

STATE OF MICHIGAN
COURT OF APPEALS

TOWNSHIP OF RICHMOND,

Plaintiff-Appellee/Cross-Appellant,

v

RONDIGO, L.L.C.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

March 5, 2013

No. 304444

Macomb Circuit Court

LC Nos. 2006-001054-CZ

2006-004429-CZ

Before: DONOFRIO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's opinion and order denying in part its motion to recover attorney fees and costs under the Michigan Right to Farm Act (RTFA), MCL 286.471 *et seq.* Plaintiff cross appeals the same order to the extent that the court denied its motion to tax costs pursuant to MCR 2.625. Because the law-of-the-case doctrine did not preclude the circuit court from determining whether defendant was entitled to attorney fees and costs under the RTFA, the court did not commit clear error regarding its factual findings that would have altered its calculation of attorney fees, the court did not abuse of discretion by awarding defendant attorney fees in the amount of \$20,550, the court properly rejected defendant's request for reimbursement of its consultant expenses, the court erred by determining that plaintiff could not qualify as a prevailing party on its ordinance-related nuisance claims before a resolution of defendant's site plan application, and the court abused its discretion by denying in its entirety plaintiff's motion to tax costs pursuant to MCR 2.625, we affirm in part, reverse in part, and remand for further proceedings.

I. UNDERLYING FACTS & PROCEEDINGS

This case is before this Court for the second time. This Court's previous decision in *Richmond Twp v Rondigo, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (Docket Nos. 288625 & 290054), slip op at 2, 10-11, set forth the following relevant background:

Rondigo owns farm property, and it intended to implement a nutrient management plan, which included extensive on-site composting, as part of an effort to naturally fertilize the farmland. Rondigo engaged in the improvement, extension, and construction of two access roads on the property to facilitate the

hauling of leaves, grass, and yard waste for composting purposes. The township disapproved of and challenged Rondigo's roadwork activities, arguing that Rondigo never obtained proper township approval. In two separate complaints, the township alleged, in pertinent part, that the roadwork construction projects violated various provisions of the township zoning ordinance and violated the township's engineering standards ordinance, thus constituting nuisances per se that required abatement. The township also contended that Rondigo's composting operation violated township ordinances and constituted a nuisance. Additional causes of action were alleged, but they are not relevant to this appeal.

* * *

As argued by Rondigo on appeal, and notwithstanding our analysis above in regard to construction of the access roads, the township's lawsuit also pertained to composting activities on the property and efforts by the township to halt any composting operation. The township claimed in part that the composting activities violated the zoning ordinance and thus constituted a nuisance. In an earlier ruling prior to trial, the trial court found that the RTFA and GAAMPs [generally accepted agricultural and management practices, see MCL 286.472(d)] controlled over any township ordinances as to the issue of composting activities and that the township could not stop a composting operation under its ordinance scheme. This ruling has not been appealed by the township. Clearly, composting fits the definition of a "farm operation." MCL 286.472(b) (iv) (field preparation), (v) (application of organic materials), and (viii) (storage and utilization of farm by-products, including agricultural wastes). Further, regardless of compliance with the RTFA and GAAMPs with respect to composting, Rondigo prevailed on the allegations that the composting operation, i.e., a farm operation, violated the zoning ordinance and thus constituted a nuisance. Accordingly, under the clear language of MCL 286.473b, the trial court could exercise its discretion and award costs, expenses, and attorney fees, *but only as to that portion of the litigation addressing composting activities and the alleged ordinance-based nuisance claims*. We remand the case to allow the court an opportunity to exercise that discretion.⁸

In summation, we reverse the trial court's rulings on the constitutionality of the ordinances and remand the case for consideration of the issue whether the denial of the site plan application covering construction work on the west-side access road was arbitrary and capricious, allowing for any argument that the matter was never properly before the court. Further, with respect to the trial court's ruling on costs, expenses, and attorney fees, we reverse and remand, but only in part, allowing the court an opportunity to exercise its discretion to make an award solely in connection with the litigation of the township's failed ordinance-based nuisance claims concerning composting activities on the property. [Emphasis in original.]

⁸ To the extent that the township's claims included a nuisance action based on failure to comply with the RTFA and GAAMPs relative to a composting operation, the record reflects that the issue was never truly resolved in the litigation. The trial court noted at the hearing on costs and attorney fees that neither party "really got to the point where we took any evidence . . . to determine . . . compliance with those GAAMP[s]." On the same subject of compliance with the RTFA and GAAMPs, the court later stated that "it was never clearly addressed by any of us." Given the circumstances, it cannot be said that Rondigo prevailed on the issue for purposes of MCL 286.473b.

On remand, defendant sought recovery of approximately \$300,000 in attorney fees and costs pursuant to MCL 286.473b. The circuit court awarded defendant attorney fees and costs in the amount of \$20,588. Plaintiff moved to tax costs under MCR 2.625(B)(2) with respect to its nuisance per se claim premised on defendant's violation of township ordinances by virtue of defendant's nonresidential driveways, which this Court upheld. The circuit court denied plaintiff's motion.

II. DEFENDANT'S APPEAL

A. LAW OF THE CASE

Defendant initially argues that the circuit court erred by denying its motion for attorney fees, costs, and expenses pursuant to MCL 286.473b from the filing of the original complaint on March 9, 2006, through March 5, 2007. Defendant asserts that this Court previously determined that it constituted a qualified farm operation under the RTFA, entitled to all compost-operation-related attorney fees and costs. The parties disputed below the scope of this Court's prior decision, but the circuit court did not specifically address defendant's law-of-the-case claim. Nevertheless, because defendant raised the law-of-the-case issue both before the circuit court and in this appeal, "it is preserved for . . . [appellate] review." *Loutts v Loutts*, ___ Mich App ___; ___ NW2d ___ (Docket No. 297427, issued September 20, 2012), slip op at 1-2, lv pending. "[T]his Court reviews de novo the determination whether the law-of-the case doctrine applies and to what extent it applies." *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

Under the law-of-the case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals. On remand, the trial court may not take action . . . inconsistent with the judgment of this Court. The trial court is bound to strictly comply with the law of the case, as established by this Court, according to its true intent and meaning. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. This rule applies without regard to the correctness of the prior determination. Where the trial court misapprehends the law to be applied, an abuse of discretion occurs. [*Id.* at 425 (internal quotations and citations omitted).]

In this Court’s prior decision, after addressing the constitutionality of plaintiff’s ordinances applicable to defendant’s nonresidential driveways, this Court briefly considered plaintiff’s “claim[] . . . that the composting activities violated the zoning ordinance and thus constituted a nuisance.” *Richmond Twp*, slip op at 10. This Court referred to the circuit court’s pretrial ruling “that the RTFA and GAAMPs controlled over any township ordinances as to the issue of composting activities and that [plaintiff] could not stop a composting operation under its ordinance scheme,” which ruling plaintiff did not appeal. *Id.* This Court held that irrespective of “compliance with the RTFA and GAAMPs with respect to composting, [defendant] prevailed on the allegations that the composting operation, i.e., a farm operation, violated the zoning ordinance and thus constituted a nuisance.” *Id.* In light of “the clear language of MCL 286.473b,” this Court remanded this case so that the circuit “court could exercise its discretion and award costs, expenses, and attorney fees, *but only as to that portion of the litigation addressing composting activities and the alleged ordinance-based nuisance claims.*” *Id.* (emphasis in original).

We read this Court’s prior decision concerning composting operations as limited to a finding that the RTFA preempted plaintiff’s ordinances pertaining to composting operations in the township. Contrary to defendant’s contention, this Court did not hold that defendant’s composting operation conformed to the RTFA. As explained in footnote 8, plaintiff’s nuisance claims “based on defendant’s failure to comply with the RTFA and GAAMPs relative to a composting operation” were “never truly resolved in the litigation.” *Id.* This Court specified that “it cannot be said that [defendant] prevailed on the issue for purposes of MCL 286.473b.” *Id.* Accordingly, we deem groundless defendant’s argument that the circuit court impermissibly “revisited the issue of whether [defendant’s] farm composting operation was afforded RTFA protection, an issue clearly decided by this Court.”

B. ATTORNEY FEES & COSTS UNDER MCL 286.473b

Defendant next challenges in several respects the circuit court’s award of attorney fees and costs in the amount of \$20,588. As set forth in *Brown v Home Owners Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307458, issued December 4, 2012), slip op at 6:

A trial court’s decision to grant or deny a motion for attorney fees presents a mixed question of fact and law. This Court reviews the trial court’s findings of fact for clear error, and questions of law de novo. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. However, this Court reviews a trial court’s ultimate decision whether to award attorney fees for an abuse of discretion. An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes. [Internal quotations and citations omitted.]

Similarly, this Court reviews for an abuse of discretion a circuit court’s ultimate award of costs, and reviews de novo related questions of law. *LaVene v Winnebago Indus*, 266 Mich App 470, 473; 702 NW2d 652 (2005). We review for clear error a circuit court’s findings of fact. MCR 2.613(C).

1. ATTORNEY FEES

As the party seeking an award of attorney fees, defendant had “the burden of proving the reasonableness of . . . [its] requested fees.” *Smith v Khouri*, 481 Mich 519, 528-529 (TAYLOR, C.J.), 538 (CORRIGAN, J.); 751 NW2d 472 (2008).¹

[T]here exists no precise formula by which a court may assess the reasonableness of an attorney fee. Rather, a court must consider multiple factors, including: (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitation imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. [*In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122, 138; 748 NW2d 265 (2008).]

This Court remanded this case for the circuit court to consider whether to award attorney fees, costs, and expenses pursuant to MCL 286.473b, which provides:

In any nuisance action brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees.

In the preceding section, MCL 286.473(1), the Legislature set forth in relevant part as follows:

A farm or farm operation shall not be found to be a public or private nuisance *if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture*. Generally accepted agricultural and management practices shall be reviewed annually by the

¹ The circuit court employed the attorney fee calculation method articulated in *Smith*, 481 Mich 519, which does not apply to this case. *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008). The parties do not suggest that the circuit court erred by calculating attorney fees on the basis of *Smith*; defendant neglects to even identify the factors a court should consider in deciding whether to award attorney fees. Because the parties do not raise this issue, and most of the attorney fee factors generally applicable to an award of a party’s attorney fees closely track the Supreme Court’s summary in *Smith*, we do not further address this matter.

Michigan commission of agriculture and revised as considered necessary.
[Emphasis added.]

Defendant asserts that MCL 286.473(1) “serves as an absolute defense to a nuisance action, not a precondition for RTFA protection,” and that “[n]othing in MCL 286.473 states that the MDA [Michigan Department of Agriculture] must find a farm or farm operation in compliance with the GAAMPs before it has RTFA protection, nor . . . that RTFA protection is withheld if a farm or farm operation does not comply with the GAAMPs.” We disagree and conclude that the plain language of MCL 286.473(1) expressly conditions RTFA immunity from characterization as a nuisance on a farm’s or a farm operation’s conformance to the “generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture.” Defendant correctly observes that MCL 286.473b clearly envisions that a farm or farm operation that prevails in a nuisance action can recover attorney fees and costs. As the preceding RTFA section unambiguously contemplates, however, the RTFA shields a farm or farm operation from a nuisance action only if the farm complies with “generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture.” MCL 286.473(1). Reading MCL 286.473(1) and MCL 286.473b together, a farm or farm operation must satisfy GAAMPs before it may recover attorney fees and costs. See *CG Automation & Fixture, Inc v Autoform, Inc*, 291 Mich App 333, 338; 804 NW2d 781 (2011) (“[w]hen discerning legislative intent,” a court should interpret the entire act together and harmonize the act’s provisions).

In light of the statutory language of MCL 286.473(1) and MCL 286.473b, we conclude that the circuit court correctly determined that defendant was not entitled to recover attorney fees, costs, or expenses until its composting operation qualified for RTFA protection. Although defendant’s composting operation did not ultimately attain MDA approval under the RTFA in these actions, the circuit court did not clearly err in finding that the operation arguably qualified for RTFA protection on March 5, 2007. The circuit court cited the March 8, 2007, hearing testimony by Stephen Mahoney, an MDA resource analyst. Mahoney testified that the two impediments to approval of defendant’s site plan included “making sure that there’s enough fill to be two-feet above ground water” and “making sure that . . . leaves are moved.” At the time of the March 8, 2007, hearing, a preliminary injunction prevented defendant from engaging in composting or construction activities on its property. *Richmond Twp*, slip op at 2 n 2. Thus, the circuit court did not clearly err in finding that “final approval of defendant’s revised March 5, 2007 composting plans was only contingent upon putting fill dirt on the property . . . and moving leaves stored on the property to the actual composting location.” Given that MDA approval of defendant’s composting site plan hinged solely on the placement of fill and the movement of leaves, neither of which could occur in early March 2007 because of a preliminary injunction obtained by plaintiff, we also find no clear error in the circuit court’s finding that “plaintiff’s opposition to defendant’s composting operations . . . constitute[d] failed ordinance-based challenges . . . [on] March 5, 2007.”²

² In plaintiff’s final question presented in its cross appeal, it submits that the circuit court ignored that defendant’s engineering site plan and composting operation plan never ultimately received

With respect to the circuit court’s calculation of an appropriate billing rate for defense counsel, defendant complains that the court mistakenly applied a “median billing rate in northern Macomb County,” because defense counsel had a practice in “Sterling Heights, . . . in the southwestern quadrant of Macomb County.” The circuit court observed that a Michigan State Bar 2007 Economics of Law Practice Summary Report identified a \$200 median hourly billing rate for both litigation and transactional work in northern Macomb County. The two tables on page 23 of the 2007 report, which list the “[t]op 10 median hourly . . . billing rates by region,” do not mention any area of Macomb County other than northern Macomb County. Furthermore, defendant references neither any specific hourly rate that the court should have applied for attorneys practicing in southwestern Macomb County, nor any other source of information that the circuit court should have considered in identifying hourly billing rates for counsel in southwestern Macomb County.

Defendant next avers that the circuit court “erred by referencing . . . [an] unidentified [prior litigation with Macomb Township] . . . as a basis to reduce the hourly rate for” defense counsel. Defendant maintains that no evidence in the circuit court substantiated the court’s reference to prior involvement by defendant in litigation with Macomb Township. The circuit court noted that “[i]n light of prior litigation with Macomb Township involving the same themes, resolution of the basic issues did not involve novel or complex legal concepts and the case should not have been difficult.” Defendant correctly asserts that no case nominally entitled *Macomb Twp v Rondigo, LLC*, was previously filed in Macomb County. But plaintiff cites in his brief on appeal Macomb Circuit Court No. 1995-004372-CZ. A search of this case number in the Macomb Circuit Court online information system yielded a case entitled *Macomb Twp v Ronald Michaels & Dolores Michaels*, whom plaintiff identifies as “principles [sic] of Rondigo LLC.” Our search of “Rondigo” in Michigan’s online limited liability company filing information reveals that articles of incorporation filed in 2002, and 11 annual statements filed by Rondigo, L.L.C., between 2003 and 2013, identify Ronald F. Michaels as the corporation’s president and a resident corporate agent, and Dolores Michaels as the corporation’s vice president and a resident agent. The docket entries in LC No. 1995-004372-CZ contain details substantiating that the *Macomb Twp v Michaels* litigation involved township challenges to the Michaels’ composting operation. The circuit court presumably was aware of the lengthy *Macomb Twp v Michaels* litigation in the Macomb Circuit Court, which remained ongoing

approval by the MDA, and thus erroneously awarded defendant costs and fees under MCL 286.473b. The circuit court’s opinion and order, however, repeatedly references that the MDA never finally approved defendant’s plans. We conclude that the circuit court correctly awarded defendant \$20,588 in attorney fees and expenses incurred between March 5, 2007, and May 16, 2007, because the court (1) adhered to this Court’s remand order to consider whether “to make an award solely in connection with the litigation of [plaintiff’s] failed ordinance-based nuisance claims concerning composting activities on the property,” *Richmond Twp*, slip op at 11, and (2) properly interpreted MCL 286.473(1) as limiting fees recoverable by defendant under MCL 286.473b to those incurred after plaintiff’s “opposition to defendant’s composting operations . . . constitute[d] failed ordinance-based nuisance challenges.”

between September 1995 and May 2009, and the public record amply supports the circuit court's reference to a prior, similar litigation.³

No clear error appears in the circuit court's reduction of 132 defense counsel hours billed between March 5, 2007, and May 16, 2007, by 29.25 hours, just over 20 percent. Our review of the billing invoices discloses repeated instances of double billing by defense counsel for client conferences in which multiple attorneys participated, identical work performed by different defense counsel, appearances at hearings by multiple attorneys and a legal assistant, and conferences among defense counsel. The billing invoices also document near daily contacts with defendant by at least one attorney.

Defendant further suggests that the circuit court erred by denying an award of legal assistant fees on the basis that the court "overlook[ed] the affidavit of the supervising attorney, which laid out the qualifications for the legal assistants" required under MCR 2.625. Pursuant to MCR 2.625, a court's award of attorney fees "may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan." A February 4, 2011, affidavit of lead attorney Cindy Rhodes Victor mentions the following concerning legal assistants Steven R. McCollum and Lauren Ford:

McCollum has worked for me as a legal assistant since April, 2000, and . . . Ford began working for our firm in early 2005. Mr. McCollum has a bachelor's degree from Michigan State University, and Ms. Ford has a bachelor's degree from Lawrence Technical University. Both currently have graduated from Thomas M. Cooley School of Law.

Even assuming that the circuit court erred by overlooking Victor's affidavit and that the legal assistants met the qualifications of the Michigan State Bar Bylaws, art I, § 6, we discern no prejudice to defendant arising from this error, primarily because the legal assistant services rendered embodied duplicative services, which the circuit court properly excluded. MCR 2.613(A).⁴

³ This Court's information pertaining to Docket No. 284180, which involved an appeal from Macomb Circuit Court No. 1995-004372-CZ, also confirms that the prior litigation involved similar legal issues between Macomb Township and defendant's principals.

⁴ Similarly, even accepting defendant's contention that the circuit court also erred by overlooking Victor's descriptions of "the[] professional standing and experience" of co-counsel Geist and Moseley, defendant was not prejudiced. MCR 2.613(A). In light of the duplicative services provided by the three co-counsel, the circuit court did not clearly err by excluding 29.25 hours billed between March 5, 2007, and May 16, 2007. Further, because the court calculated the appropriate hourly fee on the basis of Victor's extensive experience at \$200 an hour, the highest rate identified in the 2007 law practice report, the court's calculation of separate rates for attorneys Geist and Moseley would not have increased the court's award of attorney fees.

In conclusion, with respect to attorney fees we discern no clear error in the circuit court's factual findings that would have altered its calculation of attorney fees to defendant, and no abuse of discretion in the court's decision to award defendant attorney fees amounting to \$20,550.

2. COSTS

Defendant also asserts that the circuit court erroneously declined to award its requested consultant expenses in the amount of \$58,204.70. The circuit court found that "almost all of these expenses were incurred outside the relevant timeframe;" and "the record does not establish these expenses were directly related to plaintiff's challenges to defendant's composting operations," but "[i]nstead, the record suggests these expenses were necessitated in gaining MDA approval and would have been incurred whether or not plaintiff raised any issues with the composting operations." In light of our conclusion that the circuit court correctly interpreted MCL 286.473(1) as requiring that defendant's composting operation meet MDA approval before it could recover attorney fees and costs under MCL 286.473b, defendant's argument concerning costs lacks merit. We note that defendant's briefs on appeal do not specifically contest that it incurred the consultant expenses *before* March 5, 2007. Thus, we conclude that the circuit court properly rejected defendant's request for reimbursement of its consultant expenses.

III. PLAINTIFF'S CROSS APPEAL

Plaintiff argues that the circuit court erred by denying its request for costs under MCR 2.625(B) because it prevailed on its nuisance per se claims relating to defendant's nonresidential driveways. "This Court reviews for an abuse of discretion a trial court's ruling on a motion for costs pursuant to MCR 2.625." *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204; ___ NW2d ___ (Docket No. 301822, issued June 28, 2012), slip op at 2. "The determination whether a party is a 'prevailing party' is a question of law" that we review de novo. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 489; 717 NW2d 341 (2006). We review for clear error a circuit court's findings of fact. MCR 2.613(C).

Plaintiff moved to tax costs under MCR 2.625. Subrule MCR 2.625(A) provides that generally, "[c]osts 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." Subrule MCR 2.625(B)(2) states that "[i]n an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. . . ." "[T]o be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998).

Plaintiff's first amended complaint in LC No. 06-001054-CZ averred that defendant's construction of a road "on the site violate[d] various provisions of [plaintiff's] Zoning Act," defendant's ordinance violations "constitute[d] a nuisance per se," and "[a]batement of [defendant's] nuisance is only remedied by way of injunctive order of" the circuit court. The complaint in LC No. 06-004429-CZ alleged that defendant had begun construction of a second nonresidential driveway on its property without seeking plaintiff's approval, as envisioned in a

township zoning ordinance; the ordinance violation amounted to “a nuisance per se,” and “[a]batement of [defendant’s] nuisance per se is only remedied by way of injunctive order of” the circuit court. A separate count asserted that defendant’s construction of the second nonresidential driveway on its property “without first submitting plans for review and approval by [plaintiff]” violated a township engineering ordinance, and plaintiff requested injunctive relief “enjoining [defendant] from constructing, installing and/or using the roadway . . . illegally constructed.” The circuit court entered a judgment of no cause of action on those counts on the basis that plaintiff’s ordinances were unconstitutionally void for vagueness. On appeal, this Court upheld the constitutionality of plaintiff’s ordinances and determined that defendant had “fail[ed] to seek approval of its construction plans under [Richmond Township ordinance] § 4.12(A) before starting the roadway project and . . . fail[ed] to timely submit a site plan application under [Richmond Township ordinance] § IV-1(I)(2) before commencing the work.” *Richmond Twp*, slip op at 5-10. This Court concluded “that the ordinances are constitutionally sound and that the trial court erred in ruling against [plaintiff] in regard to the access roads; therefore, reversal is mandated.” *Id.* at 1. Accordingly, this Court “reverse[d] the trial court’s rulings on the constitutionality of the ordinances[.]” *Id.* at 10.

Notwithstanding this Court’s “holding that [plaintiff’s] ordinances were constitutional,” *id.*, slip op at 1, defendant suggests that plaintiff “did not improve its position” because the circuit court “did not enter judgment in favor of [plaintiff] on any claim . . . , either before or after remand,” and plaintiff “did not pursue its claims . . . on remand.” However, this Court’s decision in *Richmond Twp*, particularly the portions referenced in the preceding paragraph, plainly indicates that this Court intended to sustain plaintiff’s nuisance per se claims premised on the alleged township ordinance violations regarding nonresidential driveways. Defendant additionally submits that the final sentence in the final paragraph of this Court’s prior decision requires a denial of plaintiff’s motion to tax costs under MCR 2.625. This Court concluded, “No taxable costs are ordered under MCR 7.219, as neither party prevailed in full.” *Id.* at 11. On appeal, plaintiff prevailed in part on its nuisance per se claims, and defendant prevailed in part on the attorney fee, costs, and expenses issue. That this Court opted against taxing *appellate* costs because each of the parties prevailed in part did not preclude the circuit court from taxing costs for “the party prevailing on each issue or count” in the circuit court, in conformity with MCR 2.625(B)(2).

Although the circuit court correctly observed that plaintiff had succeeded “on appeal in having the constitutionality of its ordinances sustained,” the court clearly erred when it found that plaintiff had not prevailed concerning the ordinances on the basis that “plaintiff will not have actually prevailed on the driveway/access road issue until a determination is made regarding its decision to deny approval of defendant’s site plan application.” With respect to defendant’s site plan, this Court stated:

We recognize that very late into the litigation [defendant] had unsuccessfully submitted a site plan covering the west-side access road and failed to gain approval of its construction and planned construction activities. And we recognize that the trial court, given its rulings on the constitutionality of the ordinances, concluded it was unnecessary to determine whether the township’s denial of the site plan application was arbitrary and capricious. Although it is appropriate to remand the case to the trial court on that issue, assuming that the

issue was properly before the court in the first place from a procedural standpoint, it cannot be said that [defendant] is now entitled to costs, expenses, and attorney fees under MCL 286.473b in relation to the completed roadway litigation. *This is because the nuisance claims focused on [defendant's] undisputed failure to seek approval under the ordinances before commencing road construction. . . . [Richmond Twp, slip op at 10 (emphasis added).]*

Thus, this Court previously recognized the distinct nature of plaintiff's ordinance-based nuisance claims regarding defendant's nonresidential driveways and defendant's site plan application concerning "the west-side access road." Moreover, we find no logical connection between plaintiff's ordinance-based nuisance claims and the site plan application that would render them related claims, at least for taxation of cost purposes under MCR 2.625(B).⁵

Accordingly, we conclude that the circuit court erred when it found that plaintiff could not qualify as a prevailing party on its ordinance-related nuisance claims before a resolution of defendant's site plan application. MCR 2.613(C). We further conclude that the circuit court abused its discretion by entirely rejecting plaintiff's motion to tax costs pursuant to MCR 2.625, and that remand for a calculation of appropriate costs under MCR 2.625(B)(2) is necessary. Finally, we note that plaintiff alternatively requested reimbursement of "its costs, expenses and attorney fees . . . based on [defendant's] illegal conduct." The circuit court did not address that claim. Consequently, on remand, we direct the circuit court to consider whether to award plaintiff costs and expenses on the basis of the unlawful conduct doctrine. See *Ypsilanti Twp v Kircher*, 281 Mich App 251, 286; 761 NW2d 761 (2008).

Affirmed in part, reversed in part, and remanded for a determination of plaintiff's taxable costs under MCR 2.625(B)(2), and whether to reimburse plaintiff for any litigation expenses under the unlawful conduct doctrine. We do not retain jurisdiction. Neither party having prevailed in full, no appellate taxable costs are awarded pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

⁵ To the extent that the circuit court conclusorily invoked an "interests of justice" exception as another basis for declining to award plaintiff costs under MCR 2.625, the unambiguous court rule language does not contemplate such an exception.