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**OUTDOOR SYSTEMS, INC., d/b/a INFINITY OUTDOOR, Plaintiff-Appellant, v  
CITY OF CLAWSON, Defendant-Appellee.**

**Docket No. 263365, No. 263365**

**COURT OF APPEALS OF MICHIGAN**

*273 Mich. App. 204; 729 N.W.2d 893; 2006 Mich. App. LEXIS 3585*

**December 5, 2006, Submitted**

**December 12, 2006, Decided**

**PRIOR HISTORY:** [\*\*\*1] Oakland Circuit Court.  
LC No. 2000-022427-CZ.

*Outdoor Sys., Inc. v. Oakland Circuit Court Clawson,  
262 Mich. App. 716, 686 N.W.2d 815, 2004 Mich. App.  
LEXIS 1863 (2004)*

**DISPOSITION:** Reversed and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** When appellee City denied appellant billboard advertising company's request to install signage, the company sued the City; the trial court ruled in the City's favor. On appeal, the company succeeded in its challenge to the trial court's ruling that the ordinance in question did not unconstitutionally restrict commercial free speech. The Oakland Circuit Court, Michigan, denied the company's request for attorney fees. The company appealed.

**OVERVIEW:** On review, the company argued that the trial court erred in determining that it was not a "prevailing party" for purposes of 42 U.S.C.S. § 1988 in the underlying 42 U.S.C.S. § 1983 action. The appellate court agreed, finding that the company prevailed on a significant issue in the litigation. In the company's first appeal, the appellate court concluded that the billboard prohibition within the City ordinance violated *U.S. Const. amend. I*; to the extent that the ordinance otherwise allowed large outdoor signs, within the size and height limitations, billboard advertisers like the company had to be allowed to procure, build, and lease locations even though their signage was readily changeable. Thus, the appellate court determined that although the City was able to restrict height and size of billboards, it was not

able to prohibit billboards altogether. As such, the relationship between the company and the City was altered in a way that benefited the company, and the company was a prevailing party under 42 U.S.C.S. § 1988.

**OUTCOME:** The judgment was reversed and the case was remanded for further proceedings to determine the company's attorney's fees award.

**LexisNexis(R) Headnotes**

***Real Property Law > Zoning & Land Use > Ordinances***  
[HN1] Former Clawson, Mich., Ordinance § 34-1110 prohibited billboards. Former Clawson, Mich., Ordinance § 34-1102 defined a billboard as a non-accessory sign which is directed to the general public, and on which a display can be posted, painted or otherwise affixed in a manner which is readily changeable. Clawson, Mich., Ordinance § 34-1102 further defined a non-accessory sign as a sign which does not pertain to the principal use of the premises on which such sign is located.

***Real Property Law > Zoning & Land Use > Ordinances***  
[HN2] See former *MCL 125.592*.

***Real Property Law > Zoning & Land Use > Ordinances***  
[HN3] See Clawson, Mich., Ordinance § 640.

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview***

***Civil Procedure > Appeals > Standards of Review > De Novo Review******Governments > Courts > Judicial Precedents******Governments > Legislation > Interpretation***

[HN4] Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts upon federal questions, including interpretations of federal statutes. Federal case law uniformly holds that the issue of determining prevailing party status under 42 U.S.C.S. § 1988 is a legal question subject to de novo review.

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

[HN5] Questions of law are reviewed de novo on appeal.

***Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > General Overview***

[HN6] The Civil Rights Attorney's Fees Awards Act, 42 U.S.C.S. § 1988, governs the award of attorney fees in actions to enforce various federal civil rights and anti-discrimination statutes.

***Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > Prevailing Parties***

[HN7] See 42 U.S.C.S. § 1988.

***Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > Prevailing Parties***

[HN8] Although the phrase "may allow" in 42 U.S.C.S. § 1988 might appear to be permissive, the U.S. Supreme Court has interpreted the phrase as mandating attorney fees when the plaintiff prevails and certain special circumstances are not present.

***Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > Degree of Success******Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > Prevailing Parties***

[HN9] A plaintiff must be a "prevailing party" to recover an attorney's fee under 42 U.S.C.S. § 1988. The "prevailing party inquiry" under § 1988 does not turn on the magnitude of the relief obtained. Instead, to be a "prevailing party," a party must succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. At a minimum, the resolution of the dispute must change the legal

relationship between the plaintiff and the defendant.

***Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > Degree of Success***

[HN10] The amount of reasonable attorney fees payable to a plaintiff under 42 U.S.C.S. § 1988 must be commensurate with the degree of the plaintiff's overall success in the underlying 42 U.S.C.S. § 1983 litigation.

**COUNSEL:** *Bodman LLP* (by James J. Walsh, J. Adam Behrendt, and G. Christopher Bernard) for the plaintiff. Ann Arbor.

*Howard & Howard Attorneys, P.C.* (by Jon H. Kingsepp and Cara J. Edwards Heflin), and *Johnson, Rosati, LaBarge, Aseltyn & Field, P.C.* (by Carol A. Rosati and Marcelyn Stepanski), for the defendant. Bloomfield Hills, Farmington Hills.

**JUDGES:** Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

**OPINION**

[\*\*894] [\*205] PER CURIAM.

In this action for attorney fees brought under 42 USC 1988, plaintiff appeals as of right the circuit court's determination that it was not the "prevailing party" in an underlying lawsuit. We reverse and remand for further proceedings.

**I. Facts and Procedural History**

Plaintiff is a billboard advertising company. Plaintiff installs and maintains billboards on property that it [\*206] owns or leases, and then sells advertising space on the billboards. Plaintiff leased the right to install and maintain billboards at certain locations in the city of Clawson. At the time plaintiff applied for permits to install its signage, [HN1] Clawson Code, § 34-1110(13) prohibited billboards. Clawson Code, § 34-1102 defined a "billboard" as a "nonaccessory sign which is directed to the general public, and on which a display can be posted, painted or otherwise affixed in a manner which is readily [\*\*\*2] changeable." Clawson Code, § 34-1102 further defined a "nonaccessory sign" as a "sign which does not pertain to the principal use of the premises on which such sign is located." Accordingly, plaintiff's signs constituted "billboards" as defined by the ordinance, and Clawson

denied plaintiff's request.

Plaintiff then sued Clawson, alleging that Clawson's prohibition on billboards (1) violated the Home Rule City Act,<sup>1</sup> (2) violated § 12 of the former City and Village Zoning Act (CVZA), *MCL 125.592*,<sup>2</sup> and (3) violated *42 USC 1983* by abridging plaintiff's *First Amendment* rights. After facilitation [\*\*\*895] failed, the parties filed cross-motions for summary disposition. The circuit court issued a written opinion, granting summary disposition for Clawson on two grounds. The circuit court ruled that Clawson Code, § 34-1110 did not violate the CVZA because there was no place within Clawson where a [\*207] billboard could be appropriately located. The circuit court also concluded that Clawson's ordinance did not unconstitutionally restrict plaintiff's free-speech rights. The circuit court denied reconsideration.

1 After the Michigan Supreme Court decided *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675; 625 NW2d 377 (2001), plaintiff dismissed its claim in count 1.

[\*\*\*3]

2 *MCL 125.592*, now repealed, provided:

[HN2] A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a city or village in the presence of a demonstrated need for that land use within either the city or village or the surrounding area within the state, unless a location within the city or village does not exist where the use may be appropriately located or use is unlawful.

Plaintiff appealed by right. See *Outdoor Systems, Inc v City of Clawson*, 262 Mich. App. 716; 686 N.W.2d 815 (2004). This Court affirmed the circuit court's ruling that Clawson had not violated the CVZA, but did so on different grounds than those relied on by the circuit court. However, this Court reversed the circuit court's ruling that Clawson Code, § 34-1110 did not unconstitutionally restrict commercial free speech, determining that Clawson's billboard ban was not narrowly tailored to achieve Clawson's interest in traffic safety and aesthetics. This Court reasoned:

Plaintiff challenges [\*\*\*4] the legality of defendant's ordinance that prohibits "billboards," meaning readily changeable signs unrelated to the principal use of the premises upon which they are located. We conclude that, because it advances no governmental interest, the ordinance's prohibition of readily changeable signs violates plaintiff's *First Amendment* right of free speech. We reverse and remand. [*Outdoor Systems, supra at 717.*]

Thereafter, Clawson passed Ordinance 640,<sup>3</sup> which amended Clawson Code, § 34-1110 and deleted the prohibition of billboards. This amendment mooted plaintiff's request for injunctive and declaratory relief.

3 Clawson Ordinance 640 provides in relevant part: [HN3] "**Section 34-1110 Signs Prohibited Throughout the City** is hereby amended with the deletion of paragraph (2), **flashing signs** and the deletion of paragraph (13), **billboards.**"

In the wake of this Court's favorable ruling with respect to plaintiff's *First Amendment* claim, plaintiff moved the circuit court for a determination that [\*\*\*5] it was a prevailing party under *42 USC 1988*, which provides [\*208] for attorney fees. In response, Clawson asserted that it had prevailed. Clawson argued that plaintiff's main objective had not been to eliminate the billboard prohibition altogether, but to challenge Clawson's size and height limitations on signs.

The circuit court denied plaintiff's motion, stating:

Now, defendant also states that [it] prevailed on Count 2, and every issue in Count 3 that was actually litigated by the plaintiff. The Court in *Hensley [v Eckerhart]*, 461 U.S. 424, 433; 103 S. Ct. 1933; 76 L. Ed. 2d 40 (1983),] stated that in order to achieve prevailing party status a plaintiff must both, one, achieve success on a significant issue that, quote, leads to some benefit sought by the plaintiff. There would still have to be a hearing in front of me on *First Amendment* because I never determined if in fact there's been a remand.

\* \* \*

The Court is satisfied it's going to deny this particular motion. I don't think it's properly before me at this point in time. You can always ask the Court of Appeals to examine it. Even if it were, [\*\*\*6] I would think it would be a public question that may not be subject necessarily to costs.

[\*\*896] The circuit court denied plaintiff's motion for determination of prevailing-party status and entered a stipulated judgment providing that plaintiff had withdrawn its claim for actual damages and that the amendment of Clawson's ordinance rendered moot plaintiff's request for injunctive relief. The circuit court also awarded plaintiff nominal damages of \$ 10, and stated that the stipulated judgment "shall not provide the basis for any request by Plaintiff for attorney fees and/or costs . . . ."

## II. Standard of Review

[HN4] "Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts [\*209] upon federal questions, including interpretations of federal statutes." *Yellow Freight System, Inc v State*, 464 Mich. 21, 29 n 10; 627 N.W.2d 236 (2001), rev'd on other grounds 537 U.S. 36; 123 S. Ct. 371; 154 L. Ed. 2d 377 (2002). Federal case law uniformly holds that the issue of determining prevailing-party status under 42 USC 1988 is a legal question subject to review de novo. [\*\*\*7] *Bailey v Mississippi*, 407 F.3d 684, 687 (CA 5, 2005); *Palmetto Props., Inc. v. County of Dupage*, 375 F.3d 542, 547 (CA 7, 2004); *Richard S v California*, 317 F.3d 1080, 1086 (CA 9, 2003); *Christina A ex rel Jennifer A v Bloomberg*, 315 F.3d 990, 992 (CA 8, 2003); *Truesdell v Philadelphia Housing Auth*, 290 F.3d 159, 163 (CA 3, 2002); *Smyth v Rivero*, 282 F.3d 268, 274 (CA 4, 2002); *Church of Scientology Flag Service v City of Clearwater*, 2 F.3d 1509, 1513 (CA 11, 1993). Therefore, we will review de novo the question whether plaintiff was a prevailing party in the underlying litigation for purposes of 42 USC 1988. This is in accord with our own case law, which provides that [HN5] questions of law are reviewed de novo on appeal. *Thomas v New Baltimore*, 254 Mich. App. 196, 201; 657 N.W.2d 530 (2002).

## III. Analysis

Plaintiff argues that the circuit court erred in determining that it was not a prevailing party in the underlying 42 USC 1983 action for purposes of 42 USC 1988. We agree.

[HN6] The Civil Rights Attorney's Fees Awards Act, 42 USC 1988 [\*\*\*8], governs the award of attorney fees in actions to enforce various federal civil rights and antidiscrimination statutes. *Section 1988* provides in pertinent part, [HN7] "In any action or proceeding to enforce a provision of [42 USC 1983], . . . the court, in its discretion, may allow the prevailing party, other than the United States, [\*210] a reasonable attorney's fee as part of the costs . . . ." 42 USC 1988(b). [HN8] Although the phrase "may allow" might appear to be permissive, the United States Supreme Court has interpreted the phrase as mandating attorney fees when the plaintiff prevails and certain special circumstances are not present. *Independent Federation of Flight Attendants v Zipes*, 491 U.S. 754, 761; 109 S. Ct. 2732; 105 L. Ed. 2d 639 (1989).

[HN9] "A plaintiff must be a 'prevailing party' to recover an attorney's fee under § 1988." *Hensley v Eckerhart*, 461 U.S. 424, 433; 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). The "prevailing party inquiry" under § 1988 "does not turn on the magnitude of the relief obtained." [\*\*\*9] *Farrar v Hobby*, 506 U.S. 103, 114; 113 S. Ct. 566; 121 L. Ed. 2d 494 (1992). Instead, "[t]o be a 'prevailing party,' a party must 'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Granzeier v Middleton*, 173 F.3d 568, 577 (CA 6, 1999), quoting *Phelan v Bell*, 8 F.3d 369, 373 (CA 6, 1993), quoting *Hensley, supra* at 433; see also *Texas State Teachers Ass'n v Garland Independent School Dist*, 489 U.S. 782, 791; 109 S. Ct. [\*\*897] 1486; 103 L. Ed. 2d 866 (1989) (holding that a "prevailing party" for purposes of § 1988 is "one who has succeeded on any significant claim affording it some of the relief sought"). At a minimum, the resolution of the dispute must change the legal relationship between the plaintiff and the defendant. *Id.* at 792. The Supreme Court has rejected a "central issue test" that would require a party to succeed on the main issue of the litigation to be considered prevailing. *Krichinsky v Knox County Schools*, 963 F.2d 847, 850 (CA 6, 1992), citing *Texas State Teachers Ass'n, supra* at 790.

In this case, plaintiff was a prevailing party. Plaintiff

[\*\*\*10] prevailed on a significant issue in the litigation, and the [\*211] litigation of its claim materially altered the legal relationship between plaintiff and Clawson in a manner directly beneficial to plaintiff. As we previously determined in *Outdoor Systems, supra at 719*"The main issue presented here is not, therefore, that Clawson does not allow large outdoor advertising signs. Instead, plaintiff challenges the provision of the Clawson ordinance that prohibits "billboards" throughout the city." In a footnote, we further stated:

We recognize that plaintiff also tangentially challenges the size and height limitations of the ordinance. We conclude below that the CVZA does not apply without regard to the size or height limitations of the ordinance. We also conclude below that the trial court did not err in its determination that the size and height restrictions of the ordinance were properly tailored to the governmental interests in traffic safety and aesthetics in satisfaction of *First Amendment* concerns. [*Id. at 719 n 2.*]

We concluded that

the billboard prohibition within the Clawson ordinance violates the *First Amendment*. To the [\*\*\*11] extent that the ordinance otherwise allows large outdoor signs, within the size and height limitations discussed above, billboard advertisers like plaintiff must be allowed to procure, build, and lease locations even though their signage is readily changeable. [*Id. at 724-725.*]

Thus, we determined that although Clawson was able to restrict the height and size of billboards within its municipal limits, it was not able to prohibit billboards altogether. The relationship between plaintiff and Clawson was accordingly altered in a way that benefited plaintiff. Moreover, after we issued our opinion, Clawson amended its code of ordinances to delete its prohibition of billboards from § 34-1110. Although plaintiff presumably still would like to install signs that exceed the size and height restrictions that Clawson has imposed, [\*212] plaintiff has achieved the right to install certain billboards within the city of Clawson as a result of this

litigation because Clawson entirely deleted its outright prohibition of billboards within the city.

Clawson argues that plaintiff did not actually litigate the constitutionality of the § 34-1110 prohibition of billboards. However, plaintiff specifically [\*\*\*12] alleged in its complaint that the ordinance violated its *First Amendment* rights: "On its face and as applied to [plaintiff], the complete ban on billboards by the City of Clawson's Sign Ordinance violates the protections afforded free speech in the *First Amendment to the United States Constitution*." Plaintiff similarly raised the constitutionality of the § 34-1110 ban on billboards in its motion for summary disposition. We reject Clawson's suggestion that plaintiff never fully addressed or litigated this matter below.

In sum, plaintiff is a prevailing party under *42 USC 1988*. Because plaintiff [\*\*\*898] has not yet requested any definite amount of attorney fees, and because the circuit court did not award attorney fees below, we need not determine at this time the proper amount of attorney fees, if any, that should be paid to plaintiff. However, we note that plaintiff, as a prevailing party, is entitled to "reasonable" attorney fees. *42 USC 1988; Hensley, supra at 426*. [HN10] The amount of reasonable attorney fees payable to plaintiff under § 1988 must be commensurate with the degree of plaintiff's overall success in the underlying [\*\*\*13] *42 USC § 1983* litigation. *Texas State Teachers Ass'n, supra at 793*. We reverse the circuit court order and remand this case for further proceedings consistent with this opinion.<sup>4</sup>

4 Clawson argues that even if plaintiff was a prevailing party, no attorney fees are awardable because the underlying litigation involved a question of public interest. On the contrary, the language of *42 USC 1988* does not contain any such public-interest exception. Nor does Michigan's public-question exception apply here. Michigan's exception for cases involving public questions applies only to the taxation of costs, see *Ameritech Mich. v. PSC (In re MCI)*, *460 Mich 396, 444; 596 NW2d 164 (1999)*, and at any rate would not apply in this case, which is governed by federal statute rather than state law.

[\*213] Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen

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/s/ David H. Sawyer

/s/ Richard A. Bandstra

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