

Affirmed by 2002 VT 38 (5/16/12)

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 820-10-08 Rdcv

Leonard C. Knappmiller
Plaintiff

ORIGINAL PAPER
VERMONT SUPERIOR COURT

v.

AUG - 3 2011

RUTLAND

Joseph Bove, et al.
Defendants

DECISION

Vaillancourt's Motion for Expenses and Attorney's Fees, filed April 11, 2011

Defendant Vaillancourt Tree-Landscaping Service, Inc. ("Vaillancourt") moves to recover litigation expenses and attorney's fees from Defendants Joseph and Carolyn Bove. Vaillancourt is represented by Christopher P. Sullivan, Esq. The Boves are represented by Robin Ober Cooley, Esq.

This case originated with a complaint filed by Plaintiff Leonard Knappmiller alleging that the Boves, adjoining landowners, wrongfully cut down trees that were located on his property. Subsequently, Mr. Knappmiller amended his complaint to allege that Vaillancourt tree service, as the entity that actually cut the trees, was also liable. Vaillancourt then brought a cross-claim against the Boves for "negligence, breach of contract, and indemnity." The cross-claim requested judgment against the Boves "for indemnity if Vaillancourt is found liable to Plaintiff and for any other damages suffered by Vaillancourt resulting from the Boves' negligence and breach of contract."

The present motion follows a jury trial in which the jury determined that Mr. Knappmiller had not proved his claim against any defendant. Since the Boves were not found liable against Mr. Knappmiller, the jury did not reach Vaillancourt's cross-claim against the Boves. In this post-trial motion, Vaillancourt seeks to recover litigation expenses and attorneys' fees from the Boves under a theory of an implied right to indemnity.

The general rule in Vermont is that parties must bear their own litigation expenses, including attorney's fees. Nevertheless, there is an exception to this rule that applies "when the wrongful act of one person has made it necessary for another person to become involved in litigation with a third party to protect his or her interests." *Windsor School Dist. v. State*, 2008 VT 27, ¶ 10, 183 Vt. 452 (2008). The resolution of this motion depends on a determination of whether the Boves have committed a "wrongful act" within the meaning of this exception. If the Boves have not committed a "wrongful act," Vaillancourt is not entitled to recover attorney's fees.

“Wrongful act” as used in the context of this exception is distinct from its meaning in the law of torts. The rationale for this exception rests on principles of fairness and comparative responsibility as opposed to fault. *Id.* at ¶ 13. The crux of the matter is the differential fault between the potentially indemnifying party (the Boves) and the potentially indemnified party (Vaillancourt), not between the parties and the original plaintiff (Knappmiller). *Id.* at ¶ 18; see also *Bull v. Pinkham Eng’g Assocs.*, 170 Vt. 450, 461 (2000). In applying the exception, a court should focus on differences in the “kind or quality” of the parties’ actions. *Windsor School Dist.*, 2008 VT at ¶ 37.

Before addressing the applicability of the exception, the court notes that Vaillancourt did not include in its cross claim a request for attorney’s fees in the event the Boves prevailed on the principal claim. In fact, the language of the cross-claim itself suggests that Vaillancourt’s present request for attorney’s fees should be denied due to lack of notice in the pleading. The cross-claim asks “for indemnity *if Vaillancourt is found liable to Plaintiff*” (emphasis added). The jury found that Vaillancourt was not liable to Plaintiff and therefore the Vaillancourt request for indemnity became moot. Nor does the request for “for any other damages suffered by Vaillancourt resulting from the Boves’ negligence and breach of contract” language in the cross-complaint cover the current request for attorneys’ fees, as there was no proof at trial of negligence or breach of contract by the Boves. The pleadings did not put the Boves on notice that Vaillancourt would seek to recover attorneys’ fees from the Boves in the event the jury found no liability on the principal claim. Here the issue is raised for the first time in a post-trial motion. This is in contrast to the circumstances of *Bull v. Pinkham Eng’g Assocs.*, which was a lawsuit in which the claim for attorneys’ fees incurred by the plaintiff in a separate lawsuit was specifically included as part of the plaintiff’s claim.

The issue of notice aside, analysis of the merits of the motion does not support Vaillancourt’s position. The Boves argue that Vaillancourt cannot recover attorney’s fees because the jury found no liability, and cite to a statement by the Vermont Supreme Court in *Riblet Tramway Co. v. Marathon Elecs. Avtek Drive Div.*, 159 Vt. 503, 506 (1993): “If the third-party plaintiff prevails against the principal plaintiff and incurs no liability, the third-party defendant in turn incurs no liability to the third-party plaintiff.” However, that statement is dictum in the case, and did not address the issue of attorneys’ fees as distinct from liability on an indemnity claim. The holding of the case was that the claim was barred by *res judicata*, as it was part of a prior lawsuit that had been resolved without preservation of the issue.


Vaillancourt relies on *Bull v. Pinkham Eng’g Assocs.* in which one co-defendant in a prior lawsuit was liable to another co-defendant in the prior suit even in the absence of liability of both to the plaintiff in the prior suit. See 170 Vt. at 467 (2000) (upholding a judgment for a property developer against an engineering firm for attorneys’ fees incurred in defending a lawsuit brought by the purchasers of a lot who were misled by the engineering firm’s erroneous survey, notwithstanding the fact that the purchasers had not prevailed in their action against the firm and the developer). The indemnifying party in *Bull* was found liable to the indemnified party after an evidentiary hearing and a finding that the indemnifying party breached a duty of care to the indemnified party and damages were awarded. *Id.* at 454. Attorney’s fees for the defense of the prior suit were also awarded as an additional element of the damages stemming from the breach of duty. *Id.* at 459.

However, the circumstances in *Bull* are not present in this case, because in this case, there has been no showing of any wrongful act on the part of the Boves. The jury was never asked to, nor did it, make a finding that the Boves did anything wrong. Based on the instructions the jury was given, the jury could have determined that the Boves were entitled to cut the trees at issue, even if on Knappmiller's property, based on proof by the Boves that a reasonable person in their circumstances would find that the trees represented a significant threat to their property. Since there is no basis on which the jury could have found that the Boves committed a wrongful act, there is no basis for post-trial application of the "wrongful act" exception to the American Rule that each party bears its own expenses of litigation. Thus, Vaillancourt must bear its own costs of the litigation.

ORDER

Vaillancourt's Motion for Expenses and Attorney's Fees is *denied*.

Dated this 1st day of August, 2011.


Hon. Mary Miles Teachout
Superior Court Judge