR is empowered to hear such a complaint and, ultimately, award damages for a violation of the ELCRA, including reasonable attorney fees. See MCL 37.2602 and MCL 37.2605(2)(i), (j). Under Article 8 of the ELCRA, a person alleging a violation of the ELCRA may bring a civil action for damages or injunctive relief in the circuit court. Under MCL 37.2801, “damages” may include reasonable attorney fees.

In this case, petitioner Mazyn Barash (“Barash”) initiated this action against respondent Suburban Mobility Authority for Regional Transportation (“SMART”) with the MDCR seeking damages, including costs and attorney fees, pursuant to Article 6 of the ELCRA, MCL 37.2601, *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 USC 2000, *et seq.* After various proceedings before the MDCR, the Michigan Civil Rights Commission (“the commission”)

found SMART liable for violating the ELCRA and awarded Barash damages, including costs and attorney fees.

SMART appealed the commission's decision to the Oakland Circuit Court pursuant to §606 of Article 6, MCL 37.2606, which permits an appeal from a decision of the commission to the circuit court for de novo review. The circuit court affirmed the commission's decision, including the commission's award of costs and attorney fees.

Barash thereafter filed a motion with the circuit court seeking, pursuant to Article 8 of the ELCRA, MCL 37.2802, costs and attorney fees incurred as a result of defending SMART's appeal to the circuit court. The circuit court denied the motion without prejudice. Meanwhile, SMART had filed with this Court an application for leave to appeal from the commission's determination, including the award of costs and attorney fees, which had been affirmed by the circuit court. This Court denied the application for lack of merit in the grounds presented. *Dep't of Civil Rights v Suburban Mobility Auth*, unpublished order of the Court of Appeals, entered January 20, 2015 (Docket No. 322497). SMART did not seek reconsideration in this Court nor did SMART file an application for leave to appeal to our Supreme Court.

Barash then renewed his motion in the circuit court under Article 8, seeking appellate costs and attorney fees incurred in defending SMART's appeals to the circuit court and to this Court. The circuit court denied the request as untimely, and similarly denied Barash's motion for reconsideration.

On appeal to this Court, Barash argues that the circuit court abused its discretion in denying his request for an award of appellate attorney fees, which, Barash argues, the circuit court was empowered to award under Article 8. The majority opinion concludes that while the circuit court's decision to deny Barash appellate attorney fees does not necessarily constitute an abuse of discretion, the circuit court was empowered to award appellate attorney fees and committed legal error and applied improper reasoning in reaching its decision to not award appellate attorney fees in this instance. I disagree, and would affirm the circuit court's denial of appellate attorney fees because MCL 37.2802, under which Barash sought appellate attorney fees before the circuit court, by its plain language, applies only to actions brought pursuant to Article 8, and the action before the circuit court in this case was not an action brought pursuant to Article 8.

Generally, the decision to award attorney fees under the ELCRA is within the sound discretion of the trial court, which this Court reviews for an abuse of discretion. *King v Gen Motors Corp*, 136 Mich App 301, 307; 356 NW2d 626 (1984). The question in this case, however, turns not upon whether the circuit court abused its discretion, but instead upon whether the circuit court was empowered to award appellate attorney fees. This Court reviews such underlying questions of law de novo. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 216-217; 818 NW2d 478 (2012).

The majority opinion correctly notes that, heretofore, this Court has not determined whether a circuit court is empowered to award appellate attorney fees incurred in an appeal from the MDCR to the circuit court pursuant to Article 6 of the ELCRA. A court is permitted to award costs and attorney fees only when specifically authorized by statute, court rule, or other

recognized exception. *Waters Drain*, 296 Mich App at 217. In this case, Barash sought an award of appellate attorney fees from the circuit court pursuant to MCL 37.2802, which states:

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. (Emphasis added.)

By its plain language, MCL 37.2802 authorizes a court to award costs and attorney fees pursuant to MCL 37.2802 only in an action “*brought pursuant to this article.*” (Emphasis added). “This article” is Article 8 of the ELCRA. In this case, the action was *not* brought pursuant to Article 8 of the ELCRA; rather, Barash brought this action before the MDCR pursuant to Article 6 of the ELCRA, MCL 37.2605. The commission then issued its decision pursuant to Article 6 and SMART appealed that decision to the circuit court under §606 of Article 6, MCL 37.2606. Article 6 does not authorize the circuit court to award appellate attorney fees in an action on appeal to that court under Article 6, and Article 8 does not authorize the circuit court to award appellate attorney fees in an action on appeal to that court under Article 6. The ELCRA therefore does not authorize the circuit court to award appellate attorney fees in an action brought pursuant to Article 6 and on appeal to the circuit court pursuant to Article 6.

The majority opinion accurately notes that this Court has previously held that appellate attorney fees may be awarded by this Court under the ELCRA. In *McLemore v Detroit Receiving Hosp and Univ Med Ctr*, 196 Mich App 391, 402-403; 493 NW2d 441 (1992), this Court held that in addition to permitting a grant of attorney fees at the trial level, §802 of Article 8, MCL 37.2802, also permits a discretionary award of appellate attorney fees by this Court. Thereafter, relying upon *McLemore*, this Court has held in subsequent cases that this Court is empowered to award appellate attorney fees under MCL 37.2802. See, e.g., *Grow v WA Thomas Co*, 236 Mich App 696, 720; 601 NW2d 426 (1999); *Schellenberg v Rochester Elks*, 228 Mich App 20, 56; 577 NW2d 163 (1998).¹

The majority, reasoning by analogy, concludes that just as this Court is empowered to award appellate attorney fees in an action before it pursuant to Article 8, the circuit court, when acting in its appellate capacity under Article 6, similarly should be empowered to grant appellate attorney fees in an administrative action brought under Article 6 and on appeal to the circuit court pursuant to Article 6. While that logic provides a certain inviting symmetry, the fact remains that the statute does not so empower the circuit court.

The majority further reasons that MCL 37.2605(2)(i) “speaks more broadly” of ordering payment for injury or loss caused by violation of the act and that appellate attorney fees

¹ See also, e.g., *Toll Bros, Inc v Fekete*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2008 (Docket No. 274964); *Allen v United Ambulance Serv*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 1998 (Docket No. 191706); *Miles v TGI Friday's*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 1997 (Docket Nos. 191337, 187715, 187740.).

constitute the type of economic loss for which payment may be ordered. But any power conferred by MCL 37.2605 to order payment for losses is conferred upon the commission, not upon the circuit court. Because a court is permitted to award costs and attorney fees only when specifically authorized by statute, court rule, or other recognized exception, *Waters Drain*, 296 Mich App at 217, and because neither Article 6 nor Article 8 provides such authority to the circuit court when acting in its appellate capacity under Article 6, the circuit court in this case was not empowered to award appellate attorney fees.

I decline to extend the reading of the statute to convey that additional authority upon the circuit court.² I therefore would affirm.

/s/ Michael F. Gadola

² Because I would hold that the ELCRA does not authorize the circuit court to award appellate attorney fees in a case on appeal before it pursuant to Article 6 of the act, I would decline to address whether the circuit court erred in holding that MCL 37.2802 requires a litigant to request costs and attorney fees before judgment is entered.