VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 30th day of March, 2017.

Glen W. Helton, et al., Appellants,

against Record No. 160610
Circuit Court No. CL13-278

Mark W. Moormans, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Washington County.

Upon consideration of the record, briefs, and argument of counsel, the Court, for the reasons set forth below, is of the opinion that the trial court's judgment should be affirmed in part and reversed in part.

In this property dispute, the trial court's final order, as relevant here, (1) established the boundary line between a parcel of property owned by Glen W. Helton, Tony R. Helton and Dallas Lee Bridgeman (Heltons) and a parcel of property (Parcel No. 1) owned by Mark W. and Andrea K. Moormans (Moormans), (2) held that the Heltons trespassed on Parcel 1, (3) held that the Heltons had "no prescriptive easement or other right to enter . . . or otherwise use" Parcel No. 1 and enjoined the Heltons from trespassing on Parcel No. 1, (4) denied damages for the trespass, and (5) ordered that the Moormans recover from the Heltons $7,370.25 for the expense of a survey conducted by the Moormans' expert witness and filing fees of $84.00.[1]

The Heltons first assert that the trial court had no authority to enter that part of the order holding that the Heltons "have no prescriptive easement or other right to enter . . . or otherwise use" Parcel No. 1 because the Heltons never presented a claim or pleading seeking a prescriptive easement or any other type of easement across Parcel No. 1. The Heltons argue that the trial court could not grant relief on a claim that was not pending or before the court, *City of Norfolk v. Vaden*, 237 Va. 40, 44, 375 S.E.2d 730, 733 (1989), and to do so was error. We reject the

[1] An appeal was granted to two of the six assignments of error raised by the Heltons in the petition for appeal.

Heltons' argument.

In their complaint, the Moormans asserted that the Heltons trespassed on Parcel No. 1. The Heltons denied these allegations of trespass, but offered no evidence at trial to support their denial.[2] However, following the trial court's initial letter opinion finding that the Heltons trespassed on Parcel No.1, the Heltons filed a Motion to Reconsider in which they asserted that they had a right-of-way across Parcel No. 1 for ingress and egress over "the right-of-way or existing soil access road" shown on a plat and that Parcel No. 1 was "a servient estate to" the Heltons' property. In its final order, the trial court denied the Heltons' Motion to Reconsider and also recited that the

> [Heltons], by counsel, argued that they had a prescriptive right to cross Moormans' Parcel No. 1 on the road thereon for egress and ingress . . . but offered no evidence in support of that claim. Accordingly, it is hereby ADJUDGED, ORDERED AND DECREED that [the Heltons] have no prescriptive easement or other right to enter onto, cross or otherwise use Moormans' Parcel No. 1 and any such entry or use is, and shall be, trespass.

The Heltons' Motion to Reconsider, along with the final order, demonstrate that the Heltons argued in the trial court that they had a right to enter Parcel No. 1 and therefore their entry was not a trespass. Resolution of the Moormans' trespass claim required the trial court to address and resolve the Heltons' assertion that they had a legal right to access Parcel No. 1. The trial court's holding in the final order that the Heltons "have no prescriptive easement or other right to . . . use Moormans' Parcel No. 1" is not a grant of relief for an unpled claim, as the Heltons assert. It is a rejection of the Heltons' argument that they had a right to enter Parcel No. 1 and a grant of the relief sought by the Moormans in their claim that the Heltons had trespassed on Parcel No. 1. Accordingly, there is no error in this portion of the trial court's judgment.[3]

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[2] The Heltons offered no evidence at all at trial.

[3] The Heltons also argue that the trial court erred in dismissing its counterclaim. The Heltons originally filed a counterclaim alleging trespass against the Moormans but offered no evidence on this counterclaim and it was dismissed by the trial court in the final order. Although the Heltons filed a motion to file another counterclaim, the record does not contain a copy of the counterclaim, a transcript of any hearing at which it was addressed, or a ruling by the trial court on the motion to file a counterclaim. Accordingly, the counterclaim dismissed by the trial court in its final order was the original counterclaim alleging trespass against the Moormans and there is no error in the trial court's dismissal of that counterclaim.

The Heltons next assert that the trial court erred in awarding the Moormans judgment in the amount of $7,370.25 for reimbursement of the survey fees because the Moormans did not seek any amount of monetary damages in an *ad damnum* clause as required by Rule 3:2.

The Moormans argue that their prayer for "damages for trespass and for interference with the use of [Moormans'] right-of-way in such amount as the evidence shall show" and for the court to "grant such other relief as equity shall deem" was sufficient to put the Heltons on notice of demand for a potential monetary payment. The Moormans maintain that the survey expense was properly allowed as damages incurred as a result of the trespass. However, the trial court, in its final order, stated that the Moormans "shall recover no damages for trespass" and, therefore, the trial court did not award the survey expense as damages for the trespass.

The Moormans also argue that the survey expense could have been awarded as costs of the litigation. A court of equity has discretion in the award of costs. Code § 17.1-600. The court's discretion regarding costs that may be imposed "generally, unless otherwise specified by statute, . . . is limited only to those costs essential for prosecution of the suit." *Advanced Marine Enterprises, Inc. v. PRC INC.*, 256 Va. 106, 126, 501 S.E.2d 148, 160 (1998). Code § 8.01-181 allows the court to assess the costs of a survey directed by the court. However, in this case, the survey was conducted prior to the institution of the litigation and not at the direction of the trial court. The trial court did not specify whether the award for the survey expense was imposed as costs or damages and did not indicate that the survey was essential for prosecution of the suit. Under these circumstances, there is no statutory or other basis for the award of the costs of the survey and the award was an abuse of discretion.

In summary, for the reasons stated, that part of the judgment of the trial court authorizing the Moormans to recover $7,370.25 from the Heltons is reversed. The remainder of the judgment is affirmed.

Justice McClanahan took no part in the consideration of this case.

This order shall be certified to the said circuit court.

A Copy,

Teste: Pat L Harrington

Clerk