

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DAVID S. WILLIAMS and)	
ANGELIKA M. WILLIAMS)	CIVIL ACTION NUMBER
)	
Plaintiffs)	05C-11-209-JOH
v.)	
)	
CHARLES W. MANNING and)	
TERRI LAMBORN MANNING)	

Submitted: March 19, 2009

Decided: April 23, 2009

MEMORANDUM OPINION

Upon Motion of the Plaintiffs for Costs - GRANTED

Appearances:

Jeffrey M. Weiner, Esquire, Wilmington, Delaware, attorney for the plaintiffs

William J. Rhodunda, Jr., and Chandra J. Rudloff, Esquire, of Drinker Biddle & Reath, LLP, Wilmington, Delaware, attorney for the defendants

HERLIHY, Judge

Plaintiffs David and Angelika Williams have moved, as prevailing parties on their trespass claim, to be reimbursed for costs. They seek specifically to be reimbursed for Court costs and for expert fees. Those experts were Gary Iverson, the arborist for the Commonwealth of Pennsylvania, and Chris Episcopo, a professional land surveyor.

The Williams filed a trespass action against defendants Charles and Terri Lamborn Manning. They prevailed on that claim with the jury awarding compensatory and punitive damages. This Court, in an earlier opinion, upheld that verdict but granted the Mannings' request for remittitur of both damage awards.¹ The Williams accepted the reduced award.

The Mannings oppose the award of any expert witness fees. Their argument is that the arborist's fee was unnecessary because the Williams abandoned their significant damage claim for their ash tree on the eve of trial. By dropping this claim, the Mannings contend Iverson's testimony was largely irrelevant.

Originally, the Williams had sought around \$26,000.00 in damages in connection with claimed injury to their ash tree which the Mannings' cat, Jammers, had climbed and out of which it had to be rescued. The rescue was accomplished by another arborist who climbed the tree using spikes. The Williams contended for a long time that the use of spikes would kill the tree.

Both these arborists testified at trial that one should not use spikes to climb a live tree because such activity might seriously damage or kill the tree. In spite of this testimony, the tree is still living and is in no immediate danger of dying. Therefore, the

¹ *Williams v. Manning*, 2009 WL 960670 (Del. Super. Mar. 13, 2009).

jury awarded the Williams a total of \$375.00 to cover the costs of Iverson's two trips to inspect the tree and provide minor treatment.

Mrs. Manning had directed her rescuing arborist to enter the Williams' property to rescue the cat. At the time of the initial entry, the Williams were not home but arrived after both arborist and she had entered. In effect, Mrs. Manning had the power to stop her arborist from using spikes to climb the tree.

Although Iverson's role as a witness in this case was significantly diminished once the Williams dropped their \$26,000.00 tree damage claim, the Court cannot say his expert arborist testimony was of no value to the jury in making either its \$375.00 compensatory award or the punitive damages award. In the end, though reduced, the Williams prevailed on their trespass claims. The Court finds, as to Iverson, that they are entitled to reimbursement of only a portion of Iverson's \$875.00 fee. The Court awards \$250.00 due to both his less prominent role at trial and because the \$875.00 amount that is asked for is comparable to that of many physicians' awards.

The Mannings argue the Williams are not entitled to reimbursement of Episcopo's \$125.00 fee. They cite 10 *Del. C.* §5119² for the proposition that in a boundary dispute each side bears its own costs. This Court finds that statute inapplicable in the

² **Perpetuating testimony of boundaries.**

Upon proceedings for perpetuating testimony of boundaries, each party shall bear the costs of the attendance and examination of witnesses produced by the party. All the other costs shall be paid by the petitioner.

circumstances of this case. Whatever boundary dispute may have at one time existed disappeared when (1) the Mannings voluntarily dropped any claim for a prescriptive easement to the disputed strip of land and (2) when this Court earlier awarded summary judgment to the Williams on their claim the land was theirs. In short, no boundary dispute existed at trial.

Episcopo testified as an expert and several exhibits were introduced through him. The Court finds his \$125.00 fee reasonable.

Neither side has sought an award of attorneys' fees. Each, however, made a preemptive argument against the other if the other side did make such a request. The issue, therefore, is moot.

Finally, the Williams, as prevailing parties, seek reimbursement for \$390.00 in Court costs. They are entitled to them.

Conclusion

For the reasons stated herein, the plaintiffs' are entitled to: (1) \$250.00 for Iverson's fee, (2) \$125.00 for Episcopo's fee, and (3) \$390.00 in Court costs.

IT IS SO ORDERED.

J.