

No. 01-531

IN THE SUPREME COURT OF THE STATE OF MONTANA

2002 MT 10N

JEFF LANGEVIN,

Plaintiff and Appellant,

v.

TEDDY PAUL ANDERSEN and CAROL ANN ANDERSEN,

and JOHN S. BASHAM and SHARIE L. BASHAM,

Defendants and Respondents.

APPEAL FROM: District Court of the Nineteenth Judicial District,

In and for the County of Lincoln,

The Honorable Robert S. Keller, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

James C. Bartlett, Attorney at Law, Kalispell, Montana

For Respondents:

(No Respondents' brief filed)

Submitted on Briefs: December 28, 2001

Decided: January 29, 2002

Filed:

Chief Justice Karla M. Gray delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

¶2 In *Langevin v. Andersen*, 2000 MT 229N, 12 P.3d 428 (Table) (*Langevin I*), we affirmed the portion of a judgment entered by the Nineteenth Judicial District Court, Lincoln County, concluding that Jeff Langevin did not have an easement by prescription over a road crossing the property of Teddy Paul and Carol Ann Andersen and John S. and Sharie L. Basham, as he had claimed. We reversed the portion of that judgment awarding the Andersens \$8,826 in damages from Langevin.

¶3 Following our decision, Langevin filed a memorandum of costs on appeal with the District Court. Defendants and Respondents objected and the District Court declined to award costs on appeal to Langevin. Langevin asserts error, and we reverse and remand.

¶4 Rule 33(a), M.R.App.P., provides:

Costs on appeal in civil cases will be taxed as provided by section 25-10-104, Montana Code Annotated, and if not otherwise provided by the court in its decision, will automatically be awarded to the successful party against the other party. All costs on appeal shall be claimed as provided by section 25-10-503, Montana Code Annotated.

Section 25-10-104, MCA, provides:

- (1) In the following cases, the costs of appeal are in the discretion of the court:
 - (a) when a new trial is ordered;
 - (b) when a judgment is modified.

(2) In all other cases the successful party shall recover from the other party his costs.

The discretion referenced in § 25-10-104, MCA, is the discretion of the appellate court. *State, ex rel. Nesbitt v. District Court* (1946), 119 Mont. 198, 200, 173 P.2d 412, 413 (citation omitted).

¶5 Our decision in *Langevin I* modified the original judgment in Langevin's favor in one respect. However, we did not exercise our discretion as to costs of appeal in the subsection (1)(b) "judgment modified" regard. Thus, the District Court was left in the unenviable position of trying to determine whether Langevin was the "successful party" to whom the award of costs is automatic. It appears that neither party provided the court with legal authorities on point.

¶6 In *Nesbitt*, we discussed the meaning of "successful party" under the predecessor to § 25-10-104, MCA. We determined that, where the trial court's decision was upheld in all respects except that damages were reduced by \$162.10--an "unsubstantial" amount--the appellant was not the successful party. *Nesbitt*, 119 Mont. at 201, 173 P.2d at 413.

¶7 No response brief was filed in this appeal. Absent any legal support for the District Court's denial of Langevin's costs in the earlier appeal, and because *Nesbitt* is distinguishable on the facts here in that *Langevin I* reversed the entirety of the \$8,826 damage award to the Andersens, we conclude that Langevin was the "successful party" in the appeal in *Langevin I* and is automatically entitled to his costs on appeal pursuant to § 25-10-104(2), MCA, and Rule 33(a), M.R.App.P.

¶8 Reversed and remanded for further proceedings comports with this Opinion.

/S/ KARLA M. GRAY

We concur:

/S/ JAMES C. NELSON

/S/ PATRICIA COTTER

/S/ JIM REGNIER

/S/ JIM RICE