

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

DAVID M. KIPLEY, ET AL,
Plaintiffs,

File No. 91-8813-CP
HON. THOMAS G. POWER

COCA-COLA COMPANY, INC., ET AL,
Defendants.

David G. Grunst (P36420)
Attorney for Plaintiffs

Lloyd C. Fell (P13359)
Attorney for Defendants

DECISION AND ORDER

Pursuant to a December 12, 1994 Order of the Michigan Court of Appeals returning the above-captioned matter to this Court for a determination of costs attributable to Plaintiffs' appeal, a Prehearing Order was issued soliciting written argument and supporting documentation from the parties. Plaintiffs and Defendants have each submitted responses. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

This phase of the case began when the Court of Appeals issued its March 24, 1994 opinion determining, "this appeal and the circuit court proceedings to be vexatious" and awarding "attorneys fees and costs" to the Defendants. The case was remanded for a determination of attorneys fees and costs. After hearings and the submission of documentary support, this Court, on August 12, 1994, issued a Decision making findings as to attorney fees and costs to be awarded to Defendants pursuant to the Court of Appeals' instruction.

The Court of Appeals, in its December 12, 1994 order, has now concluded that it exceeded its authority in declaring the circuit court proceedings vexatious and therefore awarded attorney fees only for the appeal portion of the case. This Court, in the determination of attorney fees, had separated attorney fees for the trial and appeal portions of the case in its August 12, 1994 Decision, but had not separated costs. The Court of Appeals has again remanded the case for this Court to separately determine the costs that are to be attributable to Plaintiffs' appeal as distinguished from the trial court phase of the case.

Plaintiffs object that the costs to be awarded should be limited to the taxable costs described in MCR 7.219(F). These are costs which are awarded to the party prevailing in an appeal as a matter

of course. The December 12, 1994 remand to this Court for a determination of costs attributable to Plaintiffs' appeal contemplates an award of actual costs, not the limited costs set forth in the court rule. This Court, in its Decision of August 12, 1994, did include actual costs in the amount determined for an award to the Defendants. Had that not been correct, the Court of Appeals would have so indicated in its December 12, 1994 order.

This Court concludes that the "costs" the Court of Appeals has awarded, attributable to Plaintiffs' appeal, must mean the actual costs and not the limited court rule or statutory costs.

In its August 12, 1994 Decision, this Court went through Defendants' costs in great detail and made certain determinations with respect thereto. Applying those determinations to the portion of

costs attributable to the appeal results in an award to Defendants in the amount of \$421.79 on account of costs incurred by Bodman, Longley and Dahling. The costs incurred by the New York law firm of Hall, Dickler in connection with the appeal were waived by the Defendants in their memorandum submitted in response to the Pre-hearing Order.

Plaintiffs and their attorneys, David G. Grunst, and Brott, Conaway, Kipley, Grunst and Settles, P.C., are liable to the Defendants in the amount of \$10,421.79 and that liability is joint and several as provided on p. 19 of this Court's August 12, 1994 Decision.

IT IS SO ORDERED.

HONORABLE THOMAS G. POWER
Circuit Court Judge

Dated: 2/3/95