

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2001-233

DECEMBER TERM, 2001

David J. and Lynn C. Domina     George A.  
and Carolyn A. Cota

v.

George A. and Bradford B. Moore

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APPEALED FROM:

Lamoille Superior Court

DOCKET NO. 183-8-97 Lecv

Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Defendants George and Bradford Moore appeal from a superior court decision following a remand from this Court. Defendants contend the court erred in: (1) refusing to reopen the case for new evidence; and (2) awarding attorney's fees and expert witness fees to plaintiffs David and Lynn Domina and George and Carolyn Cota. We affirm the court's evidentiary ruling, but reverse the order awarding attorney's fees and expert witness fees.

This is the second time this case has been appealed to this Court. The underlying facts are set forth in our initial decision in Domina v. Moore, No. 99-163 (May 10, 2000) (mem.), and may be briefly summarized for purposes of this appeal. The parties own adjoining properties located on a peninsula on Lake Eden. A dispute over the Moores' use of a private road on the Dominas' property for access to their lot resulted in this lawsuit. The Dominas' complaint sought an injunction preventing the Moores from trespassing. The Moores counterclaimed against the Dominas and the Cotas, seeking a determination of the boundaries of the three properties, a prescriptive easement along the road through the Dominas' lot, and damages allegedly resulting from an excavation done by the Cotas in 1986 and 1987. Following a bench trial, the court concluded that the Moores' property ended at a certain point east of the shoreline, rather than the shoreline itself as the Moores had contended, and permanently enjoined the Moores from trespassing on the Domina and Cota lots. The court also entered judgment for the Dominas and the Cotas on all of the Moores' counterclaims, and - based on a finding of "bad faith" - ordered the Moores to pay attorney's fees, costs and expenses of \$5,493.13 to the Cotas, and \$13,183.04 to the Dominas.

On appeal, we affirmed all but two of the trial court's rulings. With respect to the court's conclusion that the claim for damages resulting from the 1986/1987 excavation was time-barred, we noted that the action did not accrue until the land subsided, and remanded for a specific finding on this issue. We also did not reach the attorney's fee issue, noting that the trial court might wish to reconsider the award in view of our remand. See id., slip op. at 3.

In a telephone status conference following our remand, the Moores' attorney expressed an interest in presenting additional evidence on their lateral-support claim. The court declined to reopen the evidence and directed the parties to submit written memoranda addressed to the issues remanded by this Court. Thereafter, the trial court issued a written opinion and order, finding that there was no credible record evidence that there had been any new subsidence since the excavation in 1986, and reaffirming its conclusion that the claim was time barred. The court also reaffirmed its award of attorney's fees and costs. This new appeal followed.

The Moores first contend the trial court abused its discretion in declining to take additional evidence on the subsidence question. On remand, a trial court must follow this Court's "specific directions as interpreted in light of the opinion." Coty v. Ramsey Assocs., 154 Vt. 168, 171 (1990). When a case is remanded without specific directions as to the method to be utilized for determining an issue, the trial court has discretion to decide whether the record before it is sufficient for this purpose or whether additional evidence should be taken to supplement the record. See Klein v. Klein, 153 Vt. 551, 557 (1990). Here, the court noted that the Moores had called two expert witnesses at trial on this issue, neither of whom had established that any subsidence had occurred since the original excavation, and further found that George Moore's testimony that the land was continually subsiding was not credible. Accordingly, we cannot conclude that the court abused its discretion in finding that the existing trial record was sufficient to resolve the issue on remand.

The Moores also renew their claim that the court erred in awarding attorney's fees to the Cotas and attorney's fees and expert witness fees to the Dominas. The court awarded attorney's fees to both couples based on a finding that the Moores had acted in "bad faith," a narrow exception to the "American Rule" which normally requires that parties bear their own attorney's fees absent a statutory or contractual exception. See DJ Painting, Inc. v. Baraw Enters., 776 A.2d 413, 419 (Vt. 2001). As we explained in DJ Painting, the bad faith exception "may be invoked 'only in exceptional cases and for dominating reasons of justice.'" Id. (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939)).

The trial court's finding of bad faith was based on its underlying findings that the Moores had trespassed across the Cotas' and Dominas' properties, had threatened them when they objected to the trespass, had forced them to seek injunctive relief to enjoin the trespass, and had filed frivolous counterclaims in an effort to bully them into granting a right-of-way where none existed. Some of the court's reasoning is similar to that in DJ Painting, where the trial court found that the plaintiff had acted in bad faith by filing suit in disregard of a clear contractual arbitration clause, and had unreasonably imposed litigation costs on the defendants. We reversed the award, noting that the plaintiff's conduct was "not so outrageous as to warrant an award of attorneys' fees on this ground." 776 A.2d at 419.

Here defendants' case, including that on the counterclaims, was supported by expert testimony which the court did not accept. We have reviewed defendants' claims - which were based on the interpretation of deeds, analysis of prescriptive rights, and a view of the statute of limitations for lateral support claims - and conclude that they were not so outrageous that "dominating reasons of justice" required an award of attorney's fees. Id. Moreover, we do not believe that defendants' conduct before the litigation can justify an award of attorney's fees absent a finding that defendants' legal position was asserted in bad faith, a finding we conclude cannot be made here.

The award to the Dominas included \$2,896.09 for the fees incurred in hiring an expert witness to provide reports and testify at trial concerning the location of their boundary with the Moores' property. The trial court reasoned that expert witness fees are "akin to legal fees," and premised its authority to make the award upon the same "equitable" power that authorized the award of attorney's fees for bad faith and vexatious conduct. Our conclusion that the record does not support the court's finding of bad faith for the award of attorney's fees requires reversal of the expert witness fee award, as well. Accordingly, we need not address the authority, if any, of a court to award expert witness fees in these circumstances.

We reject, finally, the Dominas' assertion that the expert witness and attorney's fee issues are "res judicata." The doctrine of law of the case, which more properly applies in this situation, holds that when a case is remanded, "no question then necessarily involved and decided will be reconsidered by the Court in the same case on a state of facts not different in legal effect." Coty, 154 Vt. at 171 (internal quotation marks omitted). We did not address or decide the merits of the attorney's fee or expert witness fee issues in the first appeal, but rather remanded the issues for further consideration. Accordingly, the Moores were not precluded from raising them below or here on appeal.

That portion of the trial court's order reaffirming the award of attorney's fees and expert witness fees is reversed. In all other respects, the decision is affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice