In The

Supreme Court of Virginia

RECORD NO. 150005

ALLAN CHACEY and SUSAN CHACEY,

Appellants,

v.

VALERIE GARVEY,

Appellee.

REPLY BRIEF OF APPELLANTS

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REPLY TO APPELLEE'S ARGUMENT

I. The Appellee's dismissive treatment of the *Kostal* case is misplaced.

The Appellee in her brief contends the *Kostal* case provides no guidance given the nearly contemporaneous amendment to the Code of Virginia, 1950, § 55-332(b), and the date of the decision from the 24th judicial circuit. See *Kostal v. Davis*, 66 Va. Cir. 489 (Va. Cir. Ct. 2004) and Virginia Acts of Assembly 2004 Session (HB 493/SB 548). However, the mere coincidence in the timing of the amended language to the Court's decision does not change the underlying observation made by trial court in its analysis of recoverable costs. Further, the *Kostal* case remains the only reported case addressing the issue of "costs" related to §§ 55-331, *et seq*.

Of particular note, the *Kostal* case addresses the very argument made by the Appellee as to the General Assembly's purported expansion of recoverable costs by inserting "any directly related legal costs" into the statutory language. Prior to the 2004 Amendment, the prevailing party in an action based in §§ 55-331 *et seq.*, was entitled to "costs" which the Court described as "filing fees." *Kostal*, 66 Va. Cir at 491. The court in *Kostal*, expounding on "costs" generally sought by prevailing parties, emphasized costs such as "[a]ppraisal fees, deposition fees, aerial photographs, and expert witness fees are not recoverable." *Id*. Recognizing

the limited nature of "costs," the Court recognized the additional items a prevailing party may seek from the opposing party, and in turn, highlighting an award of "costs" is inherently limited in scope – contrary to the broad interpretation championed by the Appellee. Most importantly, the Court in no way, either *arguendo* or in its interpretation of "costs," discusses the applicability of attorney's fees.

II. The Appellee mischaracterizes the decision in *Advanced Marine*.

The Appellee contends the decision in *Advanced Marine Enters. v. PRC. Inc.*, 256 Va. 106, 125 (1998) supports her position and that this Court "presumptively views reasonable attorney's fees in the general description of 'costs,' outside the narrow statutory context of § 17.1-601." (Appellee Brief p. 12). This characterization is a misstatement of the clearly held position of this Court as to an award of attorney's fees and the clear language from the statute at issue in *Advanced Marine*.

First and foremost, the statute at issue in *Advanced Marine* included an expressed award of attorney's fees for the prevailing party, which reads "the costs of suit, including a reasonable fee to plaintiff's counsel." Code of Virginia, 1950, § 18.2-500(a). The Appellee treats an expressed statutory award of attorney's fees in § 18.2-500(a) – in addition to and in conjunction with the recovery of costs – as this Court exercising an inherently

"inclusive" reading of costs by permitting an award of attorney's fees. With the logic outlined in the Appellee's Brief applied to the statute at hand in this appeal, the Court would clearly, obviously and unavoidably find attorney's fees ***do not*** apply as there is no ability to exercise an "inclusive" reading of the statute – there is simply no language to support an attorney's fee award.

Additionally, the Appellee argues the 2004 Amendment to § 55-332(b) rendered the recovery of "costs" in that section to be more expansive and not a mere redundant award of costs already recoverable in § 17.1-601. (Brief of Appellee p. 8-10). However, this Court in *Advanced Marine* held an award of "costs" pursuant to § 18.2-500(a) "makes no provision for an award of costs other than those ordinarily awarded under the general statutes of Title 14.1 [now 17.1] of the Code addressing the taxing of costs." *Advanced Marine*, 256 Va. at 126. In so holding, this Court confirms a separate Code Section may award "costs" already recoverable in § 17.1-601, and be construed merely as reiterating the prevailing parties' ability to recoup taxed costs. Even more notable in this Court's decision, this Court declined to take a more expansive reading of "costs" expressly authorized in § 18.2-500(a) and found costs to mean precisely what was recoverable in § 17.1-601.

III. The Appellee failed to prove any damages related to the alleged timber trespass claim and the Appellants' motion to strike should have been granted by the trial court.

The Appellee contends in her brief that she produced evidence sufficient to survive a motion to strike related to Count I in her Complaint for damages related to §§ 55-331 *et seq*. (Brief of Appellee p. 27). This Code section permits several forms of financial recovery based on the timber allegedly removed from the petitioning party's property. Section 55-332(b) states in pertinent part the party at fault:

> …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.

The Appellee contends evidence related to damage to a dirt road, character and quantity of changes to a road and cattle guard, and the condition of a bridge constituted damages related to § 55-332(b). (Brief of Appellee p. 27). Despite this contention, missing from Appellee's argument is any sort of connection or relevance to the issue of "reforestation costs," which was permitted to go forward to the jury by the trial court. (See A. p. 1058 at ¶ 7-13 for the trial court's granting of the Appellants' Motion to Strike the Evidence).

"Reforestation" is defined as "the action of renewing forest cover (as by natural seeding or by the artificial planting of seeds of young trees)." Merriam-Webster's English Dictionary, 11th Edition (2004). A plaintiff thus must prove two primary factors relating to damages. *Shepherd v. Davis*, 265 Va. 108, 125 (2003). 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).

Absent from the Brief of Appellee is any argument or contention that the alleged damage to a road or cattle guard has any sort of causal connection to reforestation costs sought by the Appellee. Additionally, absent is any argument that those alleged damages have any factual foundation to an award of "reforestation costs." In fact, most importantly, absent from the Brief of Appellee is the contention or citation to the record that the Appellee incurred or proved through competent evidence that she incurred any "reforestation costs" whatsoever. Without such proof, the motion to strike made by the Appellants should have been granted in its entirety as to Count I based in §§ 55-331 *et seq.* – rendering the question of attorney's fees moot.

IV. The Appellee mistakenly purports closing argument by counsel for Appellants at trial constitutes judicial estoppel.

The Appellee continues to claim judicial estoppel bars the Appellants from arguing attorney's fees of less than $130,000.00 should be awarded. This position is based on a demonstrated and fundamental misunderstanding as to the nature of judicial estoppel and the nature of closing argument, while simultaneously ignoring the Code of Virginia's expressed authorization of such argument during trial.

In her brief, the Appellee identifies the basic concept of judicial estoppel in stating, "[e]ssentially, judicial estoppel forbids parties from assum[ing] successive positions in the course of a suit, in reference to the same *fact or state of facts*, which are inconsistent with each other, or mutually contradictory." (Emphasis added). *Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 380-81 (2004). 'Facts in evidence' is defined as "[a] fact that a tribunal considers in reaching a conclusion; a fact that has been admitted into evidence in a trial or hearing." Black's Law Dictionary (7th ed. 1999). Further, "argument should be based upon the record, the evidence produced in court, and the instructions to the jury. Counsel may comment at this stage of the trial on the weight of evidence, the lack of evidence, and the demeanor and credibility of the witnesses." Bryson on Virginia Civil Procedure, 11-24 (Fourth Edition 2005).

The Appellee has mischaracterized the ability to utilize a portion of the Appellants' closing argument at trial for the basis of establishing judicial estoppel. However, the closing argument of counsel is not a fact in which judicial estoppel could apply, and instead is simply a portion of litigation in which counsel may *argue* and identify portions of evidence before the jury is to make a decision. In no way could it be construed that content of closing argument should be deemed an admitted fact by a party for the purposes of avoiding the re-litigation of a settled issue. Such a position is contrary to the well-established principles of Virginia civil procedure.

Further, pursuant to the Code of Virginia, 1950, § 8.01-379.1, "[n]otwithstanding any other provision of law, *any party in any civil action may inform the jury of the amount of damages sought by the plaintiff in the opening statement or closing argument*, or both. The plaintiff may request an amount which is less than the ad damnum in the motion for judgment." The statutory permission of any party to inform a jury of damages sought negates the Appellee's position the Appellants are estopped from arguing the issue.

V. The trial court erred in its determination as to the quantum of 'directly associated legal costs' pursuant to the Code of Virginia, 1950, § 55-332(b), as amended.

A. The Appellee mischaracterizes the actions of the parties leading to trial.

The brief of the Appellee maintains the "'no quarter' approach of the defendants in opposing every possible remedy" during litigation led to the copious hours alleged to have been spent working on this case by counsel for the Appellee. (Brief of Appellee p. 17). In fact, a review of the record indicates a distinct and different approach by the parties at trial. Further, the Appellee offers no specific incidents which support her claim of the "no quarter" approach allegedly taken by the Appellants.

Of note, counsel of record during trial, Holland & Knight, entered their appearance June 4, 2013. (A. p. 161). After this time, counsel for the Appellee filed their notice of expert witnesses on October 21, 2013, who were ultimately excluded upon motion of the Appellants. (A. p. 163; see also A. p. 201). The expert witness identified by the Appellee was excluded due to counsel for the Appellee failing to disclose identifying information related to the expert during the discovery process – of which the trial judge found the Appellee did without any just cause. (A p. 209; see also A p. 373). The Appellants filed a Motion to Compel discovery responses of the Appellee due to the unreasonable failure of Appellee's counsel to

adequately or timely respond, which was granted by the trial court. (A. p. 332; A. p. 373).

Further, counsel for Appellee filed multiple motions to amend the *ad damnum* clause, which were granted. (A. p. 256; A. p. 375). Additionally, counsel for the Appellee filed a Motion in *Limine* which the trial court failed to address as the matter was never praeciped to be heard by the Appellee. (A. p. 478). Counsel for Appellee also filed a multi-paged Motion for Sanctions Due to the Defendant's Spoliation of Evidence which the Appellee voluntarily removed from the docket without decision from the trial court. (A. p. 297; A. p. 407).

The aforementioned filings were the extent of pre-trial involvement Holland & Knight had in the instant proceedings. Of note, only the request to raise the *ad damnum* clause was granted – a relative foregone conclusion in civil practice in the Commonwealth of Virginia. Of even more importance, the Appellee's failure to provide and cooperate with the discovery process led to unnecessary court hearings, the exclusion of a crucial and key expert witness who planned to testify on behalf of the Appellee, and several decisions and orders by the trial court which pointed blame squarely on the shoulders of the Appellee. Despite the limited involvement and the overwhelmingly unsuccessful positions taken by the

Appellee through her counsel during this time, the Appellee maintains *the Appellants* took a "no quarter" approach leading up to and during trial. Since the inception of litigation on this issue, the Appellants and their counsel have acted prudently and rationally in conducting any and all affairs related to litigation.

B. The record outlines the Appellee's repeated efforts to frustrate the legal process resulting in unnecessary fees and needlessly prolonging the conclusion of this matter at the Circuit Court level.

The record is clear that the Appellee, in fact, displayed a continued effort to frustrate the legal process in her own cause of action; thereby leading to needless billing, court appearances, and thus restricting the opportunity to settle the matter by forcing the parties into costly litigation.

To highlight all of the Appellee's aforementioned procedural shortcomings, on April 10, 2013, then counsel of record for the Appellee filed their Motion to Withdrawal as counsel. (A. p. 41). The Appellants' filed a Brief in Opposition to the Appellee's request to withdraw and continue the matter for trial. (A. p. 49). Following the filing of Appellants' brief in opposition, then counsel for the Appellee filed an additional motion to withdraw on May 9, 2013, proffering to the court in their pleading their obligation to withdraw from the matter as the Appellee herself created a conflict consistent with Rule 1.16 of the Virginia State Bar Rules of

Professional Ethics, including; "(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; (4) he client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; [and] (6) other good cause for withdrawal exists." Rule 1.16. (A. p. 153).

Further, in the Appellants' Brief in Opposition to the Plaintiff's Motion to Withdrawal and Continuance, the Appellants outlines in detail the frustrating tactics employed by the Appellee including, employing no less than seven (7) new and independent counsel during the history of the instant matter beginning in June 2010. (A. p. 49 *et seq*.). Of note, the Appellee's decision to hire and fire counsel led to the failure to reach several settlement agreements, the requirement that multiple matters be continued to accommodate new counsel, the Appellants' participating in a full day of a Neutral Case Evaluation before the Appellee voluntarily non-suited her Complaint, and most importantly, the requirement that additional

hours be spent by counsel for the Appellants for each respective new counsel of record for the Appellee in order to fully advise them of the status of the matter in hopes of a possible settlement agreement. (*Id*.) The Appellee's actions directly related to hours upon hours of needless billing and frustrated the legal process with bringing in countless new attorneys – all while the Appellants have maintained the same firm both throughout litigation and the instant appeal.

C. The Appellee misstates the holding in *City of Riverside v. Rivera* to bolster their argument as to the disproportionately of the awarded attorney's fees.

In the *City of Riverside v. Rivera*, the Petitioners sought redress for civil rights claims based in 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986. 477 U.S. 561, 564 (1986). They also sought attorney's fees through § 1988(b), a code section specifically authorizing attorney's fees. *Id*. This case has no procedural or precedential value to the matter at hand, as § 1988(b) specifically indicates, "a reasonable attorney's fee as part of the costs" – a clear and concise mandate which is missing from the Code of Virginia, 1950, § 55-332(b), as amended. The Appellee's example further strengthens the Appellants argument that attorney's fees do not apply.

Further, in holding the disproportionate attorney's fees would apply in a civil rights matter, the Supreme Court found "[a] rule that limits attorney's

fees in *civil rights* cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986). The rationale of the Court in *City of Riverside*, for finding the attorney's fees would stand in a civil rights matter, has absolutely no illustrative or procedural bearing on the matter at issue in this appeal.

VI. The Appellee, both in her Brief in Opposition and Brief of Appellee, fail to identify any statutory authority or statutory example where an award of "costs" or "legal costs" included an award of attorney's fees.

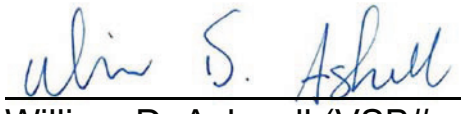
Conspicuous by its absence, in either the Brief in Opposition or the Brief of Appellee, is a reference to any example where "costs" or "legal costs" are construed as to include attorney's fees. The Appellee's argument that the open-ended and inclusive intent of the General Assembly in drafting the language "any directly related legal costs" is unaccompanied by any example or similar situation in which an award of attorney's fees was given in the Commonwealth of Virginia.

Further, the Appellee simply fails to address the well-established American Rule, followed by this Court, that attorney's fees must be

expressly authorized in order to be recoverable. The Appellee maintains failure to award attorney's fees stifles a land owners desire to bring suit – while simultaneously ignoring the fact that the vast majority of civil litigation does not include an avenue to collect attorney's fees by a prevailing party from a non-prevailing party.

Respectfully submitted,

Allan & Susan Chacey
By Counsel



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CERTIFICATE

I hereby certify that on this 21st day of August, 2015, pursuant to Rule 5:26(h), an electronic copy of the foregoing Reply Brief of Appellants has been filed, via VACES, and ten paper copies of the same have been hand-filed with the Clerk of the Supreme Court of Virginia. An electronic copy of the foregoing Reply Brief of Appellants was served, via email, along with a paper copy of the same, via UPS Ground Transportation, to the counsel for Appellee at the following address:

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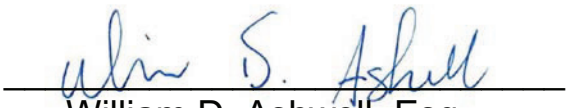

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