NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 17, 2019

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Re: *Robert M. Swahn, Jr., et. al. v. Nouman Hussain, et. al.*
Case Nos. CL–2016–12933, CL–2016–15236

Dear Counsel:

Sometimes, in hotly contested litigation between neighbors, everyone loses. Alas, this is one of those lawsuits. The issue is whether the Hussain family (the "Hussains") is entitled to attorney fees under Virginia Code § 55–515 as the "prevailing party" on a public nuisance count brought by their neighbors, the Swahn family (the "Swahns"), notwithstanding the Hussains' losses on a related count for private nuisance and on their own counterclaim for trespass. The Court holds it must view the entire result of the litigation to determine the "prevailing" and "losing" parties, balancing success on one count with failure in related counts before adjudging a party to be a "prevailing party." Taken as a whole in this case, the Court rules that the Hussains' losses on the private nuisance claim and the trespass counterclaim offset their success on the public nuisance count and consequently denies their petition for attorney fees.

As a first alternative holding, the Court concludes the Swahns' efforts to abandon the public nuisance count rendered the prosecution of that claim unnecessary and the Hussains'

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"victory" on that count inconsequential. As a second alternative holding, the Court holds the Hussains failed to prove their counsel took any more time to successfully defend the public nuisance count than taken to defend the private nuisance count on which the Swahns prevailed, rendering any attorney fees associated with the public nuisance count merely duplicitous of those associated with the private nuisance count. By failing to distinguish the attorney fees attributable to either claim, the Hussains fell short of their burden of proof to show the requested fees were reasonable and necessary. As a result of either alternative holding, the Court denies the Hussains' petition for attorney fees.

I. BACKGROUND: A COOKING DISPUTE BETWEEN NEIGHBORS BOILS OVER.

The Swahns and the Hussains were immediately adjacent neighbors in a town house community. The Hussains regularly cooked copious amounts of food in their noncommercial kitchen, emitting odors outside their home the Swahns found unpleasant and noxious. The Swahns surmised an illegal commercial catering business was afoot and, in a two-count complaint, sued the Hussains for $200,000 in compensatory and punitive damages.

Count I of the Complaint alleged the Hussains' conduct was a public nuisance in violation of the neighborhood's Declaration of Covenants, Conditions and Restrictions (the "Declaration"). Article X, Section 4 of the Declaration reads:

> No noxious or offensive activity shall be carried upon any portion of the Properties, nor shall anything be done thereon that may be or become a nuisance or annoyance to the neighborhood. . . .

The Swahns contended the Hussains cooking constituted a nuisance as defined by the Declaration. Based on these same basic facts, Count II set forth a claim of common law private nuisance.

The Hussains repudiated the illegal catering allegation as well as the allegation their cooking constituted a nuisance and filed a counterclaim for common law trespass against the Swahns, praying for $600,000 in compensatory and punitive damages. The Hussains accused the Swahns of illegally entering their town house to spy on them in order to bolster their nuisance claims. The Hussains also filed a counterclaim seeking attorney fees under Virginia Code § 55–515. In response, the Swahns rebuffed any such trespass.

Together, these four counts spawned protracted litigation, spanning the course of two years. Prior to the jury trial, the Swahns desired to nonsuit the public nuisance claim (Count I). However, the Hussains objected to the nonsuit, which was their right since they had a pending counterclaim. *See* VA. CODE §8.01–380(D). This forced a trial on the public nuisance count. Nonetheless, during the trial, the Swahns waived their right to seek their only remedy to the public nuisance count—an injunction—effectively neutering the count.

After many pre-trial motions and several continuances, a five-day jury trial finally ensued, resulting in a split decision. The jury found for the Hussains on Count I for public nuisance under the Declaration and dismissed the count. As for Count II for private nuisance, the jury found the Hussains liable and awarded the Swahns $2,190.96 in damages. The jury also dismissed the Hussains' counterclaim for trespass.[1] Thus, the Swahns "prevailed" on the private nuisance count and the trespass counterclaim. The Hussains "prevailed" on the public nuisance count. The only money changing hands was from the Hussains to the Swahns.

Yet, of the three counts, only the public nuisance count, per the provisions of Virginia Code § 55–515, permitted the recovery of attorney fees for the prevailing party. So, despite prevailing on only one of three counts submitted to the jury, the Hussains petitioned the Court for attorney fees in the amount of $118,264.84[2]—the entirety of the attorney fees incurred by counsel for the Hussains during the course of this litigation.

II. ANALYSIS

A. A "Prevailing Party" Must Substantively Prevail in the Case as a Whole.

The Hussains prevailed in their defense to the Swahns' claim for public nuisance as defined by the Declaration. Virginia Code § 55–515(A) of the Virginia Property Owners' Association Act requires all lot owners to "comply with . . . all provisions of the declaration. Any lack of such compliance shall be grounds for an action or suit . . . in any proper case, by one or more aggrieved lot owners on their own behalf." Where such a cause of action is filed, "the prevailing party shall be entitled to recover reasonable attorney fees, costs expended in the matter, and interest on the judgment." VA. CODE § 55–515; *see also White v. Boundary Ass'n*, 271 Va. 50, 57 (2006) (holding lot owners could recover attorney fees under Virginia Code § 55–515(A) if the prevailing party).

Concerning awards of counsel fees, the general rule of thumb is: "in an action encompassing several claims, the prevailing party is entitled to an award of costs and attorneys' fees only for those claims for which (a) there is a contractual or statutory basis for such an award and (b) the party has prevailed." *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 428–29 (2012) (citing *Ulloa v. QSP, Inc.*, 271 Va. 72, 83 (2006)). Virginia Code § 55–515(A) specifically "authorizes an award of costs and fees to the [prevailing party] . . . only on claims that (a) were brought to enforce the Declaration and (b) they prevailed upon." *Id.* at 429.

The Court must make this threshold inquiry prior to determining the reasonableness of any award. Here, unquestionably, the public nuisance count was brought to enforce the parties' Declaration and the Hussains prevailed upon that claim. But, the fact the Hussains prevailed on

[1] By a consent order entered July 24, 2017, the parties agreed to bifurcate the Hussains' counterclaim for attorney fees. Therefore, the jury was not informed and did not reach a verdict on that counterclaim.
[2] This was the original amount in the petition for fees. At the hearing, the Hussains offered additional invoices raising the total fees to approximately $122,000.

the public nuisance count, standing alone, does not necessitate a conclusion the Hussains were a "prevailing party."

Virginia law defines "prevailing party" to mean "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Sheets v. Castle*, 263 Va. 407, 413 (2002) (citing *Prevailing Party*, BLACK'S LAW DICTIONARY (7th ed. 1999)); *see also City of Richmond v. Cty. of Henrico.*, 185 Va. 859, 869 (1947) ("The 'prevailing party', within the meaning of the general rule that such a party is entitled to costs, is the party in whose favor the decision or verdict in the case is or should be rendered and judgment entered." (quoting 20 C.J.S. COSTS § 8, at 268)). In determining which party was the prevailing party, "the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action." *Sheets*, 263 Va. at 414 (quoting *City of Richmond*, 185 Va. at 869).

The salient factor in this case is "the results obtained." The Hussains only prevailed on one of the three claims submitted to the jury. That is, "the results obtained by [the Hussains] in [their] litigation against [the Swahns] can be characterized, at best, as marginally successful." *Ulloa*, 271 Va. at 82–83. Indeed, the jury awarded the Swahns monetary damages on a similar claim of nuisance.

The Supreme Court of Virginia, in a case involving a claim for attorney fees pursuant to Virginia Code § 55–515(A), held a trial court did not err in refusing to award the fees to defendants where they prevailed on certain claims but the opposing party prevailed on others. *See Raintree of Albemarle Homeowners Ass'n v. Jones*, 243 Va. 155, 161 (1992). There, like here, the result was split. The plaintiff prevailed on several claims, the defendant only on one. *Id.* Similarly, here, the Hussains were not the "prevailing party" in this litigation and therefore are not entitled to an award of counsel fees and costs pursuant to Virginia Code § 55–515(A). In view of the law, and in light of the general results obtained, the contention the Hussains were the prevailing party is specious. Accordingly, the Court denies the Hussains' petition for attorney fees.

B. Since the Public Nuisance Claim Was Unnecessary the Hussains Are Not Entitled to Attorney Fees, even if They Were the "Prevailing Party" on that Claim.

In the alternative, if the Hussains, because they prevailed on the public nuisance claim brought pursuant to the Declaration are a "prevailing party," the Court holds they are not entitled to an award of attorney fees. "[T]he amount of the fee award rests within the sound discretion of the trial court." *Manchester Oaks*, 284 Va. at 429. "As the fact-finder, [a] circuit court ha[s] to determine 'from the evidence what [were] reasonable fees under the facts and circumstances of [this] particular case.'" *West Square, L.L.C. v. Commc'n Techs., Inc.*, 274 Va. 425, 435 (2007) (quoting *Mullins v. Richlands Nat'l Bank*, 241 Va. 447, 449 (1991)). There are several factors to consider when determining an award of counsel fees. *See, e.g., Manchester Oaks*, 284 Va. at 429–30. The pertinent factors include:

> [(1)] the time and effort expended by the attorney, [(2)] the nature of the services rendered, [(3)] the complexity of the services, [(4)] the value of the services to the client, [(5)] the results obtained, [(6)] whether the fees incurred were consistent with those generally charged for similar services, and [(7)] whether the services were necessary and appropriate.

Id. at 430 (quoting *Chawla v. Burgerbusters, Inc.*, 255 Va. 616, 623 (1998)). The Court may also consider the number of claims the party seeking costs and counsel fees actually prevailed on. *See Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 254–56 (2017) (interpreting a parallel statute in the Virginia Condominium Act, Virginia Code § 55–79.53(A)).

Here, even regarding the Hussains as the "prevailing party" on the public nuisance claim brought under Virginia Code § 55–515(A), an award of attorney fees would be unfair and a misapplication of the *Manchester Oaks* factors. Effectively, the Hussains are seeking attorney fees on an abandoned count that remained in the litigation due principally to their own insistence.

The Swahns did not want to prosecute the public nuisance claim. The Swahns offered to nonsuit the claim but could not due to the Hussains' refusal to dismiss their counterclaim for attorney fees. Furthermore, without objection by the Hussains, the Swahns abandoned their right to obtain an injunction—the only relief pursuable on the public nuisance count. Thus, the Hussains prevailed on a claim the Swahns had no incentive to argue at trial.

"A trial court may, when determining the reasonableness of the fees and expenses claimed by a prevailing party, deduct from the award any fees and expenses associated with claims and defenses the court views to be frivolous, spurious, or *unnecessary*." *Dewberry & Davis, Inc. v. C3NS, Inc.*, 284 Va. 485, 496 (2012) (emphasis added) (citing *Chawla*, 255 Va. 624; *Ulloa*, 271 Va. at 83). Here, the fact the Hussains were the prevailing party on the public nuisance claim must be taken with a grain of salt. Although Virginia Code § 55–515(A) mandates an award of attorney fees, the Court has the discretion to deduct fees associated with unnecessary claims. But for the Hussains refusal to permit the Swahns' nonsuit, the Hussains would not have prevailed on any count. "[T]here is no 'prevailing party' when a nonsuit is awarded." *Sheets*, 263 Va. at 414. Thus, because the public nuisance count persisted merely due to the Hussains' refusal to permit the Swahns to nonsuit the claim, the Court finds the public nuisance count was an unnecessary claim.

Since the public nuisance claim was unnecessary, this Court, in its discretion, further rules the entirety of attorney fees attributable to that claim, if any, must be deducted. It would shock the conscience to find the Hussains created a private nuisance and order them to pay $2,190.96 damages to the Swahns, but because they were the prevailing party on the public nuisance count, permit them to collect $118,264.84 in attorney fees from the Swahns. As such, the Court holds the Hussains are not entitled to an award of attorney fees under Virginia Code § 55–515(A) for being the "prevailing party" on the public nuisance count, as that count was unnecessary.

C. *The Hussains Failed to Carry Their Burden to Prove What Attorney Fees Were Attributable to the Public Nuisance Count.*

As a second alternative holding, the Court holds the Hussains failed to carry their burden of proof of distinguishing what amount of the $118,264.84 attorney fees petitioned for were associated specifically with the public nuisance claim. *See West Square*, 274 Va. at 434 (citing *Chawla*, 255 Va. at 623; *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 96 (1997)); *see also Manchester Oaks*, 284 Va. at 429 (citing *Ulloa*, 271 Va. at 83). The time and effort expended by counsel for the Hussains to defend the public nuisance count appears to the Court to be identical and indistinguishable to that reasonably necessary to defend the private nuisance count. In light of the factual parallels between the claims, the time and effort expended by counsel for the Hussains would have been the same if the public nuisance count had not been tried. Taking the public nuisance count to trial in no way altered the nature or increased the complexity of the services provided by Counsel for the Hussains. *See Manchester Oaks*, 284 Va. at 429–30.

"A prevailing party who seeks to recover attorneys' fees . . . has the burden to present a prima facie case that the requested fees are reasonable and that they were necessary." *West Square*, 274 Va. at 433. "Even though claims may be intertwined and have a common factual basis . . . the party seeking an award of costs and expenses, ha[s] 'the burden to establish to a reasonable degree of specificity' those costs and expenses associated with the [claim prevailed on]." *Id.* at 435–36 (quoting *Ulloa*, 271 Va. at 83). "This burden requires the [prevailing party] 'to furnish evidence of sufficient facts and circumstances to permit the fact-finder to make at least an intelligent and probable estimate of the damages sustained.'" *Manchester Oaks*, 284 Va. at 424 (quoting *Dillingham v. Hall*, 235 Va. 1, 4 (1988)) (discussing "proof to a reasonable certainty" in the context of a plaintiff proving the damages element of a breach of contract claim).

Here, the Hussains failed to segregate their attorney fees associated with the public nuisance count from those associated with the private nuisance count. In so failing, they fell short of their burden. The request for all incurred attorney fees in this litigation is not reasonable because counsel for the Hussains necessarily incurred these fees to defend the private nuisance count without regard to the public nuisance count.[3] The Hussains were required, but neglected to demonstrate to the Court, the fees requested were necessary and attributable to the public nuisance claim as opposed to any other claim.

The Court finds the Hussains requested attorney fees—for prevailing on an unnecessary public nuisance claim—indistinguishable from the fees incurred from litigating the private

[3] For clarity's sake, the dichotomy between Count I setting forth a claim of public nuisance and Count II setting forth a claim for private nuisance was never contemplated by the parties during the course of this litigation, but was concluded to be so by the Court from the bench on October 12, 2018 as part of its ruling on the Swahns' post-trial Motion for Judgment Notwithstanding the Verdict.

nuisance claim. Therefore, as a second alternative holding, the Court holds the Hussains are not entitled to recover attorney fees based on their failure to establish what fees, if any, are specially associated with defending the public nuisance count that they were not already required to spend to defend the public nuisance count.

III. CONCLUSION

For the reasons stated herein, the Court holds that Hussains were not the prevailing party in this litigation despite prevailing in their defense against Count I for public nuisance as defined by the Declaration. In the alternative, assuming the Hussains were a "prevailing party," because the public nuisance count was unnecessarily tried and submitted to the jury primarily due to the Hussains' own conduct, the Court holds they are not entitled to an award of attorney fees for prevailing on that count. As a second alternative holding, the Court holds the Hussains fell short of their burden and failed to distinguish to the Court any attorney fees attributable to their success on the public nuisance count from the attorney fees attributable to their failure on the private nuisance count. Therefore, the Court denies Defendants' Petition for Attorney Fees and Costs.

An appropriate Order is attached.

Kind regards,

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROBERT M. SWAHN, JR., *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	CL–2016–12933
	)	CL–2016–15236
NOUMAN HUSSAIN, *et al.*	)	
	)	
Defendant.	)	

ORDER

THIS MATTER comes before the Court on Defendants' Petition for Attorney's Fees and Costs; and

UPON CONSIDERATION of the Defendants' Petition & Memorandum in Support, Plaintiffs' Memorandum in Opposition; and

UPON HEARING oral argument of counsel for both parties on the matter on January 11, 2019; it is hereby

ORDERED and DECREED Defendants' Petition is DENIED WITH PREJUDICE; and

ORDERED and DECREED the Opinion Letter issued by this Court dated January 17, 2019 in this matter is hereby adopted by reference into this Order as though it were fully restated herein.

JAN 1 8 2019

Dated

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.