

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

FILED  
2012 MAY 15 PM 12:12  
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HENN CO. DISTRICT  
COURT ADMINISTRATOR

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Peter H. Lanpher, and  
Penny A. Rogers,

Plaintiffs,

v.

Jay T. Nygard, and  
Kendall M. Nygard,

Defendants.

**ORDER**

File No. 27-CV-11-25386  
Judge Susan M. Robiner

The above-entitled matter came before Judge Susan M. Robiner for a court trial on May 3, 2012. Mark A. Lund, Esq. appeared for and with Plaintiffs. Milton E. Nordmeyer, Esq. appeared for and with Defendants. Based on the file, records and proceedings herein, the Court makes the following:

**FINDINGS OF FACT**

1. Plaintiffs commenced this action in Conciliation Court to recover money for damage that was done to their fence. Plaintiffs assert that Defendants painted their natural cedar fence with clear malice. They asked the Conciliation Court to award them \$5,071.86 which is the estimated cost to repair the fence. Plaintiffs filed this Conciliation Court action on September 26, 2011.
2. Defendants filed a counterclaim on October 25, 2011 arguing that the fence was a common fence along the property line. Defendants alleged that they maintained and repaired the fence and were entitled to reimbursement for their efforts in the amount of \$920.00.

3. On December 7, 2011, the parties appeared for Conciliation Court where the Court awarded Plaintiffs a judgment against Defendants of \$2,000.00 plus the \$70.00 court filing fee.
4. On December 22, 2011, Defendants filed a Demand for Removal to District Court requesting a court trial and de novo review. This was scheduled for trial by the District Court on May 3, 2012.
5. Plaintiffs and Defendants are neighbors in Orono, Minnesota. Plaintiffs reside at 1380 Rest Point Road. Defendants reside at 1386 Rest Point Road. This dispute arises out of the painting of a fence which first occurred on July 29, 2011 and occurred again on September 25, 2011.
6. Prior to the commencement of testimony at trial, all parties stipulated that the fence is on Plaintiffs' property although Defendants did note that it is only three inches inside the property line at one point. It is evident from the counterclaim and the argument of counsel that Defendants' original position was that the fence was a common (or partition) fence. Although the property had previously been surveyed, Plaintiffs once again had the property surveyed to make certain that the fence was on their property. The Court will not address the issue of the cost of the survey as it was Plaintiffs' choice to have the property surveyed again.
7. Testimony commenced when Plaintiffs called Defendant Jay Nygard to the stand. Defendant J. Nygard testified that the fence on Plaintiffs' property was not maintained, was in disrepair and had mold on it which was aggravating his wife's allergies. He testified that he did not contact Plaintiffs regarding his concerns about the fence and instead hired a friend to repair and paint the fence. The key part of Defendant J. Nygard's

testimony is that he admits he does not own the fence and made no attempt to contact the Plaintiffs to ask them to repair and maintain the fence.

8. After Defendant J. Nygard's testimony, Defendant Kendall Nygard testified. She corroborated the assertions made by her co-defendant and confirmed she has a mold allergy.
9. Plaintiffs then called the police officer who responded to the fence painting call on July 29, 2011. The testimony of the police officer provided an objective view of what occurred on that day.
10. In addition to the Defendants' testimony, the Court received testimony from the two Plaintiffs who insisted that the fence was not in disrepair and that a cedar fence should be kept in a natural unpainted condition. Two neighbors who view the fence only occasionally also testified and opined that the fence was not in disrepair. Plaintiffs argued in closing that the Court should order their fence restored to its natural state.
11. The Court finds that "malicious painting" (a phrase from the pleadings) did occur in this case. Defendants knew they did not own the fence. They did not contact Plaintiffs to ask them to repair or paint the fence or abate the mold. They decided to remedy what they believed to be disrepair and mold by painting a fence that did not belong to them. The Court cannot allow this type of self-help remedy to occur without consequences. Defendants did not advance any legal theory that would excuse their actions.
12. In addition, the mal intent is further supported by the fact that Defendants had the fence painted a second time in September 2011 long after they were told to cease and desist from invading the property of Plaintiffs.
13. Plaintiffs' contractor, Ross Langhans, testified regarding the cost to restore the fence to its natural state. Mr. Langhans stated that he would strip the fence posts of the paint, but

the rails and pickets would need to be replaced as stripping those would be too cost prohibitive. Exhibit F was presented by Plaintiffs and is Mr. Langhans' estimate for the work to repair/replace the fence. Based on Mr. Langhans' testimony, the Court finds his bid reasonable given the amount of labor and supplies involved.

14. One concern that has arisen around the restoration of the fence is the fact that any person repairing the fence will have to go onto Defendants' property in order to make repairs. Given the ongoing conflict between these neighbors, the Court will issue an Order allowing Plaintiffs and/or their designees to enter the property of the Defendants for the sole purpose of repairing the fence. The Court suggests that both parties secure a certified copy of this order and keep it available in case a dispute about the fence repair arises.

#### **CONCLUSIONS OF LAW**

1. Based on the parties' stipulation, this is not a common fence and Minnesota Statute Chapter 344 which applies to partition fences only does not apply. Plaintiffs are the sole owners of the fence.
2. Defendants did not advance a legal theory that justifies their actions and are liable for damage to Plaintiffs' property.
3. Defendants are not entitled to any judgment as the removing party in this case as they are not a prevailing party pursuant to Minn. R. Gen. Prac. 524. The judgment for Plaintiffs was altered significantly and they are entitled to additional judgment because they are the prevailing party as defined by Minn. R. Gen. Prac. 524. The Court will award court costs to Plaintiffs.

#### **ORDER**

1. Judgment is hereby entered against Defendants, jointly and severally, in favor of Plaintiffs in the amount of \$5,071.86, plus \$70.00 for the filing fee in conciliation court

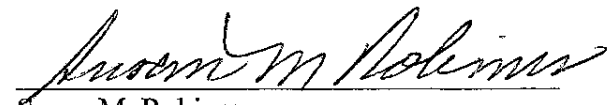
plus \$50.00 in mandatory court costs for a total judgment of \$5,191.86 plus interest in accordance with Minnesota Statute §504B.178, Subd. 2 (2011).

2. Plaintiffs and Plaintiffs' designees are allowed access to Defendant's property for the sole purpose of repairing the fence. Law enforcement is authorized to assist in enforcing this Order if necessary.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: 5/15/12

BY THE COURT:

  
Susan M. Robiner  
Judge of District Court