In The

Supreme Court of Virginia

RECORD NO. 150005

ALLAN CHACEY and SUSAN CHACEY,

Appellants,

v.

VALERIE GARVEY,

Appellee.

BRIEF OF APPELLANTS

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THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

A. NATURE OF THE CASE

In 1995, the Plaintiff/Appellee (hereafter "Appellee") purchased the property at issue located at 11190 Red Oak Lane, Markham, Virginia, from the Defendants/Appellants (hereafter "Appellants") (Appendix (hereafter "A.") p. 749 at ¶ 10-14). The property purchased by the Appellee was approximately twenty-five (25) acres of rural pasture, which is partially wooded by a pine forest. (A. p. 751 at ¶ 4-6). The Appellee's and Appellants' respective properties are accessible by a single dirt road. (A. p. 770 at ¶ 17-1). The road contains a concrete cattle guard to aid the control of animals on the property. (A. p. 783 at ¶ 11-16). Further, the road crosses small concrete bridge build circa 1961. (A. p. 786 at ¶ 15-19; p. 878 at ¶ 21).

Beginning around 2008, the Appellants engaged a logging company to remove certain timber on their property. (A. p. 771 at ¶ 10-13). According to the testimony of the Appellee, the logging trucks, using the shared road, caused extensive damage to the concrete cattle guard on the dirt road. (A. p. 785 at ¶ 6-19). Further, the Appellee testified that the logging trucks caused damage to the bridge supporting a portion of the dirt road. (A. p. 791 at ¶ 1-8). The Appellee also claimed the logging trucks

caused damage to fencing that ran alongside the shared dirt road. (A. p 795 at ¶ 11-20).

In September of 2013, the Appellee engaged the services of a surveyor in order to assess the location of the alleged timber damage by the Appellants, which occurred between 2008 through 2009. (A. p. 916 at ¶ 4-9). The surveyor conducted his work and field study in August of 2013. (A. p. 920 at ¶ 6-10). Further, the surveyor was unable to make any observations as to what caused the alleged timber disturbance. (A. p. 920 at ¶ 11-16).

At the beginning of the timbering process, the Appellants hired Blue Ridge Forestry Consulting, Inc. (hereafter "Blue Ridge") to assist in the desired timbering on their property. (A. p. 925 at ¶ 12-15). Jeremy Clem, the owner and president of Blue Ridge, personally assisted the Appellants with marking the boundaries of their property. (A. p. 926 at ¶ 5-10). The Appellants marked the boundary, with the aid of Blue Ridge, based on a recorded survey of the property. (A. p. 1156 at ¶ 11-14). Based on the marking done by Blue Ridge, the Appellants logged the timber on their property up to and including their marked boundary line. (A. p. 930 at ¶ 2-5). Additionally, Blue Ridge assisted the logging operation by taking appropriate safeguards to reinforce the road and bridge used by the

logging trucks, including placing oak beams across the bridge to reduce or eliminate any weight being place on the Appellee's bridge. (A. p. 1152 at ¶ 12-20). The road used by the logging trucks exiting the Appellants' property was also repaired or improved with the help of Blue Ridge by grading and adding new gravel. (A. p. 1155 at ¶ 14-16).

B. MATERIAL PROCEEDINGS BELOW

This matter began by the filing of a Complaint (Case No. CL12-659) by the Appellee on December 11, 2012 in the Circuit Court for the County of Fauquier. The Appellee's Complaint sought redress and compensation from the Appellants, as well as co-Defendants, for alleged timber theft (also referred to as "timber trespass") on the Appellee's property, trespass upon the Appellee's Property, and property damage to the Appellee's property. (A. p. 1-6 at ¶ 1-46). Further, the Appellee sought injunctive relief against the Appellants for alleged overburdening of an easement, prescriptive termination of an easement, and temporary injunctive relief. (A. p. 6-8 at ¶ 47-64).

During the discovery process, the Appellants sought information from the Appellee's expert witnesses through interrogatories served upon the Appellee July 17, 2013. (A. p. 201). The Appellee declined to provide information related to any expert witnesses. (*Id.*) Appellee then filed a

witness list pursuant to the pre-trial scheduling order which included an expert witness, Lew Bloch, who was to be called as an expert for purposes of establishing a monetary value of the timber at issue in the Complaint. (*Id*.) The Appellants successfully excluded the expert testimony of Lew Bloch due to the Appellee's failure to comply with the Va. Sup. Ct. R. 4:1(b)(4)(A)(i). (A. p. 366).

A three-day jury trial was held on the merits of the Appellee's Complaint, including the Appellee's claim of the alleged timber theft pursuant to the Code of Virginia, 1950, §§ 55-331, *et seq.*, as amended. During trial, the court ruled, pursuant to the Appellee's timber theft claim and the language of the Code of Virginia, 1950, § 55-332(b), as amended, that the Appellee would be entitled to her attorney's fees, if successful on the timber damage claim. (A. p. 1067-1068 at ¶ 20-16). Further, the trial court ruled a separate hearing would be held to determine the quantum of said "directly associated legal costs" and the amount to be awarded would not be addressed by the jury. (A. p. 1067 a ¶ 3-16).

At the conclusion of the evidence and upon argument from counsel, the jury returned a verdict in favor of the Appellee for one hundred and thirty-five dollars ($135.00) for the timber theft claim; a verdict in favor of the Appellee for her trespass claim in the amount of fifteen thousand

dollars ($15,000.00); and a verdict in favor of the Appellants on the Appellee's property damage claim. The verdicts in favor of the Appellee were offset and reduced to five thousand dollars ($5,000.00) due to a settlement agreement between the Appellee and co-defendant, Blue Ridge. (A. p. 1652).

Pursuant to the Court's earlier decision relating to "directly associated legal costs" under the Appellee's timber trespass count, the Court directed the parties to brief and argue their positions and scheduled a hearing for June 30, 2014 to determine the quantum of said legal costs. (A. p. 1339 at ¶ 8-17). At the conclusion of argument, the trial court awarded the Appellee legal costs, including attorney's fees, in the amount of one hundred and fifty thousand dollars ($150,000.00) based on the jury's award of one hundred and thirty five dollars ($135.00) for the timber theft. (A. p. 1638 at ¶ 9-10). A notice of appeal was timely filed by the Appellants and a Writ of Appeal was granted by this Court June 4, 2015.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN RULING ATTORNEY'S FEES WERE RECOVERABLE BY A PREVAILING PARTY IN AN ACTION FOR TIMBER THEFT PURSUANT TO THE CODE OF VIRGINIA, §§ 55-331, *ET SEQ.* AS AMENDED, BASED ON THE LANGUAGE CONTAINED IN § 55-332(B). (Error preserved by Defendant's Objection to Final Order "Objection #1" entered the 7th day of October, 2014 (A. p. 1663)).

II. THE TRIAL COURT ERRED IN DETERMINING THE QUANTUM OF DIRECTLY ASSOCIATED LEGAL COSTS PURSUANT TO THE CODE OF VIRGINIA, § 55-332(B), AS AMENDED, BY FAILING TO CONSIDER THE RELEVANT FACTORS ILLUSTRATED BY CASE LAW IN FASHIONING AN APPROPRIATE ATTORNEY'S FEES AWARD. (Error preserved by Defendant's Objection to Final Order "Objection #1 and "Objection #9" entered the 7th day of October, 2014 (A. p. 1663-1664); also Defendant's Brief in Opposition of the Plaintiff's Motion for Legal Costs (A. p. 1514-1525)).

III. THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE APPELLEE SHOW THE DIRECTLY RELATED LEGAL COSTS CLAIMED PURSUANT TO THE CODE OF VIRGINIA, 1950, § 55-332(B), AS AMENDED, WERE ACCRUED OR AMASSED BY THE APPELLEE IN PURSUIT OF THE TIMBER TRESPASS CLAIM KNOWN AS COUNT I IN HER COMPLAINT. (Error preserved by Defendant's Objection to Final Order "Objection #1" and "Objection #9" entered the 7th day of October, 2014 (A. p. 1663-1664); See also Defendant's Brief in Opposition of the Plaintiff's Motion for Legal Costs (A. p. 1514-1525)).

IV. THE TRIAL COURT ERRED IN PERMITTING THE APPELLEE'S TIMBER TRESPASS CLAIM TO PROCEED TO THE JURY BECAUSE THE APPELLEE FAILED TO PROVIDE ANY EVIDENCE RELATED TO VALUE OF THE ALLEGED DAMAGED TIMBER. (Error preserved by Defendant's Objection to Final Order "Objection #8" entered the 7th day of October, 2014 (A. p. 1664)).

AUTHORITIES AND ARGUMENT

I. ASSIGNMENT OF ERROR NO. 1. THE TRIAL COURT ERRED IN RULING ATTORNEY'S FEES WERE RECOVERABLE BY A PREVAILING PARTY IN AN ACTION FOR TIMBER THEFT PURSUANT TO THE CODE OF VIRGINIA, §§ 55-331, *ET SEQ*. AS AMENDED, BASED ON THE LANGUAUGE CONTAINED IN § 55-332(B).

A. Standard of Review.

Whether the trial court correctly applied a statutory provision is a question of law, and this Court "reviews the trial court's decision *de novo*." *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104-5 (2007). (*See also Phillips v. Mazyck*, 273 Va. 630, 636 (2007)).

B. Discussion.

The plain language of Code of Virginia, 1950, § 55-332(b), as amended, outlines the damages recoverable by a prevailing party. It states, in pertinent part:

> 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).

1. A plain reading of the Code of Virginia, § 55-332(b), as amended, does not authorize an award of attorney's fees as a "directly related legal cost."

The language utilized by the General Assembly in § 55-332(b) is plain and unambiguous. Under basic rules of statutory construction, the court is to consider the language of these statutes to determine the General Assembly's intent from the words contained therein, unless a literal construction would yield an absurd result. *Vaughn, Inc. v. Beck*, 262 Va. 673, 677 (2001); *Cummings v. Fulghum*, 261 Va. 73, 77 (2001). When a statute's language is plain and unambiguous, the court is bound by the plain meaning of that language. *Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353 (2002); *Cummings*, 261 Va. at 77; *Earley v. Landsidle*, 257 Va. 365, 370 (1999). Therefore, when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding that the General Assembly intended something other than that which it actually expressed. *Vaughn*, 262 Va. at 677; see *Advanced Marine Enters., Inc. v. PRC Inc.*, 256 Va. 106, 125 (1998).

Nowhere in the code section does the legislature expressly authorize, reference or provide language that would tend to be construed to allow a prevailing party to recover her attorney's fees. The intent of the General

Assembly through the words chosen in the enactment of the code section should be given their plain meaning. The term "costs" does not authorize or expressly permit an award of attorney's fees for a prevailing party. To construe the General Assembly's choice of the term "costs" as permitting an award of attorney's fees would be contrary to its plain and unambiguous intent.

2. An award of attorney's fees is generally not recoverable for a prevailing party unless expressly authorized by statute or other competent authority.

§ 55-332(b) itself does not define or elaborate on the terms utilized in the code section. Therefore, the plain meaning of "costs" must be used. The term "costs" is defined as "[a] pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action or a distinct proceeding within an action. Generally, 'costs' do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case." Black's Law Dictionary 312 (5th ed. 1979); *O'Loughlin v. O'Loughlin*, 23 Va. App. 690 (1996).

Further, under the so-called "American rule," a prevailing party generally cannot recover attorneys' fees from the losing party. *Lee v. Mulford*, 269 Va. 562, 565 (2005). However, parties are free to draft and

adopt contractual provisions shifting the responsibility for attorneys' fees to the losing party in a contract dispute. *Mullins v. Richlands National Bank*, 241 Va. 447, 449 (1991).

The twenty-fourth (24th) judicial circuit addressed §§ 55-331 *et seq.* and the use of the terms "costs" throughout the chapter, stating:

> The Court interprets 'costs' to mean court costs. This means filing fees are recoverable. Appraisal fees, deposition fees, aerial photographs, and expert witness fees are not recoverable. Generally, unless specified by statute, the award of costs is limited only to those costs essential for the prosecution of the suit, such as filing fees or charges for service of process. *Kostal v. Davis*, 66 Va. Cir. 489 (Va. Cir. Ct. 2004). [(See also, *Advanced Marine Enterprises v. PRC, Inc.*, 256 Va. 106, 126 (1998), analyzing the Code of Virginia, 1950, § 18.2-500, as amended, which provides that "costs of suit, including a reasonable fee to plaintiff's counsel" may be recovered on proof of a violation of Code § 18.2-499)].

The language in § 55-332(b) is clear in the authorization of costs related to the prosecution of the Appellee's suit. The General Assembly is presumed to expressly utilize the language and relief it intends to provide through its drafting of relevant code sections, and the judiciary is required to utilize the statute's plain meaning where possible. There is no statutory basis, after a plain reading § 55-332(b), which would permit a trial court to authorize an award of attorney's fees based on the language of "any directly associated legal costs incurred by the owner of the timber as a result of the trespass."

3. In making an award of costs, this Court has routinely held costs recoverable by a prevailing party are only those costs necessary for the prosecution of the suit.

The Code of Virginia mandates a prevailing party be permitted to recoup the costs of the prosecution of a law suit in certain circumstances. This mandate includes the language contained in the Code of Virginia, 1950, § 17.1-601, as amended, which states "[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."

In construing an award of costs, and the content of said award in the event it is made by a trial court, this Court has addressed the expressed distinction between what is a permissible cost to be recouped and what is not. In *Advanced Marine*, this Court held "a trial court's discretion to award costs under . . . the relevant provisions of Code §§ 14.1-177 through - 201 [now § 17.1-600, *et seq.*], is <u>*limited only to those costs essential for prosecution of the suit*</u>, such as filing fees or charges for service of process, *id*., where the statute granting the trial court such authority limited the award to 'costs of suit, including reasonable counsel fees.' Code § 18.2-500. In doing so, we noted that the authority for such awards is in derogation of the common law and, thus, subject to a strict interpretation." (Emphasis added). *Lansdowne Dev. Co., L.L.C. v. Xerox Realty Corp.*,

257 Va. 392, 403 (1999), quoting *Advanced Marine Enters. v. PRC. Inc.*, 256 Va. 106, 125 (1998).

Further, this Court has addressed the inherent distinctions from "costs essential for prosecution of the suit" and additional costs prevailing parties typically seek in stating:

> In this case, we are not concerned with an award of costs as contemplated by Code § 17.1-601, which provides, in part, that "the party for whom final judgment is given in an action or motion shall recover his costs against the opposite party." Nor are we concerned with the distinctions we necessarily draw between costs essential for the prosecution of a suit, such as filing fees or charges for service of process, and incidental expenses incurred in an attorney's representation of clients in the form of expert witness fees, express mail service, messengers, meals, law clerk temporaries, computer-based legal research, library research, photocopies, parking, taxicabs, telephone calls, and transcript preparation in appropriate cases.[1]

The key distinction between this Court's previous analyses of costs applicable to a prevailing party pursuant to the Code of Virginia, 1950, § 18.2-500, as amended, or the provisions of a contract permitting an award of attorney's fees, is that the statute at hand, the Code of Virginia, 1950, § 55-332(b), as amended, neither mandates nor references any

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[1] *Stepp v. Foster*, 259 Va. 210, 218 (2000); *See also Advanced Marine Enterprises v. PRC Inc.*, 256 Va. 106, 126, (1998) and *Lansdowne Development Company v. Xerox Realty Corp.*, 257 Va. 392, 403 (1999)(discussing award of "all litigation expenses" under contract).

authority upon which a prevailing party may seek an award of attorney's fees. Further, costs have been limited even further from the language included in § 17.1-601, to stipulate only "directly related legal costs" are recoverable by a prevailing party. Therefore, only costs, as outlined as recoverable by this Court in *Advanced Marine*, which are directly related to the timber trespass claim and are necessary for the prosecution of the suit, are recoverable by a prevailing party.

II. ASSIGNMENT OF ERROR NO. 2. THE TRIAL COURT ERRED IN DETERMINING THE QUANTUM OF DIRECTLY ASSOCIATED LEGAL COSTS PURSUANT TO THE CODE OF VIRGINIA, § 55-332(B), AS AMENDED, BY FAILING TO CONSIDER THE RELEVANT FACTORS ILLUSTRATED BY CASE LAW IN FASHIONING AN APPROPRIATE ATTORNEY'S FEES AWARD.

A. Standard of Review.

The trial court's determination of an award of attorney's fees "will be set aside only upon a finding of abuse of discretion." *Holmes v. LG Marion Corp.*, 258 Va. 473, 479 (1999).

B. Discussion.

If the Court were to find an award of attorney's fees was permitted pursuant to § 55-332(b), the trial court abused its discretion in awarding the Appellee one hundred and fifty thousand dollars ($150,000.00) as a result of the one hundred thirty five dollar ($135.00) verdict in favor of the Appellee. The court must take into account multiple factors when

calculating an award of attorney's fees. The court is required to determine the reasonable amount of attorney's fees under the facts and circumstances of the case. *Mullins v. Richlands Nat'l Bank*, 241 Va. 447, 449 (1991). The party requesting attorney's fees has the burden of proving by *prima facie* evidence that the attorney's fees sought are reasonable. *Chawla v. Burgerbusters*, 255 Va. 616, 623-624 (1998).

In determining an attorney's fees award, the trial court must consider the time consumed, the effort expended, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees were consistent with those generally charged for similar services, and whether the services were necessary and appropriate. *Tazewell Oil Co. v. United Virginia Bank*, 243 Va. 94, 112 (1992). *Albright v. Woodfin*, 68 Va. Cir. 115, 119 (Va. Cir. Ct. 2005). Federal Courts employ a similar formula known as the "lodestar" method. The lodestar method utilized twelve similar factors to be considered by the trial court prior to the award of attorney's fees. *See Barber v. Kimbrell*, 577 F.2d 216, 226 (4th Cir. 1978).

1. The time consumed, effort expended, and nature of services rendered.

In considering the time consumed, effort expended and nature of services rendered, the trial court should consider the performance of the

attorney or attorneys seeking an award regarding the case at issue. See *Tazewell Oil Co.*, 243 Va. at 112; *Chawla*, 255 Va. at 623. *Albright v. Woodfin*, 68 Va. Cir. 115, 119 (Va. Cir. Ct. 2005).

The Appellee's counsel attached an accounting of billing related to work done by Appellee's counsel before and during trial. (A. p. 1457). The accounting includes billing by no less than three (3) attorneys with an hourly rate as high as $600 an hour. (A. p. 1461-1485). No less than six (6) persons from Holland & Knight are included in the proposed fee calculation submitted by the Appellee. (*Id.*) The Appellee alleges more than seven-hundred (700) hours were spent by Holland & Knight preparing for and litigating the instant case. (*Id.*) The Appellee sought two hundred seven thousand one hundred six dollars and seventy cents ($207,106.70) based on Holland & Knight's work on the matter. (*Id.*)

Further, the Appellee submitted a Rees Broome, P.C. billing totaling forty three thousand two hundred twenty nine dollars and twenty six cents ($43,229.26) for work done prior to the substitution of Holland & Knight as counsel of record. (A. p. 1486-1509). Rees Broome, P.C. withdrew from Representation of the Appellee, over objection by the Appellee, due to ethical concerns with continued representation. (A. p. 153).

Despite the hundreds of hours purportedly spent on this matter by Appellee's counsel, the Appellee encountered several failures during the course of the proceedings, including but not limited to, the exclusion of a timber expert (A. p. 373). Said exclusion of the timber expert resulted in the failure of the Appellee to establish "three times the value of the timber on the stump … reforestation costs incurred not to exceed $450 per acre, the costs of ascertaining the value of the timber." § 55-332(b). (A. p. 373; HT 1/29/14; p. 1058 at ¶ 7-13). The Appellee, in her Complaint and through amendment of her *ad damnum* clause, sought damages of two-hundred thirty thousand dollars ($230,000.00). (A. p. 375). Because counsel for the Appellee failed to properly designate a timber expert and said expert was excluded by pre-trial motion, the Appellee's damages on the timber trespass claim was all but defeated. Despite offering no evidence that reforestation took place, the Appellee was awarded one hundred and thirty five dollars ($135.00) for reforestation costs.

2. The complexity of the services, the value of the services to the client and the results obtained.

In a trial court's calculation of appropriate attorney's fees, the court shall consider the complexity of the services, the value of the services to the client, and the results obtained. *Tazewell Oil Co.*, 243 Va. at 112;

Chawla, 255 Va. at 623. *Albright v. Woodfin*, 68 Va. Cir. 115, 119 (Va. Cir. Ct. 2005). In the instant matter, 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 attorney's 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.

The Code of Virginia, 1950, §§ 55-331*, et seq.*, as amended, is a statutory cause of action, which outlines an aggrieved party's right to proceed against another for timber trespass both in a summary proceeding and through a Complaint filed in a court of law. The Appellee offered no evidence of how the legal representation required additional complexities, which would necessitate a higher amount of attorney's fees.

Moreover, the Appellee failed to articulate how the attorney's fees sought were a valuable service to the Appellee based on the result obtained. The trial court identified the disproportionate nature of the amount of attorney's fees sought and the result obtained for the Appellee:

> 12 THE COURT: Well, let me ask you this, Ms.
> 13 Rosati. And this is something this Court is really
> 14 wrestling with, and really, to be candid with you, I
> 15 find quite troubling in this case.
> 16 The legal fees are so disproportional to the
> 17 amount recovered.
> 18 At what point in time should the Court say those

19 legal fees are too high considering the amount that the
20 plaintiffs obtained? (A. p. 1642 at ¶ 6-8).[2]

However, counsel for the Appellee failed to show through argument, expert testimony, or other competent evidence how Appellee's requested two hundred fifty thousand three hundred thirty five thousand dollars and ninety six cents ($250,335.96) in legal fees were a valuable service to the Appellee, when the result obtained was an award of one hundred and thirty five dollars ($135.00).

3. Whether the fees were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Finally, in a calculation of appropriate attorney's fees, the trial court must ascertain whether the fees were consistent with those generally charged for similar services and whether the services were necessary and appropriate. *Tazewell Oil Co.* 243 Va. at 112; *Chawla*, 255 Va. at 623. *Albright v. Woodfin*, 68 Va. Cir. 115, 119, (Va. Cir. Ct. 2005).

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[2] 2 Q: THE COURT: But you would agree that it is one
3 of them, that the Court should look at proportionality
4 when it comes to the amount of damages obtained versus
5 the amount of legal fees charged?
6 A: MS. ROSATI: I believe that the Court can -- and
7 what the case law says is --
8 Q: THE COURT: You say can?
9 A: MS. ROSATI: Can. (A. p. 1622 at ¶ 2-9).

The trial court observed the fees charged by counsel for Appellee were higher than those generally charged:

> 6 I will also note the hourly rate, even though
> 7 it's been discounted, is a little higher than what's
> 8 customarily charged in this part of Virginia. (A. p. 1632 at 6-8).[3]

Counsel for the Appellee billed for no less than six attorneys and staff ranging in hourly rates; Michelle A. Rosati, with an hourly rate of four hundred fifty dollars ($450.00); David L. Schneider, with an hourly rate of two hundred fifty dollars ($250.00); Dianne Holmes, with an hourly rate of two hundred seventy five dollars ($275.00); Robert T. Hicks, with an hourly rate of six hundred dollars an hour ($600.00); Elizabeth N. Jochum, with an hourly rate of three hundred ten dollars an hour ($310.00); and Andrew R. Oja, with an hourly rate of three hundred seventy five dollars an hour ($375.00) (A. p.1479). Holland & Knight, as counsel for the Appellee, billed a total of six hundred ninety nine hours and nine tenths hours (699.9) that led to a jury verdict of one hundred thirty five dollars ($135.00).

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[3]
> 18 I do, think, however, that the hourly rate is a
> 19 little less down here than it is up in Fairfax and
> 20 Arlington and Alexandria where a firm such as Holland &
> 21 Knight or Rees, Broome operates, does most of their
> 22 work. (A. p. 1632 at ¶ 18-22).

4. The Court incorrectly based its award of attorney's fees on a compensatory damage award for an unrelated count where attorney's fees were not recoverable and failed to utilize the statutory jury award reduction contained in the final order.

The trial court, in rendering its decision as to the quantum of attorney's fees that would be awarded to the Appellee, based its decision on the fifteen thousand dollar ($15,000.00) jury award returned for the Appellee for the trespass claim. (A. p.1638 at ¶ 15-17). The trespass claim, which was a separate and distinct cause of action from the timber theft claim pursuant to the Code of Virginia, § 55-332 (b), as amended, does not entitle the prevailing party to seek and receive an award of costs or attorney's fees. The trial court ruled:

> 15 But I think ten times the amount of the
> 16 compensatory damage, which is roughly what that is -- I
> 17 think that's about as appropriate as I can get.
> 18 It may be that the person who's writing the
> 19 checks to plaintiff's counsel may think oh, my gosh, I'm
> 20 stuck with a hundred thousand plus of legal costs and
> 21 fees. (A. p.1638 at ¶ 15-21).

By the trial court calculating the attorney's fee award based on a damages award on a count on which neither costs nor attorney's fees were recoverable, the Appellants are responsible for an attorney's fees amount that is more than a thousand times the amount of the award for the timber theft claim. Further, the trial court's use and formula of ten times the

amount of compensatory damages was incorrectly applied, given the fifteen thousand dollar ($15,000.00) award was reduced to account for a settlement already reached between the Appellee and a co-defendant, to five thousand dollars ($5,000.00). (Final Judgment Order dated October 7, 2014; see also Defendant's Motion to Reduce Jury Award dated February 11, 2014).

III. ASSIGNMENT OF ERROR NO. 3. THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE APPELLEE SHOW THE DIRECTLY RELATED LEGAL COSTS CLAIMED PURSUANT TO THE CODE OF VIRGINIA, 1950, § 55-332(B), AS AMENDED, WERE ACCRUED OR AMASSED BY THE APPELLEE IN PURSUIT OF THE TIMBER TRESPASS CLAIM KNOWN AS COUNT I IN HER COMPLAINT.

A. Standard of Review.

The trial court's analysis of the Appellee's evidence as to "directly associated legal costs" pursuant to the Code of Virginia, § 55-332(b), as amended, is a mixed question of law and fact. See *Napper v. ABM Janitorial Servs*., 284 Va. 55, 61 (2012). Therefore, the Court gives "deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing part[y,] but [the Court] review[s] the trial court's application of the law to those facts *de novo*." *Tuttle v. Webb*, 284 Va. 319, 324 (2012) (quoting *Caplan v. Bogard*, 264 Va. 219, 225 (2002)).

Further, "[w]hen the sufficiency of a plaintiff's evidence is challenged by a motion to strike, the trial court should resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor and should grant the motion only when it is conclusively apparent that plaintiff has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006).

B. Discussion.

The Code of Virginia, 1950, § 55-332(b), as amended, states the prevailing party may recover "any *directly* associated legal costs incurred by the owner of the timber as a result of the trespass." (Emphasis added). The General Assembly has chosen to permit recovery of costs incurred by the prevailing only in the event they are directly related to the timber theft claim. Therefore, given the Appellee's Complaint contained five other counts unrelated to the timber theft claim against the Appellants, it is incumbent upon the Appellee to show the legal costs sought were unique and particular to the timber theft count. To find otherwise would permit the Appellee to recover costs that the General Assembly did not intend to permit the Appellee recover.

Despite the Appellee's obligation to establish the "direct" association with the legal costs related to the timber theft count, counsel for Appellee submitted billing replete with generic descriptions of work done by counsel. (A. p. 1461 *et seq.*). Moreover, counsel for the Appellee submitted billing and sought recovery for work clearly not associated with the timber theft claim, including but not limited to: "evaluate potential new claims" (A. p. 1466); "research right of way easements" (A. p. 1466); "research abuse of process, research malicious prosecution, research using criminal citation in a civil claim, research surveyor's rights" (A. p. 1468); continue case law research on partition (A. p. 1471); call to prosecutor… travel to Fauquier general district court file appearance, review video… criminal trespass research" (A. p. 1473); "prep and attend GDC (*Id.*); prepare for criminal trespass trial" (*Id.*). Additionally, the Appellee sought reimbursement for the timber expert who was excluded from testifying due to counsel for the Appellee's failure to properly designate said expert during the discovery process. (A. p. 1479-1481).

Despite submitting numerous entries seeking reimbursement outside of the timber theft claim, counsel for the Appellee represented to the Court that the bill submitted had been redacted to only include billable hours recoverable pursuant to the Code of Virginia, 1950, § 55-332(b), as

amended.[4] Despite this representation to the Court, the bill submitted is rife with billing that is outside the scope of "*directly* related legal costs" recoverable by a prevailing party. (Emphasis added).

IV. ASSIGNMENT OF ERROR NO. 4. THE TRIAL COURT ERRED IN PERMITTING THE APPELLEE'S TIMBER TRESPASS CLAIM TO PROCEED TO THE JURY BECAUSE THE APPELLEE FAILED TO PROVIDE ANY EVIDENCE RELATED TO VALUE OF THE ALLEGED DAMAGED TIMBER.

A. Standard of Review.

When the sufficiency of a plaintiff's evidence is challenged by a motion to strike, the trial court should resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor and should grant the motion only when it is conclusively apparent that plaintiff has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006).

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[4] 1 And so we actually culled our own bill and by
2 hand culled the Rees, Broome bill, redacted things that
3 did not apply -- which, frankly, there were more on the
4 Rees, Broome than ours, because they had represented Ms.
5 Garvey earlier in the proceedings and focused, I think,
6 to a much greater extent on some of these legal issues
7 than we did. So we took a lot of that out. (A. p. 1592 at ¶1-7).

B. <u>Discussion.</u>

The Code of Virginia, 1950, § 55-332(b), as amended, states a prevailing party under this code section may recover "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." § 55-332(b).

During trial, the Appellant's Motion to Strike the Evidence was granted in part and denied in part, based on the Appellee's failure to provide any competent evidence of the value of the alleged timber damage. (A. p. 1058 at ¶ 7-13).[5] Despite the Appellee's failure to prove any damages related to the timber theft and value of the timber allegedly taken or damaged, the Court permitted reforestation costs to go forward to the jury. (*Id.*) Given the Appellee was unable to prove any damages related to the timber theft, Count I of the Appellee's Complaint for timber theft should

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[5] 7 THE COURT: Okay. I'm going to go ahead and
8 rule on this. Okay? What I'm going to go ahead and
9 do is I'm going to grant the Motion to Strike on the
10 punitive issue. Under this code section, under Count
11 1, I'm granting on the punitives (sic) and I'm granting it
12 on the compensatory claim for the trees. I'm going to
13 allow it for the reforestation costs. (A. p. 1058 at ¶ 7-13).

have been dismissed upon the Appellant's timely Motion to Strike the Evidence.

1. The Appellee's failure to prove any timber value was fatal to the Appellee's timber theft claim.

At trial, the moving party has the "burden of proving with reasonable certainty the amount of damages and the cause from which they resulted; speculation and conjecture cannot form the basis of the recovery." *Shepherd v. Davis*, 265 Va. 108, 125 (2003) (quoting *Carr v. Citizens Bank & Trust Co.*, 228 Va. 644, 652, (1985)). A plaintiff thus must prove two primary factors relating to damages. *Shepherd*, 265 Va. at 125. First, a plaintiff must show a causal connection between the defendant's wrongful conduct and the damages asserted. Second, a plaintiff must prove the amount of those damages by using a proper method and factual foundation for calculating damages. *Id*. See also *United Const. Workers v. Laburnum Const. Corp.*, 194 Va. 872, 891 (1953).

The Appellee provided no calculable damages for a factfinder to consider related to the alleged timber theft. The Appellee's expert witness was excluded from testifying at trial, and the Appellee failed to prove any value related to timber or stumpage value by other competent evidence. (A p. 373; *see also* A. p. 1047 at ¶ 2-8). The Appellee further attempted to submit a letter, rife with inadmissible hearsay, which included an alleged

timber damage amount that was ultimately excluded from evidence by the trial court. (A. p.843 at ¶ 6-13).

During the Appellants' Motion to Strike the Evidence related to the timber theft, the Court itself admitted no evidence has been submitted into evidence for the consideration of the jury, in stating:

> 20 THE COURT: Well, I mean, we don't have the
> 21 value because it was excluded in evidence. I mean,
> 22 that's the reason we don't have the value. (A. p. 1035 at ¶ 20-22).[6]

Given the Appellee failed to prove any damages related to the alleged timber theft, the Appellee was similarly unable to prove a causal connection between the timber trespass and any actions related to the Appellants. Without such a causal connection, the Appellee's claim failed, and the Appellant's Motion to Strike should have been granted when made to the trial court.

2. The reforestation costs referenced in the Code of Virginia, 1950, § 55-332(b), as amended, are a statutory cap, do not constitute a statutory award, and should not be awarded if the moving party fails to prove any damages.

The Code of Virginia, 1950, § 55-332(b), as amended, states a prevailing party shall recoup and the liable party shall pay, "three times the value of the timber on the stump and shall pay to the rightful owner of the

[6] See also Appellant's Motion to Strike the Evidence as to the timber trespass claim beginning on page 1032 of the Appendix.

property the reforestation costs incurred not to exceed $450 per acre." Under basic rules of statutory construction, the court is to consider the language of a statute to determine the General Assembly's intent from the words contained therein, unless a literal construction would yield an absurd result. *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, (2001); *Cummings v. Fulghum*, 261 Va. 73, 77 (2001). When a statute's language is plain and unambiguous, a court is bound by the plain meaning of that language. *Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353 (2002); *Cummings*, 261 Va. at 77; *Earley v. Landsidle*, 257 Va. 365, 370 (1999).

The language in § 55-332(b) is clear that the prevailing party may only recoup reforestation costs that have been "incurred." The term "incurred" is defined as "[t]o suffer or bring on oneself (a liability or expense)." Black's Law Dictionary, 7th Edition (1999).

The Appellee failed to prove any sort of reforestation costs were incurred due to the actions of the Appellants at the date of trial. In fact, the Appellee admitted no replanting or reforestation had occurred whatsoever related to the alleged timber damage which occurred due to the actions of the Appellants. (A. p. 1051 at ¶ 14-21). Although the Appellee had investigated different methods and ways to repair and replant the alleged damages area, no work or reforestation had been done at the time of trial.

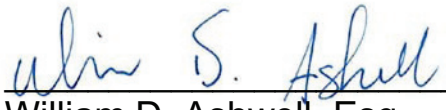
(*Id*.) Because the costs incurred at the time of trial were speculative, indefinite and, had not been done, the Appellee had not incurred reforestation costs which would permit recovery under § 55-332(b).

CONCLUSION

The Appellant's respectfully request this Honorable Court hold (1) the Appellee failed to prove any damages related to the timber theft claim and the trial court erred in failing to grant the Appellants timely Motions to Strike the Evidence; (2) the Appellee is not entitled to award attorney's fees pursuant to the Code of Virginia, 1950, § 55-332(b), as amended; (3) if attorney's fees are recoverable pursuant to the Code of Virginia, 1950, § 55-332(b), that (a) the trial court abused its discretion by failing to consider the appropriate factors in determining an appropriate quantum of attorney's fees and (b) that the purported attorney's fees sought by the Appellee were not directly related legal costs under the statute, and therefore are not recoverable.

Respectfully submitted,

Allan & Susan Chacey
By Counsel



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CERTIFICATE

I hereby certify that on this 14th day of July, 2015, pursuant to Rules 5:26(h) and 5:32(a)(3)(ii), electronic copies of the Brief of Appellants and Appendix have been filed, via VACES, and ten paper copies of the Brief of Appellants and three paper copies of the Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia. An electronic copy of this Brief of Appellants was served, via email, and an electronic copy on CD of this Brief of Appellants and Appendix, along with a paper copy of the Brief of Appellants was served, via UPS Ground Transportation, to the counsel for Appellee at the following address:

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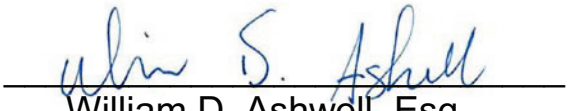

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