In The

Supreme Court of Virginia

RECORD NO. 150005

ALLAN CHACEY and SUSAN CHACEY,

Appellants,

v.

VALERIE GARVEY,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

NATURE OF THE CASE & MATERIAL PROCEEDINGS BELOW 1

STATEMENT OF FACTS..... 3

AUTHORITIES & ARGUMENT 5

STANDARD OF REVIEW..... 5

SUMMARY OF ARGUMENT..... 5

DISCUSSION OF THE ISSUES 6

I. Virginia Code § 55-332(b) Authorizes an Award of Attorney's Fees..... 6

A. A plain reading of Virginia Code § 55-332(b) does authorize an award of attorney's fees 6

B. To the extent Virginia Code § 55-332(b) is ambiguous, the logical interpretation allows attorney fee recovery 8

C. "Directly related legal costs" under Virginia Code § 55-332 are not limited to just filing fees or charges for service of process, and this Court has implicitly held that attorney's fees are a "cost" 11

II. The Court's Award of Legal Fees Was Appropriate 15

A. The time consumed, effort expended, and nature of the services rendered dictated the costs incurred 16

B. All of Garvey's Legal Fees Were Necessary as a Result of the Chaceys' Actions 18

C. The Award Has Already Been Discounted Multiple Times 21

D. The Chaceys are Estopped From Arguing Garvey is Not Entitled to at Least $130,000 in Legal Costs through the End of Trial 21

III. Appellee's Attorney's Fees Were Directly Associated With the Trespass and Timber Theft 24

IV. Garvey Proved Her Timber Theft Damages 27

CONCLUSION 28

REQUEST FOR REMAND SOLELY FOR DETERMINATION OF APPELLATE LEGAL FEES 28

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Page(s)

CASES

Advanced Marine Enterprises, Inc. v. PRC, Inc.,
256 Va. 106, 501 S.E.2d 148 (1998) 8, 11, 12, 13

Baker v. Commonwealth,
28 Va. App. 306, 504 S.E.2d 394 (1998) 24-25

Barber v. Kimbrell's,
577 F.2d 216 (4th Cir. 1978) 15-16

Barr v. Town and Country Props.,
240 Va. 292, 396 S.E.2d 672 (1990) 24

Boynton v. Kilgore,
271 Va. 220, 623 S.E.2d 922 (2006) 5

Burnette v. Commonwealth,
194 Va. 785, 75 S.E.2d 482 (1953) 25

City of Riverside v. Rivera,
477 U.S. 561 (1986) 20

City of Va. Beach v. ESG Enters., Inc.,
243 Va. 149, 413 S.E.2d 642 (1992) 24

Cummings v. Fulghum,
261 Va. 73, 540 S.E.2d 494 (2001) 7

Dalo v. Commonwealth,
37 Va. App. 156, 554 S.E.2d 705 (2001) 9

Frazier v. Commonwealth,
27 Va. App. 131, 497 S.E.2d 879 (1998) 24

Garrison v. First Fed Savings and Loan Ass'n of S.C.,
241 Va. 335, 402 S.E.2d 25 (1991) 25

Holmes v. LG Marion Corp.,
258 Va. 473, 521 S.E.2d 528 (1999) 5, 16

Huffman v. Kite,
198 Va. 196, 93 S.E.2d 328 (1956) 24

Johnson v. Ga. Highway Express, Inc.,
488 F.2d 714 (5th Cir. 1974).....16

Jones v. Conwell,
227 Va. 176, 314 S.E.2d 61 (1984) 8

Kostal v. Davis,
66 Va. Cir. 489 (Va. Cir. Ct. 2004) 10

Lee v. Mulford,
269 Va. 562, 611 S.E.2d 349 (2005) 11

Lofton Ridge, LLC v. Norfolk S. Ry. Co.,
268 Va. 377, 601 S.E.2d 648 (2004) 23

Monument Assocs. v. Arlington County Bd.,
242 Va. 145, 408 S.E.2d 889 (1991) 24

Moyer v. Commonwealth,
33 Va. App. 8, 531 S.E.2d 580 (2000) 25

O'Loughlin v. O'Loughlin,
23 Va. App. 690, 497 S.E.2d 98 (1996).....23

Porter v. Commonwealth,
276 Va. 203, 661 S.E.2d 415 (2008) 8

Raven Red Ash Coal Corp. v. Absher,
153 Va. 332, 149 S.E. 541 (1929).....25

Stepp v. Foster,
259 Va. 210, 524 S.E.2d 866 (2000) 13

Tazewell Oil Co. v. United Virginia Bank,
243 Va. 94, 413 S.E.2d 611 (1992) 15, 17

Vaughn, Inc. v. Beck,
262 Va. 673, 554 S.E.2d 88 (2001) 6

Wilkins v. Peninsula Motor Cars, Inc.,
266 Va. 558, 587 S.E.2d 581 (2003) 14

STATUTES

Va. Code § 17.1-601 ..... 11, 12, 13

Va. Code § 18.2-500 12

Va. Code § 18.2-500(a) 12

Va. Code §§ 55-331, *et seq* 6, 10, 18

Va. Code § 55-332 .....*passim*

Va. Code § 55-332(a) 4, 19

Va. Code § 55-332(b) .....*passim*

OTHER AUTHORITY

Virginia Acts of Assembly 2004 Session (HB 493/SB 548) 9, 10

NATURE OF THE CASE & MATERIAL PROCEEDINGS BELOW

This matter began with the filing of a Complaint (Case No. CL12-659) by Respondent-Appellee Valerie Garvey ("Garvey") on December 11, 2012 in the Circuit Court of Fauquier. The Complaint sought compensation for timber theft, trespass, and property damage related to the logging activities of Petitioners-Appellants Allan and Susan Chacey ("the Chaceys") and co-defendants. (A. 1-6). Garvey additionally requested equitable relief for the overburdening of an easement, prescriptive termination of said easement, and temporary injunctive relief. (A. 6-8). Prior to the trial, on January 7, 2013, the Chaceys successfully barred Appellee's expert witness, Lew Bloch, from testifying as to the quantum of damages from the illegal timber cutting. Order dated January 7, 2013.

A three day jury trial began on January 28, 2014. At the conclusion of the trial, the jury found for Garvey on her claim for timber removal and trespass: awarding $135 under Count I and

$15,000 under Count II respectively.[1] January 30, 2014 Hearing Transcript ("Jan 30, 2014 Hearing Transcript") (A. 1455). In addition, under Count I, the jury awarded Garvey her legal costs as mandated by Virginia Code § 55-332(b), without setting the specific amount. Id.

During trial, the court ruled that a separate hearing would be required to determine the amount of legal costs, including attorney's fees, to be awarded. January 29, 2014 Hearing Transcript ("Jan 29, 2014 Hearing") (A. 1437-1438). This hearing was conducted on June 30, 2014. June 30, 2014 Hearing Transcript ("June 30, 2014 Hearing") (A. 1581).[2] At that time, Counsel for Appellee requested approximately two hundred and fifty thousand dollars ($250,000) for their services in handling the timber trespass, and the Court awarded one hundred and fifty thousand dollars ($150,000). Id. at p. 58. This fee amount consisted of one hundred and thirty thousand dollars ($130,000)

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[1] The $15,000 trespass award was offset by a settlement agreement between Garvey and a co-defendant. (A. 1652-1653).
[2] Between the dates of trial and the hearing on attorney fees, the Appellants filed a Motion for Reconsideration and for J.N.O.V., which motion was denied. (A. 1394-1405).

from the trial, and an additional twenty thousand ($20,000) in fees awarded for all post trial legal work. (A. 1638).

On November 5, 2014, Appellants noticed their appeal.

STATEMENT OF FACTS

In 1995, Garvey purchased the property at issue located at 11190 Red Oak Lane, Markham, Virginia from the Appellants. Jan 28, 2014 Transcript (A. 749). This property is approximately fifty acres with twenty-five (25) acres of rural pasture and partially wooded by a pine forest. (A. 751). Both Garvey's and the Chaceys' properties are accessible by a single dirt road containing both a cattle guard, as well as a concrete bridge. (A. 770-771, 783, 786 and 878). Garvey has the *servient* estate as the road passes her land to reach the Chaceys.

In 2008, the Chaceys engaged a logging company to remove timber from the property. (A. 771). The trucks employed by the logging company caused extensive damage to the cattle guard, fencing, and the bridge. (A. 785, 791 and 795). Prior to the trial, the logging company settled Garvey and paid her for the damage caused.

Garvey engaged a surveyor in 2013 to determine if the Chaceys had logged within her property boundaries. (A. 916). The surveyors study was conducted in August of 2013. (A. 920). The surveyor found a "rather large area of disturbance" on Garvey's property. (A. 916). This disturbance included "vegetation turned up," "trees cut down, piled up" and the property looked like "equipment had run through there." (A. 916).

During the logging, Garvey sent, via certified mail, requests to the Chaceys to have a survey conducted to ensure the logging would be solely on Appellant's land. (A. 802). After no such survey was conducted, Garvey appointed a timber estimator to determine the value of the timber taken. (A. 807-811). Garvey then sent notice on December 22, 2010 of the trespass and made a demand for payment for the timber. (A. 854). The Chaceys denied the trespass and did not appoint any estimators as required by the summary procedure of Virginia Code § 55-332(a) to determine the scope of the taking. (A. 832-834). In effect, the Chaceys invited Garvey to file this litigation.

AUTHORITIES & ARGUMENT

STANDARD OF REVIEW

This matter involves the interpretation of a Virginia Statute and is therefore reviewed *de novo* with regards to the trial court's granting of attorney's fees under Va. Code § 55-332(b). *See Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925 (2006). The quantum of attorney's fees is question of fact and "[o]n appeal the trial court's determination of the amount of the attorneys' fees to be awarded will be set aside only upon a finding of abuse of discretion." *Holmes v. LG Marion Corp*., 258 Va. 473, 479, 521 S.E.2d 528, 533 (1999).

SUMMARY OF ARGUMENT

A plain reading or logical interpretation of Virginia Code § 55-332(b) permits the recovery of attorney's fees as a directly associated legal cost. These fees, which have been discounted multiple times, are reasonable given the complex and novel nature of the statute being litigated – particularly over a three day jury trial. Finally, Garvey put forth sufficient evidence of damages for the trial court to properly deny the motion to strike.

DISCUSSION OF THE ISSUES

I. Virginia Code § 55-332(b) Authorizes an Award of Attorney's Fees.

Damages from the illegal cutting of timber is authorized by statute in Virginia. See Va. Code §§ 55-331, *et seq*. In that respect, Va. Code § 55-332(b) states:

> Any person who (i) severs or removes any timber from the land of another without legal right or permission or (ii) authorizes or directs the severing or removal of timber or trees from the land of another without legal right or permission shall be liable to pay to the rightful owner of the timber three times the value of the timber on the stump and shall pay to the rightful owner of the property the reforestation costs incurred not to exceed $450 per acre, the costs of ascertaining the value of the timber, and *any directly associated legal costs incurred by the owner of the timber as a result of the trespass*.

Emphasis added.

A. A plain reading of Virginia Code § 55-332(b) does authorize an award of attorney's fees.

In Virginia, the court is to examine the language of the statute in its entirety to determine the intent of the Generally Assembly from the words contained in the statute, unless a literal construction of the statute would yield an absurd result. *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001). When

the language of a statute is clear and unambiguous, the court is bound to the plain meaning of the statute. *Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001).

The plain meaning of this statute is clear and unambiguous. Virginia Code § 55-332(b) provides for "*any directly associated legal costs incurred by the owner as a result of the trespass*." The legislature amended § 55-332 in 2004 to include treble damages and these legal costs which were "directly associated" with the trespass.

The amended law's intent is clear: to punish violators while ensuring that property owners are held harmless (and thus reimbursed) for any resulting legal costs. Here, Appellants' initial trespass and refusal to recognize its wrongful conduct caused all of the legal costs the Appellee has incurred in this matter – including this very appeal. Appellants should be required to make Appellee whole.

B. To the extent Virginia Code § 55-332(b) is ambiguous, the logical interpretation allows attorney fee recovery.

The Chaceys cite the definition of "costs," as well as Virginia case law interpreting the term "costs," in order to contend that "costs" are limited to filing fees or charges for service of process, and do not include attorney's fees. Brief of Appellants at p. 9; *see also Advanced Marine Enterprises, Inc. v. PRC, Inc.*, 256 Va. 106, 126, 501 S.E.2d 148, 160 (1998).

In regard to the relevant provision in Section 55-332, however, the language is much broader than just "costs," and is also stated within a remedial context where landowners are made whole. In such case, this Court has held that "[t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read to give reasonable effect to every word." *Porter v. Commonwealth*, 276 Va. 203, 230, 661 S.E.2d 415, 427 (2008) (quoting *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984)).

Virginia Code § 55-332(b) provides explicitly for the recovery of "***any*** *directly associated legal costs* incurred by the owner as a result of the trespass." Va. Code § 55-332(b) (emphasis added). This broad language was added in the 2004 amendment, which also added treble damages as well as criminal penalties for timber theft. Before the 2004 amendments, section 55-332(b) did not exist, and there was no reference to "any directly associated legal costs." See Virginia Acts of Assembly 2004 Session (HB 493/SB 548).[3]

The legislature in 2004 was presumed to be aware of the Court's pre-existing obligation to award generic "costs" (filing and service fees) pursuant to any judgment. *See Dalo v. Commonwealth*, 37 Va. App. 156, 165, 554 S.E.2d 705, 709 (Va. Ct. App. 2001) ("We presume the legislature was aware of similar language within the Code and the courts' interpretations of that language when drafting this statute."). Here, their specific choice of remedial language expands the statute beyond that pre-existing obligation. Moreover, the Assembly's intent in

[3] Indeed, the pre-2004 version of the statute had no enforcement means, other than just an ordinary cause of action.

amending the statute in 2004 was to deter violators – it would be an absurdity to add the remedy of "treble damages" and then merely permit the successful owner to recover his filing fees, especially when that fee is already taxable under Virginia law.

The Chaceys cite *Kostal v. Davis*, a 2004 Virginia Circuit Court case that interprets the term "costs" in Virginia Code §§ 55-331, *et seq.*, to only mean filing fees or charges for service of process. 66 Va. Cir. 489 (Va. Cir. Ct. 2004). Putting aside the fact that this Circuit Court decision has no precedential effect to the present appeal, it is still irrelevant. *Kostal* predates the 2004 amendment that changed the substance of the timber theft statute and added the critical language. Therefore the trial court is interpreting of the wrong version of Virginia Code § 55-332. See Virginia Acts of Assembly 2004 Session (HB 493/SB 548). The 2004 amendment, as discussed earlier, added the new section which includes "directly related legal costs." *Kostal* interprets old law, and thus not relevant to this case.

C. "Directly related legal costs" under Virginia Code § 55-332 are not limited to just filing fees or charges for service of process, and this Court has implicitly held that attorney's fees are a "cost."

The Chaceys cite *Advanced Marine* as an example of where the Supreme Court of Virginia has interpreted the term "costs" narrowly. In *Advanced Marine* the Court found that under Virginia Code § 17.1-601 "costs" only include filing fees or charges for service of process. Id., 256 Va. at 126, 501 S.E.2d at 160. Therefore, *Advanced Marine* is not relevant to this case because of the different nature of the code sections. Va. Code § 17.1-601 is a general rule that provides a baseline of what prevailing parties shall receive as recovery in all proceedings.[4] For the Court to interpret "costs" in that context to include attorney's fees would require the awarding of attorney's fees in all proceedings with a prevailing party – thereby obviating the American Rule that prevails in Virginia. *Lee v. Mulford*, 269 Va. 562, 565, 611 S.E.2d 349, 350 (2005).

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[4] Specifically it states that "[e]xcept when it is otherwise provided, the party for whom final judgment is given in an action or motion shall recover his costs against the opposite party." Virginia Code § 17.1-601.

In actuality, *Advanced Marine* supports Respondent's position. After limiting the definition of "costs" pursuant to the general statute, Virginia Code § 17.1-601, this Court recognized attorney's fees as recoverable pursuant to a specific remedial statute – like the present case.

Advanced Marine involved a challenge of awarded costs under Virginia Code § 18.2-500. This code section related to business conspiracy allows for the recovery of "the costs of suit, including a reasonable fee to plaintiff's counsel." Virginia Code § 18.2-500(a). In discussing the costs awarded, this Court held "*with the exception of reasonable attorney's fees*, Code § 18.2-500 makes no provision for an award of costs other than those ordinarily awarded under the general statutes of Title 14.1 of the Code addressing the taxing of costs." *Advanced Marine*, 256 Va. at 125, 501 S.E.2d at 159. The opinion's inclusive language indicates that this Court presumptively views reasonable attorney's fees in the general description of "costs," outside the narrow statutory context of § 17.1-601.

In addition, the Chaceys cite *Stepp v. Foster*, to again contend that "costs" only include filing fees or charges for service of process. See Brief of Appellant at p. 12; *Stepp v. Foster*, 259 Va. 210, 218, 524 S.E.2d 866, 871 (2000). Identical to *Advanced Marine*, the Court in *Stepp* interpreted § 17.1-601, the "catch-all" code section which mandates the obligatory award of filing and service fees. The interpretation of this provision does not constrain the defined "costs" allowed under § 55-332.

The Chaceys also contend that Virginia Code § 55-332 "neither mandates nor references any authority upon which a prevailing party may seek an award of attorney's fees." Brief of Appellants at pp. 12–13. However, the "hold harmless" nature of the code section is apparent from a plain reading. The statute is intended to protect landowners from illegal trespass and taking of timber from their property. In awarding various damages and "any directly associated legal costs incurred by the owner as result a result of the trespass," the statute (§ 55-332) places the victimized landowner in the position they would have occupied if the trespass and taking of timber had not occurred.

If the Court adopted the Chaceys' approach limiting "any directly associated legal costs" to only include filing fees or charges for service of process, landowners would effectively be deterred from pursuing legal recourse. Potential plaintiffs under Virginia Code § 55-332 would have no incentive to pursue their statutory recourse for fear of being liable for attorney's fees that exceed any recovery. That is not how remedial statutes work. *See Wilkins v. Peninsula Motor Cars, Inc.*, 266 Va. 558, 563, 587 S.E.2d 581, 584 (2003) (finding that the "fee shifting provisions of the VCPA are designed to encourage private enforcement of the provisions of the statute"). Perpetrators of the statute would also be incentivized to make the trial as difficult and time consuming as possible, through excessive motions and continuances. Inevitably, circumstances would reach the point where pursuing legal recourse would be financially infeasible.

Finally, the Chaceys argue that the allowance of "directly related legal costs" under Virginia Code § 55-332 is narrower than allowing for just "costs." (Brief at pp. 8-9) Instead, as argued earlier, the term "any" in Virginia Code expands, rather

than limits, the scope of the recoverable costs in the code section. For all these reasons, the trial court correctly determined that Section 55-332 permitted the plaintiff to recover its attorney's fees as part of the "directly associated legal costs."

II. The Court's Award of Legal Fees Was Appropriate.

In Virginia, the fact finder must determine "from the evidence the amount of the reasonable fees under the facts and circumstances of each particular case." *Tazewell Oil Co. v. United Virginia Bank*, 243 Va. 94, 111, 413 S.E.2d 611, 621 (1992). "In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances." Id. at 112, 413 S.E.2d at 621. The Fourth Circuit has adopted a similar set of standards.[6] *See Barber v.*

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[6] These factors are: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the out-set of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal

Kimbrell's, 577 F.2d 216, 229 (4th Cir. 1978) (adopting the "twelve factor" test of *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). The quantum of attorney's fees is question of fact and "[o]n appeal the trial court's determination of the amount of the attorneys' fees to be awarded will be set aside only upon a finding of abuse of discretion." *Holmes v. LG Marion Corp*., 258 Va. 473, 479, 521 S.E.2d 528, 533 (1999).

The Chaceys' own selections of the transcript from the hearing on the subject of attorney's fees demonstrates that the court weighed these factors and reached a reasonable conclusion in awarding $150,000.00.

A. The time consumed, effort expended, and nature of the services rendered dictated the costs incurred.

"In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other

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community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

attending circumstances." *Tazewell Oil Co.*, 243 Va. at 112, 413 S.E.2d at 621.

The present matter involved a three day jury trial. Prior to the trial, there were depositions taken and a multitude of pre-trial motions which were argued. Post-trial, there was a motion to overturn the jury verdict and then a separate hearing for attorney's fees. This was also a complex matter regarding a new statute with no supporting precedent. Even the judge himself noted the complexity of the statute, stating:

> [T]hese code sections -- you know, it kind of reminds me of reading the Bible. Every time you read it, you see something else there that you didn't see before. It's kind of like reading § 55-332. It's like waiting for more revelations to come forward by reading and rereading that rather difficult code section.

Hearing Transcript, Jan. 29, 2014 (A. 1032).

The number of hours incurred in the case – both before and after trial counsel was involved – was dictated by the complex nature of the case and the "no quarter" approach of the defendants in opposing every possible remedy.

The Chaceys discuss "several failures during the course of the proceedings," in support of their argument against the award

of any attorney's fees. See Brief of Appellants at p. 16. The trial court, however, already discarded this argument in its ruling during the post-trial valuation hearing. Specifically, it said, "I don't think you have to necessarily win every motion or do things perfectly to be compensated for your attorney's fees when you're trying a case. It's pretty hard to try a perfect case." (A. 1636).

B. All of Garvey's Legal Fees Were Necessary as a Result of the Chaceys' Actions.

Virginia Code § 55-331, *et seq.*, provides for two avenues for recovery in a timber cutting situation. The first is a summary proceeding that avoids the cost of litigation:

> The owner of the land on which such trespass was committed **shall have the right**, within 30 days after the discovery of such trespass and the identity of the trespasser, **to notify the trespasser and to appoint an experienced timber estimator** to determine the amount of damages. . . . Within 30 days after receiving notice of the alleged trespass and of the appointment of such estimator, **the alleged trespasser, if he does not deny the fact of trespass**, shall appoint an experienced timber estimator to participate . . . The estimation of damages and the rendition of statement must be effected within 30 days from the receipt of

> notice of appointment, by the trespasser, of an estimator.

Virginia Code § 55-332(a) (emphasis added).

After the trespass was discovered, Garvey properly appointed an estimator and notified the Chaceys of the trespass. By letter, the Chaceys denied the trespass which necessitated this court proceeding. Indeed, counsel for the Chaceys admits the court proceeding was necessitated by his own client's actions:

> MR. HOOK: That's what's in this letter. There's a reason for refusing to appoint an estimator. I told them we didn't trespass. How much more clearer can we be? And in such case, the aggrieved party may proceed in the appropriate court. The legislature – that's the end of 334, Your Honor, the second paragraph. So what we have here is the legislature attempted to have neighbors resolve this themselves.
>
> THE COURT: Right. That seems to be the intent of the statute.
>
> MR. HOOK: And when that falls, when that fails, we come to court.
>
> THE COURT: Okay

Hearing Transcript, Jan. 28, 2014 (A. 832).

The Chaceys had no good faith basis for their continued trespass and timber cutting, especially after they were put on

notice. They had not conducted a survey of the property and did not appoint a timber expert as the summary procedure requires. They never admitted to the trespass or agreed to the boundary lines, which necessitated the action. All of the legal expenses of Garvey were avoidable and incurred solely because of the intentional, ongoing actions of the Chaceys.

The Chaceys state "the amount of the Appellee's attorney's fees compared with the result obtained by counsel for the Appellee is so grossly *disproportionate*, that any award of attorneys fees renders such award a penalty to the Appellants and permits the Appellee to collect a monetary award not supported by statutory or case law authority." Brief of Appellants at p. 17. Despite the Chaceys' contentions, the trial court had proper authority to issue such an award. The Supreme Court of the United States in *City of Riverside v. Rivera*, expressly prohibited the limiting of attorney's fees based on its *proportion* to compensatory damages. 477 U.S. 561, 576 (1986).[7]

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[7] In this case the Plaintiffs received $33,350 in compensatory damages and were awarded $245,456.25 in attorney's fees, noting that damages is one of many factors to be considered and

C. The Award Has Already Been Discounted Multiple Times.

In representing Garvey, Holland & Knight billed at an hourly rate lower than their customary fee to account for the trial being held in a different legal market. At the conclusion of the trial they deducted another ten percent (10%) from their invoice. June 30, 2014 Hearing at p. 12 (A. 1592). Additionally, Garvey incurred $43,000 in legal expenses from prior counsel that were not submitted to the court for payment, because they were based on a previous action by the Chaceys that was nonsuited (A. 1530). On top of these voluntary reductions, the trial court still cut the invoice of Holland & Knight nearly in half – from approximately $250,000 to $150,000.

D. The Chaceys are Estopped From Arguing Garvey is Not Entitled to at Least $130,000 in Legal Costs through the End of Trial.

During Appellants' closing argument, their counsel brought up the legal costs of Appellee, saying:

> MR. HOOK: Thank you very much. You guys have had a long couple of days. In the beginning of this case,

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rejecting the theory that attorney's fees should be proportionate to damages recovered.

> counsel for the plaintiff was saying there was going to be a real trespass and real damage. Let me dive right into Count 1.
>
> Count 1 is timber removal. $135 in damage is what they're entitled to. $135. But Ms. Garvey said she spent $130,000 on attorneys' fees. Is there any rationale to that at all? Why wasn't this in a small claims court if it's $135?
>
> **But if you award her $135, you have to award legal costs, and she's saying it's $130,000 to get $135. I would suggest that maybe this Count 1 is a pretext to get attorneys' fees**.
>
> They're not entitled to attorneys' fees in the other two claims, so they trump up this Count 1, $135 in damages to get $130,000 in attorneys' fees.

Jan 30, 2014 Transcript at 660-61 (A. 1329-1330)(emphasis added).

In other words, the Chaceys made a strategic decision in closing argument to emphasize the perceived windfall of attorney's fees. They specifically told the jury that, if they find for Garvey on Count I, then they are effectively awarding attorney's fees in the amount of $130,000 through the trial. The purpose of this argument was clearly to "shock" the jury into not finding liability on Count I – and yet they found for Garvey anyway and awarded her "legal costs."

As a result of taking this position, the Chaceys are now estopped from arguing on appeal that Garvey's attorney's awarded fees (which are now $150,000) were not anticipated by the law or by the jury.[8] In fact, they are exactly what the Chaceys publicly predicted at trial. "Essentially, judicial estoppel forbids parties from assum[ing] successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 380-81 (2004) (citations omitted).

The jury was tasked to fully compensate Garvey for all damages they believed she incurred. Legal costs, under the statute, are a damage to be awarded. The Chaceys took the position that Garvey was claiming at least $130,000 under Count 1, should the jury find in her favor. (Notably this argument was

[8] In this Opposition, Garvey is asking the Court, if it finds in her favor, to remand this matter back to the Circuit Court for a hearing on any additional "related legal costs" incurred during the appeal, pursuant to the plain text of Virginia Code Section 55-332. *O'Loughlin v. O'Loughlin*, 23 Va. App. 690, 497 S.E.2d 98 (1996) requires a specific request that the case be remanded for a fee award. Ms. Garvey hereby makes that request.

made before the post-trial motions and ensuing appeal). By finding in her favor on Count 1, the jury could easily (if not likely) assume she would receive at least this amount, if they found for her on Count I. And they specifically made that finding.

III. Appellee's Attorney's Fees Were Directly Associated With the Trespass and Timber Theft.

The plain language of the final clause in § 55-332(b) mandates how legal costs are to be paid to a plaintiff that prevails under its statutory scheme. "When analyzing a statute, we must assume that 'the legislature chose, with care, the words it used ... and we are bound by those words as we interpret the statute.'" *City of Va. Beach v. ESG Enters., Inc.*, 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting *Barr v. Town and Country Props.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)); *see also Huffman v. Kite*, 198 Va. 196, 199, 93 S.E.2d 328, 330 (1956); *Frazier v. Commonwealth*, 27 Va. App. 131, 135, 497 S.E.2d 879, 881 (1998). The courts are bound, wherever possible, to give effect and meaning to each and every word of a statute. *See, e.g., Monument Assocs. v. Arlington County Bd.*, 242 Va. 145, 149, 408 S.E.2d 889, 891 (1991); *Baker v.*

Commonwealth, 28 Va. App. 306, 504 S.E.2d 394 (1998). "It is the duty of the courts to give effect, if possible, to every word of the written law." *Moyer v. Commonwealth*, 33 Va. App. 8, 35, 531 S.E.2d 580, 593 (2000). A word or clause can only be deemed unnecessary if it "appears to have been inserted through inadvertence or mistake, and which is incapable of any sensible meaning," or is otherwise completely inapposite to the rest of the statute. *Burnette v. Commonwealth*, 194 Va. 785, 788-89, 75 S.E.2d 482, 485 (1953). "[N]o part of an act should be treated as meaningless unless absolutely necessary." *Garrison v. First Fed Savings and Loan Ass'n of S.C.*, 241 Va. 335, 340, 402 S.E.2d 25, 28 (1991) (citing *Raven Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335, 149 S.E. 541, 542 (1929)).

Virginia Code § 55-332(b) provides for "any directly associated legal costs incurred by the owner of the timber a*s a result of the trespass*." (emphasis added). Both parties agreed, without objection, to Instruction 11, which defined trespass as:

> "A trespass is an entry on the premises of another without any right, lawful authority, or an express or implied invitation. An entry can include a trespass, including walking upon it, flooding it with water, casting

> objects upon it, or otherwise. A trespass may also be found through an intentional failure to leave the premises of another after being requested to do so by the occupant."

Jury Instruction No. 11. (Exhibit C). The addition of the word "the" before trespass means the remedy refers to the specific trespass being litigated – here the entry on Appellee's property by Appellant.

The General Assembly allows for legal costs that are a "result of the trespass." (A. 1451). To understand the scope of what is "a result of the trespass," the Court must look to the clause in its entirety. The clause modifies "result of the trespass" through the word "any." The General Assembly intended to allow **any** legal cost incurred by Garvey "as a result of" the Chaceys entering her land and damaging her property through the cutting down of her trees.

All of the counts in the trial were a direct result of the trespass. Without the trespass, there would have been no timber cutting, no litigation and likewise no legal fees.

The Chaceys attempt to muddy the issue by bringing to light a number of invoice discrepancies or disputes. However, these

same items were presented to the trial court who, after careful weighing and deliberation, lowered Garvey's attorney's fees by approximately one hundred thousand dollars ($100,000). Nothing new is raised in this respect on appeal.

IV. Garvey Proved Her Timber Theft Damages.

Virginia Code § 55-332(b) grants multiple avenues of recovery for property owners who have their timber taken. These include: treble the value of the timber taken; cost of ascertaining the value of the timber; reforestation costs not to exceed $450; and any directly associated legal costs. The trial court granted the motion to strike with regards to the first two measures of damages for lack of evidence. However, the trial court allowed the latter two to go to the jury.

At trial Garvey produced significant evidence of damages. She produced photographs showing the large trucks driving on the dirt road and the resulting damage to both the road. January 28, 2014 Hearing Transcript (A. 773, 783-784). Testimony was given as to the character and quantity of changes and damages to the road and cattle guard. (A. 774-786). Testimony and

pictures were likewise produced to show the condition of the bridge before and after the logging. (A. 786-793).

In addition to the testimony of Garvey, a surveyor provided testimony of the trespass itself. The surveyor testified as to a land disturbance on the property of Appellee. (A. 915) This "rather large area of disturbance" included vegetation that was turned up; signs of the use of heavy machinery; and trees cut down and piled up. (A. 916). Garvey put on sufficient evidence for her claim to go to the jury – and clearly the jury validated the Court's confidence in her evidence, finding for Garvey on two of the three counts.

CONCLUSION

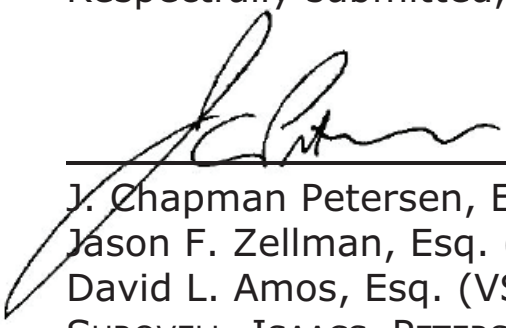
For the reasons stated above, Valerie Garvey respectfully requests the Court to affirm the decision of the trial court.

REQUEST FOR REMAND SOLELY FOR DETERMINATION OF APPELLATE LEGAL FEES

Pursuant to the Rules of the Virginia Supreme Court and Section 55-332 of the Virginia Code, Valerie Garvey hereby requests that the Court remand this matter to the Circuit Court of

Fauquier County solely for a determination of those reasonable legal costs and fees incurred by her pursuant to her defense of the appeal in this matter.[9]

Respectfully submitted,



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[9] Ms. Garvey is seeking an affirmation of the circuit court's ruling. If the Court does remand for a hearing we are not waiving any rights to seek a full refund of all legal fees incurred by Ms. Garvey in this litigation.

CERTIFICATE OF SERVICE

I hereby certify that this Brief of Appellee is within the word limit set out by the Rules of the Supreme Court of Virginia, Rule 5:26(h). This Brief of Appellee is 5,452 words.

I hereby certify that on this 10th day of August, 2015, 10 copies of this Brief of Appellee were hand-filed with the Clerk of the Supreme Court of Virginia, and an electronic copy of the same was filed, via VACES. On this same day, an electronic copy of the same was served, via email, upon the following persons:

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