NEW HAMPSHIRE SUPREME COURT

WBTSCC Limited Partnership and
(as counterclaim defendants only) William Binnie and Harbour Links Estates, LLC

v.

Mark and Jenny Galvin, individually, and
as p/n/f of Holly Galvin, Paige Galvin, Kelly Galvin, Gregory Galvin and Michelle Galvin

Case No. 2009-0450

APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Whether the trial court committed an unsustainable exercise of its discretion by awarding the respondent Galvins $50,000.00 in attorney's fees, notwithstanding that: a.) the Galvins did not prevail on the issues consuming the bulk of attorney time in the litigation, losing their claim to have their country club membership reinstated, losing their claims challenging the validity of certain golf course easements burdening their property, and losing twelve (12) of their thirteen (13) counterclaims; b.) the Galvins failed to show, and the trial court failed to find, any nexus between the attorneys' fees that the trial court awarded the Galvins and the issues on which the Galvins prevailed; c.) the Galvins failed to show, and the trial court failed to find, that any judicially recognized exception applied to the general rule assigning each party responsibility for its own attorneys' fees; d.) the Galvins failed to meet their burden to prove the amount of attorneys' fees, if any, to which they were supposedly entitled; and e.) the Galvins' claimed fees were unreasonable. Appendix to Appellant's Brief (Appendix) at pp. 203-210; Transcript at pp. 31-38.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

None known.

STATEMENT OF THE CASE

By Order dated October 26, 2007, this Court remanded the case to the trial court for a determination of the Galvins' claim for reimbursement of attorney's fees. Appendix at p. 31.

By Order dated June 17, 2009, the trial court issued a terse two-sentence Order stating, "This Court has determined that based upon Judge Morrill's Order, the defendants are entitled to

be reimbursed a portion of their legal fees as a result of the plaintiff's bad faith. Recognizing that making that determination is an inexact science, the Court awards the defendants attorney fees totaling $50,000.00." Id. at p. 211. The Court made this Order despite the fact that, as explained below, the Galvins failed to prevail on either of the two (2) overarching issues in the case, failing to obtain any judicial Order invalidating the golf course easements subject to which they took their property, and failing to obtain any judicial Order reinstating their country club membership.

This Appeal followed.

STATEMENT OF FACTS

As Judge Morrill stated in his April 17, 2006, summary judgment Order, "[t]here [were] two overarching issues" in this case. "First, the parties dispute the validity and enforceability of a golf course easement over land of the Galvins. Second, the Galvins contend that their suspension from Wentworth by the Sea Country Club was illegal." Appendix at p. 2.

The Galvins have lost each of these issues thus far in this litigation, which is now lumbering into its sixth year. This Court reversed a trial court Order reinstating the Galvin family membership by Order dated October 26, 2007. Id. at pp. 28-29. Furthermore, by the same Order, this Court affirmed the trial court's Order granting the Wentworth summary judgment on the Galvins' claim challenging the validity of the Wentworth's easement on the Galvins' property, which claim rested on the factually incorrect basis that the easement somehow deprived them of a possessory interest in their land. Id. at pp. 27-28.

This Court then remanded the case for the trial court to address other challenges raised by the Galvins to the validity of the golf course easement which the trial court had omitted to address in its initial consideration of the case. Id. at p. 28. This Court further remanded the case

for the trial court to address the Galvins' claim that they were somehow entitled to reimbursement of attorney's fees, despite the fact that they did not prevail on the "overarching issues" in the case. Id. at p. 31.

Indeed, the Galvins only obtained one small piece of affirmative relief in their epic battle against their former country club. They did not succeed in their quest to invalidate the Wentworth's golf course easement on their property. Nor did they succeed in their quest to obtain an Order reinstating their country club membership. The Galvins only succeeded in obtaining an Order finding that the Wentworth breached a duty of good faith and fair dealing by planting certain trees on the Wentworth's own property in the environs of the Galvin home and on the golf course easement burdening the Galvin property. Id. at pp. 15-18.

Importantly, although the trial court ordered the trees removed and found that the Wentworth acted in bad faith by planting the trees, the trial court made no finding that the Wentworth somehow acted in bad faith by litigating its entitlement to plant trees on its own property and on its easement, particularly where the easement deed language specifically authorized the Wentworth to plant trees there. Id. at pp. 5-22 and 207.

On remand, the Galvins audaciously moved for reimbursement of 75% of the attorney's fees that they incurred in the litigation. Id. at pp. 39-51. The Galvins made no effort in their pleadings to correlate the attorney's fees they sought with the one claim on which they obtained modest relief. Id. The Galvins simply argued that they were entitled to reimbursement of most of their fees based on the Wentworth's "bad faith," regardless of whether or not they prevailed. *See* Id. at p. 51 (arguing that the Galvins should receive reimbursement of attorney's fees on issues such as the membership issue even if the Galvins lost (and even if this Court reversed the trial court)).

The Wentworth objected on several grounds, arguing that: a.) the Galvins should not recover fees because they did not prevail on the "overarching issues" in the litigation; b.) the Galvins should not recover fees because they had failed to demonstrate any nexus between the one claim on which they obtained modest relief and the fees they sought; c.) the Galvins should not recover fees because the "bad faith litigation" exception did not apply, even if the trial court did find that the Wentworth planted the trees in bad faith, because the Wentworth had "a fair and reasonable ground" to litigate its entitlement to plant trees on its own property and on a golf course easement on which the relevant deed language specifically authorized the Wentworth to plant trees; and d.) the Galvins should not recover fees because they failed to meet their burden to prove the reasonableness of the fees asserted or awarded. Id. at pp. 203-210.

The trial court issued a terse 2-sentence Order awarding the Galvins $50,000.00 in fees without providing any explanation of the basis for its determination. Id. at p. 211. The Wentworth now appeals the trial court's Order awarding the Galvins fees.

SUMMARY OF ARGUMENT

The Court should reverse the trial court's Order awarding the Galvins $50,000.00 in attorney's fees as an unsustainable exercise of the trial court's discretion. First, it is axiomatic that a party must be the "prevailing party" in order to have any hope of recovering attorney's fees. The Galvins are not "prevailing parties" in this litigation and therefore fail to meet the threshold requirement for eligibility for any exception to the general rule that each party bears responsibility for its own attorney's fees. The Galvins lost their claims with respect to both of the "overarching issues" in the case, losing their quest for a Court Order invalidating the golf course easement subject to which they took their property, and losing their quest for a Court Order reinstating their country club membership. No basis exists for awarding a losing party

attorney's fees, even where the underlying record contains findings that the prevailing party at times may have acted in "bad faith." Because the Galvins did not prevail on either of the overarching issues in the case, they should not recover attorney's fees.

Furthermore, the trial court's Order is unsustainable because it provides no explanation for the result reached. Trial courts are required to provide explanations for the computation of an attorney fee award and are generally required to follow the lodestar method, pursuant to which the court calculates the attorney's fee award by multiplying the number of hours productively spent by a reasonable hourly rate. Courts departing from the lodestar method (which this Court has endorsed) must explain the departure.

Here, the trial court awarded $50,000.00 out of thin air. The trial court failed to make any effort to use the lodestar method, nor did it explain its departure from the lodestar method or provide the slightest insight into the method and manner underlying its computation. The trial court's award therefore smacks of arbitrariness and should be reversed.

The Court should also reverse the trial court because no judicially recognized exception to the rule that each side pays its own attorney's fees applies here. In particular, the "bad faith litigation" exception does not apply because the Wentworth had fair and reasonable grounds to litigate each of the claims in the case, and the trial court did not find otherwise. A finding that one side may have breached a duty of good faith and fair dealing (or acted in bad faith) in the conduct giving rise to the case does not automatically entitle the other litigant to attorney's fees. For the "bad faith litigation" exception to apply, the party against whom fees are assessed must have litigated a position without having fair and reasonable grounds for doing so. The Wentworth certainly had fair and reasonable grounds to litigate its easement rights and its right

to suspend the Galvins' country club membership. The Wentworth prevailed on all claims concerning these issues.

Furthermore, the Wentworth had fair and reasonable grounds to litigate the Galvins' breach of good faith and fair dealing claim arising from the Wentworth's acts of planting trees in the environs of the Galvin property, even though the Wentworth ultimately lost this issue. This is the case because the Wentworth had a fair and reasonable basis to believe it could plant trees on its own property and likewise had a fair and reasonable basis to believe it could plant trees on an easement where the relevant deed language specifically authorized the Wentworth to plant trees there. Regardless, the trial court did not find that the Wentworth did <u>not</u> have such fair and reasonable grounds for its litigation positions.

Because the record contains no support for the proposition that the Wentworth litigated claims without fair and reasonable grounds for doing so, the bad faith litigation exception should not apply. The Court should reverse the trial court.

Finally, the Court should reverse the trial court because the Galvins failed to prove the reasonableness of the fees claimed or awarded. The time records submitted do not enable the reader to determine the time spent on each task, nor do they enable the reader to segregate the modest work done on successful claims from the majority of the work done on failed claims. These deficiencies in the time records disable the Galvins from meeting their burden of proof and warrant reversal of the trial court's Order.

ARGUMENT

A. Standard of Review

The Court should overturn a trial court's award of attorney's fees if the trial court committed an unsustainable exercise of its discretion in awarding the fees. Portsmouth Country Club v. Town of Greenland, 152 N.H. 617, 624 (2005). As applied to an award of attorney's fees, the standard requires the Court to overturn the trial court if the record fails to provide "some support" for the award of attorney's fees that the trial court made. Bennett v. Town of Hampstead, 157 N.H. 477, 483 (2008).

Although the standard of review is deferential, a reviewing court "nonetheless must engage the [trial] court's decision critically." Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331, 337 (1st Cir. 1997). The trial court is therefore required "to explain its actions." Id. "[A]t a bare minimum, the order awarding fees, read against the backdrop of the record as a whole, must expose the district court's thought process and show **the method and manner underlying its decisional calculus**." Id. (emphasis supplied). "An appellate court deprived of meaningful insight into the trial court's thinking frequently will be unable to conduct an adequate review of [the fee award], and thus will be compelled to remand for further findings." Id.

B. The Supreme Court Should Vacate The Trial Court's Order, Finding That The Trial Court Committed An Unsustainable Exercise of Its Discretion By Awarding The Galvins $50,000.00 In Attorneys' Fees.

"The general rule in this State is that each party to a lawsuit is responsible for payment of his or her attorney's fees." Van Der Stok v. Van Voorhees, 151 N.H. 679, 684 (2005); *accord* Scheele v. Village Dist. of Eidelweiss, 122 N.H. 1015, 1020 (1982) ("New Hampshire still adheres to the rule that attorney's fees are not awarded except in limited circumstances.").

1. The Court Should Vacate The Trial Court's Order Because The Galvins Did Not Prevail On The "Overarching Issues" in the Case And Obtained Minimal Relief.

Whether a party is entitled to attorney's fees depends, first and foremost, on whether the party prevailed on its claims. A party cannot recover attorney's fees unless the party qualifies as a "prevailing party." Bennett v. Town of Hampstead, 157 N.H. 477, 483 (2008). Courts generally "disallow time spent litigating failed claims." Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 336 (1st Cir. 2008).

The trial court's Order awarding the Galvins $50,000.00 in fees is therefore unsustainable because the Galvins failed to obtain most of the relief that they sought. "There [were] two overarching issues" in this epic litigation, as the trial court noted in its April 17, 2006, Order granting the Wentworth summary judgment on the Galvins' challenge to the Wentworth's easement burdening the Galvins' land. Appendix to Appellant's Brief (Appendix) at p. 2. "First, the parties dispute the validity and enforceability of a golf course easement over land of the Galvins. Second, the Galvins contend that their suspension from Wentworth by the Sea Country Club was illegal." Id.

a. The Galvins Have Failed In Their Challenges To The Wentworth's Easement Rights.

The Galvins have not prevailed on either of the "overarching issues" in the case, rendering the $50,000.00 attorney's fee award patently unsustainable—because there is no basis in the law for awarding a losing party attorney's fees. The Galvins' challenges to the Wentworth's easement rights have repeatedly failed. Judge Morrill entered summary judgment in the Wentworth's favor on the Wentworth's easement rights by Order dated April 17, 2006, finding that the Wentworth's easements were valid and enforceable because they did not transfer possession of the land, rejecting the Galvins' arguments to the contrary. Id. at pp. 2-4. This

Court affirmed Judge Morrill's Order by Order dated October 26, 2007, rejecting the Galvins' arguments that the "nearly exclusive" nature of the easement found in their chain of title somehow invalidated it. Id. at pp. 27-28.

Furthermore, the Galvins have fared no better with the remaining challenges to the Additional Golf Course Easement that this Court instructed the trial court to consider on remand. The Galvins argued that the Additional Golf Course Easement was invalid because its creation supposedly triggered a need for subdivision approval. On remand, the trial court forcefully rejected this claim with language indicating that the trial court correctly perceived the Galvins' arguments as frivolous:

> This Court has no difficulty in dismissing that claim. Under no circumstances can the creation of an easement be deemed to need subdivision approval. If that were the law then 90% of the easements on New Hampshire land would be illegal. Admittedly the issue of golf course easements was treated more specifically by the Town of Rye Planning Board than is given generally to other proposed easements by other municipalities. However the golf course easements did not transfer fee ownership and therefore subdivision approval was not required.

Id. at p. 35.

The trial court likewise rejected the Galvins' one remaining challenge to the Additional Golf Course Easement, finding no merit to the Galvins' argument that the easement was somehow invalidated by the Wentworth's omission to meet a condition of subdivision approval and obtain Town Counsel's approval of the easement deed language. As the trial court correctly held, "the remedy for failure to meet a condition of subdivision approval is a fine under RSA 676:16 not a divestment of title to property." Id. at pp. 36, 37; *see also* Ryan James Realty v. Villages at Chester Condo Assoc., 153 N.H. 194, 199 (2006); White v. Francoeur, 138 N.H. 307, 311 (1994) ("A conveyance in violation of a subdivision plat is not void.").

Given that the Galvins' claims challenging the Wentworth's easement rights have uniformly failed, the award of attorney's fees should be reversed. The Galvins cannot recover attorney's fees for the time devoted to prosecuting their unsuccessful challenges to the Wentworth's easement rights. Yet, the record does not indicate whether the trial court's award includes time devoted to these unsuccessful claims. Indeed, the trial court's Order fails to offer any explanation of how the trial court decided to award the Galvins $50,000.00. This Court should therefore reverse the trial court.

b. The Galvins Have Failed In Their Efforts To Obtain A Court Order Reinstating Their Country Club Membership.

The Galvins have failed on the other "overarching issue" in the case as well, failing to obtain reinstatement of their country club membership. This Court reversed the trial court's Order reinstating the Galvin family membership by an October 26, 2007, Order, finding that the trial court Order "relied solely upon an erroneous interpretation of the [Club] by-laws." Appendix at p. 29. As this Court correctly held, the trial court and the Galvins were wrong in their contentions that the Wentworth's membership committee, and not its general manager, had to make all decision relating to the restriction, suspension or termination of a country club membership. Contrary to the trial court's findings and the Galvins' arguments, the Wentworth acted consistent with its by-laws by extending the Galvins' membership suspension based on the general manager's unilateral decision, because the Galvins would only have been entitled to membership committee review under the by-laws if they requested such review—which they did not. Id. Because the trial court's reasoning and the Galvins' arguments were wrong, this Court reversed the trial court's Order reinstating the Galvins' country club membership and awarding them money damages for the suspension of their membership. Id.

The Galvins have therefore failed to recover any relief with respect to both the "overarching issues" in the case—failing to obtain any judicial Order invalidating the easements subject to which they took their land, and failing to obtain any judicial Order reinstating their country club membership. The Galvins therefore cannot recover attorney's fees with respect to any of the attorney time expended on either of the "overarching issues" in the case because they did not prevail.

The Court should therefore reverse the trial court Order awarding the Galvins $50,000.00 in attorney's fees, given that the Galvins lost the "overarching issues" in the case, and given that the trial court failed to explain how it determined that the Galvins were somehow entitled to windfall of an attorney's fee award despite not prevailing.

2. The Court Should Reverse The Trial Court's Order Because The Trial Court Failed To Follow The Lodestar Method In Computing An Attorney's Fee Award But Instead Awarded The Galvins A Sum That It Picked Out Of Thin Air, In An Unsustainable Exercise of the Trial Court's Discretion.

In the unusual circumstance where a court awards a party attorney's fees, "[a] reasonable fee typically is determined through the lodestar method, which involves multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure." Torres-Rivera, 524 F.3d at 340. This Court has specifically endorsed the lodestar method. Scheele, 122 N.H. at 1020. This Court has also affirmed an award of attorney's fees computed pursuant to the lodestar method, where the prevailing party was found entitled to reimbursement of attorney's fees based on the bad faith litigation exception. Funtown USA, Inc. v. Town of Conway, 129 N.H. 352, 355 (1987). "[S]purning all consideration of a lodestar places a substantial burden on the [trial] court to account for its actions" as the First Circuit Court of Appeals has held. Coutin, 124 F.3d at 338.

Notably, the Coutin court vacated a trial court order awarding attorney's fees where the trial court failed to apply the lodestar method and further failed to provide any satisfactory explanation for ignoring the lodestar method. In Coutin, the trial court arbitrarily awarded $5,000.00 in attorney's fees without paying any heed to the number of hours counsel spent on successful claims. Instead, the trial court arbitrarily awarded the $5,000.00 sum based on three (3) factors: "the appellant's limited success, the parties' abortive efforts to settle the case, and the equities of the situation." Id. at 338. Vacating and remanding, the First Circuit said: "the court's reliance on the first of these three factors is at best insufficiently explained, and its reliance on the other two factors is plainly wrong. Moreover, **none of these factors justifies the court's failure to compute (and then adjust, if necessary) a lodestar**." Id. (emphasis supplied). This was in violation of the trial court's obligation "to provide a 'concise but clear' explanation of the...fee award." Torres-Rivera, 524 F.3d at 337.

The Court should likewise vacate the trial court's Order awarding the Galvins $50,000.00 in attorney's fees because the trial court's Order fails to provide any explanation of the method and manner underlying the trial court's decisional calculus. As was true in Coutin, the trial court erroneously failed to apply the lodestar approach. The record is devoid of any evidence to suggest that the trial court somehow decided to award the Galvins $50,000.00 in attorney's fees by multiplying opposing counsel's hourly rates by the amount of time opposing counsel devoted to successful claims or defenses.

Rather, the trial court's Order is the epitome of an unsustainable exercise of discretion. The trial court appears to have picked the $50,000.00 number out of thin air, failing to provide the slightest glimpse into the judicial thought process involved in reaching this result.

Because the trial court decided to award the $50,000.00 sum to a party who mostly lost, and because the trial court failed to provide a scintilla of support for its computation of the amount it found owing, the Court should reverse the trial court, finding an unsustainable exercise of discretion.

3. The Court Should Reverse The Trial Court Order Because The Trial Court Failed To Find That The "Bad Faith Litigation" Exception Applied.

"Fees may be awarded to the prevailing litigant only by statutory authorization, an agreement between the parties, or an established exception." Mahoney v. Town of Canterbury, 150 N.H. 148, 155 (2003) (emphasis supplied). The Galvins claim no statutory authorization to attorneys' fees, nor is there any agreement between the parties.

Accordingly, the Galvins could only be eligible to recover attorney's fees on a claim on which: 1.) they prevailed; and 2.) to which the "bad faith litigation" exception somehow applied. The "bad faith litigation" exception only applies under the following circumstances: 1.) "instances where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct"; 2.) "cases in which parties are forced to litigate against an opponent whose position is patently unreasonable"; or 3.) "where an individual is forced to seek judicial assistance to secure a clearly defined and established right, *which should have been freely enjoyed without such intervention*." Van Der Stok v. Van Voorhees, 151 N.H. 679, 684 (2005) (quotations and citations omitted) (emphasis in original).

The record contains no finding that the bad faith litigation exception applies, rendering an attorney's fee award inappropriate. The trial court did find that the Wentworth breached an obligation of good faith and fair dealing by planting trees in the environs of the Galvin home, on the Wentworth's own property and on an easement where the Wentworth was specifically

authorized to plant trees. A breach of the duty of good faith and fair dealing does not automatically entitle the prevailing party to an attorney's fee award, however, contrary to the import of the trial court's holding here. More is required to warrant a departure from the general rule assigning each party responsibility for its own fees.

The "bad faith litigation" exception must apply for fees to be awarded, meaning that the party to whom the court decides to shift liability for fees must have litigated an issue without having "a fair and reasonable ground for litigation." N. Country Envtl. Servs. v. Town of Bethlehem, 146 N.H. 348, 359 (2001) (affirming trial court's denial of award of attorney's fees to prevailing party where issue "was a fair and reasonable ground for litigation.").

The trial court made no finding that the Wentworth litigated any claim without a fair and reasonable ground for doing so, rendering the "bad faith litigation" exception inapplicable. Certainly the Wentworth had fair and reasonable grounds to litigate the validity and enforceability of its golf course easement, just as it had fair and reasonable grounds to litigate the propriety of its suspension of the Galvins' country club membership. The Wentworth prevailed on each of these claims. Furthermore, even though the Wentworth received an unfavorable ruling on the Galvins' breach of the duty of good faith counterclaim arising from the planting of the trees in the environs of the Galvins' property, the trial court did not find (nor could it have found) that the Wentworth litigated this claim in bad faith. Certainly, the Wentworth had fair and reasonable grounds to litigate its entitlement to plant trees on its own land, just as it had fair and reasonable grounds to litigate its entitlement to plant trees on land where the relevant deed language gave the Wentworth the right to do so. Given that the Wentworth had fair and reasonable grounds for the positions it took in the litigation, and given that the record contains no trial court finding to the contrary, the Court should reverse the trial court. The Court should find

that no basis exists to award attorney's fees because the "bad faith litigation" exception does not apply.

4. The Court Should Reverse The Trial Court Because The Galvins Failed To Meet Their Burden To Prove The Reasonableness Of The Hours Claimed.

In a motion for approval of attorney's fees, "[t]he prevailing party has the burden of proving the reasonableness of the hours claimed." Torres-Rivera, 524 F.3d at 340.

The Galvins have failed so much as to try to prove any nexus between $50,000.00 in attorney's fees and the hours expended to obtain the modest relief they achieved. Indeed, it is impossible to discern from the time records that the Galvins submitted in support of their fee request what time was devoted to which claims. *See* Appendix at pp. 59-202. The Galvins therefore have not and cannot meet their burden to prove entitlement to the fees they have been awarded. The Court should reverse the trial court's Order awarding the Galvins $50,000.00 in attorney's fees.

CONCLUSION

The Court should reverse the trial court's June 17, 2009, Order awarding the Galvins $50,000.00 in attorney's fees.

Respectfully submitted:

WBTSCC LIMITED PARTNERSHIP, WILLIAM BINNIE AND HARBOUR LINKS ESTATES, LLC
By their attorneys:
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DATED: December 4, 2009 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the within Brief was mailed this date, first class mail, to opposing counsel Ralph R. Woodman, Jr., Esquire.

_____

Benjamin T. King

REQUEST FOR ORAL ARGUMENT

The appellants request fifteen (15) minutes oral argument and designate Benjamin T. King, Esquire, as the attorney to be heard.

_____

Benjamin T. King