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No. 72532-7 I

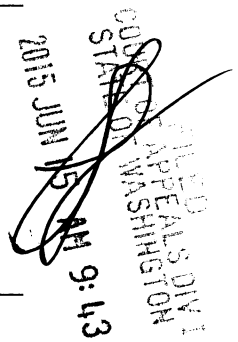
IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

CHRISTIAN RYSER, Appellant,
v.

JOHN E. ERNEST and MARGARET F. ERNEST, husband and wife and their marital community, et. al, Respondents



REPLY BRIEF OF APPELLANTS

Honorable Ken Schubert, J.
King County Superior Court No. 12-2-25731-1 SEA

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TABLE OF CONTENTS

I. SUMMARY OF REPLY ARGUMENT 1

II. REPLY ARGUMENT 2
A. Ryser accurately state evidence. 2
B. Respondents point to no evidence in the record that the property value with an open driveway and blocked driveway was the same. 3
C. Respondents ignore the trial court's trespass instruction and the jury's verdict form interrogatory responses 5
D. The measure of damages is the difference in the property's value with an open road before the trespass and with a closed road as a result of trespass 10
E. Attorneys' fees are not discretionary under RCW 4.24.630 14

III. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 203, 11 P.3d 762 (2000) 14
Boeing Co. v. State, 89 Wn.2d 443, 451, 572 P.2d 8 (1978)..... 14
Brundridge v. Fluor Fed. Servs. Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008)..... 14
Bunch v. King County Dep't of Youth Services, 155 Wn.2d 165, 178, 116 P.3d 381 (2005) 7
Contra Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 161, 776 P.2d 676 (1989) 8
Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L.Ed. 2d 494 (1992)..... 16
Meenach v. Triple E Meets, 39 Wn.App. 635, 638, 694 P.2d 1125 (1985)..... 15
Nichols v. Lackie, 58 Wn.App. 904, 907, 795 P.2d 722 (1990), review den'd, 116 Wn.2d 1024, 812 P.2d 103 (1991). 8
Palmer v. Jensen, 132 Wn.2d 193, 200, 937 P.2d 597 (1997). 8
Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997) 16
State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013)..... 8
State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003)..... 11

Statutes

RCW 19.86..... 15
RCW 4.24.630..... 4, 5, 15
RCW 4.24.630(1) 17

Rules

CR 59(a)(5) 13, 14

I. SUMMARY OF REPLY ARGUMENT

Appellant Ryser files this reply in response to the arguments raised by the Ernest Respondents' briefs. There are only two narrow issues on appeal: (1) is Ryser entitled to additur or a new trial on the issue of damages for his proven statutory trespass claim, and (2) is Ryser entitled to attorney fees under RCW 4.24.630 for his proven statutory trespass claim? Respondents appear to concede the critical facts relevant to Ryser's statutory trespass claim because they point to no evidence in the record to demonstrate dispute.[1]

Moreover, Respondents ignore the trial court's instruction to the jury on statutory trespass and the jury's answers to the first two questions on the special verdict form. Juries are presumed to follow the court's instructions. Respondents provided no evidence that the jury failed to follow the trial court's instruction on trespass when the jury found Ryser had proven his trespass claims by answering the very first two questions of the special verdict form in the affirmative.

[1] Although John and Margaret Ernest's brief placed quotation marks around the term "undisputed" in their brief, one presumes if there was disputed evidence in the record regarding the critical fact, then Respondents would have brought such evidence to the court's attention. Their failure to do so, demonstrates no such dispute exists.

Based upon the trial court's instruction on trespass, the jury's findings that Ryser had proven each of the elements of his statutory trespass claims against all three Respondents, and the undisputed evidence in the record, Ryser is entitled to additur or a new trial on issue of damages for the proven trespass claim.

The trial court instructed the jury that to find Ryser had proven his trespass claim, the jury needed to find from its review of all evidence that Ryser had proven each of the four elements in the instruction. Juries are presumed to have followed the court's instructions, and Ernest has provided no evidence or argument to the contrary. Costs, including attorneys' fees, under RCW 4.24.630 are mandatory once liability has been proven. The jury expressly found Ryser had proven his trespass claims. Accordingly, attorneys' fees are mandatory under RCW 4.24.630.

II. REPLY ARGUMENT

A. Ryser accurately stated the evidence.

Respondents do not dispute the following facts. Nor do Respondents point to any evidence that demonstrates a dispute. Thus, the following critical facts are undisputed:

- Before Ernest had a contractor dump debris on Ryser's former property, the driveway was open;[2] and
- The debris Ernest had the contractor dump on Ryser's property blocked the driveway and access to Ryser's former waterfront home.[3]

Moreover, Respondents point to no evidence in the record, nor to any argument even, that Ryser's former waterfront property had the same value with an open driveway before Ernest had his contractor block it and after Ernests' trespass with a blocked driveway. On this issue, no legitimate controversy exists.

B. Respondents point to no evidence in the record that the property value with an open driveway and blocked driveway was the same.

Not only is it within common sense, but the undisputed and uncontroverted evidence in the record establishes the property's value was greater with an open driveway than with a blocked driveway. The difference in the property's valued with an open driveway before Ernest blocked the driveway and after Ernest

[2] E.g., RP 94-95, 858, and 865.
[3] E.g., RP 153-154.

blocked the driveway is the damage caused by the proven trespass.

For "Zero" damages to be within the range of evidence to support the jury's verdict on trespass damages, there needs to be sufficient credible evidence in the record which would factually support a conclusion that the value of Ryser's former property with an open driveway before Ernests' trespass was the same as the value of Ryser's former property with a blocked driveway after Ernests' trespass. *See Bunch v. King County Dep't of Youth Services*, 155 Wn.2d 165, 178, 116 P.3d 381 (2005) (holding appellate court engages in de novo review of evidence to determine whether sufficient credible evidence existed, which would factually support a verdict of the size rendered).

Thus, in its independent review of the record on appeal, to sustain the verdict, this court needs to find evidence that would convince an unprejudiced, thinking mind that the value of Ryser's former property was the same (a) with an open driveway before Ernest trespassed, and (b) with a blocked driveway after Ernest trespassed. *See Bunch*, 155 Wn.2d at 179 (evidence is sufficient if it would convince an unprejudiced, thinking mind). The Ernest Respondents point to no credible evidence that the value of the

property with an open driveway before the Ernest trespass was the same as the value of the property after the Ernests' proven trespass. *Contra Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 161, 776 P.2d 676 (1989)(disputed medical testimony was sufficient evidence to support jury verdict).

Because there is no credible evidence in the record to support "Zero" damages for the proven trespass, Respondents argue the jury did not have to believe the undisputed and uncontroverted witness testimony. As the *Palmer* court pointed out this type of argument does not prevail in cases where the damage award is outside the range of evidence. *See Palmer v. Jensen*, 132 Wn.2d 193, 200, 937 P.2d 597 (1997). When the verdict is outside the range of evidence, there is no discretion for the trial court to exercise, and additur or a new trial is required.

C. Respondents ignore the trial court's trespass instruction and the jury's verdict form interrogatory responses.

The jury is presumed to have followed the trial court's instructions. *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013); *Nichols v. Lackie*, 58 Wn.App. 904, 907, 795 P.2d 722 (1990), review den'd, 116 Wn.2d 1024, 812 P.2d 103 (1991). The

trial court instructed the jury on the elements of Ryser's trespass claim and on the need to find each element had been proven. In relevant part, the trial court instructed the jury as follows:

> In order to prove his trespass claim, Christian Ryser must prove the following elements took place after July 31, 2009:
> (1) The defendant entered Christian Ryser's lands;
> (2) The defendant wrongfully caused waste or injury to the land or improvements on the land; and
> (3) The defendant knew or reasonably should have known that he lacked authorization to so act, and
> (4) The amount of the damages caused by the wrongful actions of defendant.
> ...
> If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

Appendix A; CP at 85 (Court's Instruction No. 5) (emphasis added). Thus, the jury was instructed that Ryser had to prove, among other things, that defendants wrongfully caused waste or injury to the land and damages caused by the wrongful actions of defendants. This element required the jury to find causation and damage (i.e. waste or injury) in order to find Ryser had proven his trespass claim. The jury answered in the affirmative.

In closing, Ryser's counsel also pointed the jury to the Court's trespass instruction:

> That ladies and gentlemen, leads to our trespass claim. And if you look at Instruction No. 5, John Ernest entered onto Christian Ryser's land and he caused waste or injury. He entered on the land with equipment and what's the waste and injury claim? He blocked that open road. It doesn't matter that it was blocked before and that he was – it wouldn't have been any different than if Christian had opened up the road, had gotten a person to open up the road. And then John dug up a bunch of dirt in his orchard and took it down and dumped it on the road. It doesn't matter who opened the road up. It doesn't matter how long the road was open for. It matters that John Ernest without any authority or permission from Christian Ryser got all that material and went and dumped it on Christian Ryser's property and closed his road. …

RP II at 102.

The Ernest Respondents ignore the trial court's instruction on trespass in their response briefs, and they present no evidence that the jury failed to follow the court's trespass instruction when answering the very first two questions presented on the verdict form. Thus, following the trial court's instruction on trespass, the jury found from consideration of all the evidence that each

proposition or element of Ryser's trespass claim against the Ernest Respondents had been proved:

1. **We, the jury, find that the Plaintiff proved his claim of trespass against John and Margaret Ernest:**

   Yes: ✓ **No:** _____

2. **We, the jury, find that the Plaintiff proved his claim of trespass against Thomas Ernest:**

   Yes: ✓ **No:** _____

Appendix A; CP at 77 (Verdict, Questions 1 and 2). These factual findings by the jury have not been challenged and are verities on appeal. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003)(Unchallenged findings are verities on appeal).

The jury further found Ryser had been damaged by his proven claims:

4. **We, the jury, find that the Plaintiff was damaged by the claims proved against the Defendants:**

   Yes: ✓ **No:** _____

Appendix A; CP at 77 (Verdict, Question 4). Question 4 does not ask whether Ryser was damaged by "any of" the claims proved against the Ernests as Respondents argue. Ryser accurately stated the verdict in his opening brief.

Once the jury factually determined that Ryser had proven the elements of his trespass claim, including waste or injury to land and

damages caused by the Ernests' wrongful conduct, the jury's verdict on the issue of damages for the proven trespass claims must fall within the range of evidence in the record, and cannot be contrary to the evidence in the record.

D. **The measure of damages is the difference in the property's value with an open road before the trespass and with a closed road as a result of trespass.**

The Ernest Respondents were not obligated to open up the driveway. However, once they gratuitously opened up the driveway for their own reasons, they had no right to go back on Ryser's former property and dump material to block the road. In closing, Ryser's counsel used the following analogy:

> I have a neighbor that he's a landscaper and when it snows where I live – I don't live in Seattle – he comes over and he plows out the snow in my driveway. It's a big steep driveway. And I'm appreciative of that. I don't accuse him of trespass when he does that. He is doing a neighborly thing.
> But I'll tell you what he doesn't do. He doesn't come back and put the snow back on my driveway afterwards to block my access. That's not what neighbors do. That's trespass.

RP II at 84. As the trial court noted, it does not matter how long the driveway was open, once it was open, the Ernests Respondents had no authorization to go onto Ryser's former property and damage it by blocking the driveway with debris:

> ... So before the mudslide happened at all we had a value of a property that had a passable road. Nature interfered. The value of the property decreased because of that. The Ernests came in for their own reasons, made the road passable again. Now the property is back where it was in terms of its value prior to the mudslide. Then the Ernests decided, you know what? We're going to come back on the property and make the road impassable. An that's – that caused them damage. So the claim for these purposes survives, because they caused damage to the roadway. They made it impassable after it was passable.

RP at 752.

Respondents mistakenly argue the measure of damages is based upon the amount of time the driveway was open and passable before the proven trespass. However, the amount of time the driveway was open is immaterial because once open, the Ernest Respondents had no right to damage the driveway on Ryser's former property. The measure of damage is the difference in value before the trespass while the driveway is open and after

the trespass while the driveway is blocked. Because there is no evidence in the record that the value of the property with an open driveway was the same as with a blocked driveway, "Zero" is outside the range of evidence and additur or a new trial is necessary.

Ryser filed a Motion for Additur or in the Alternative a New Trial on the Issue of Trespass Damages Only. CP 163-174. In his motion, among other authorities, Ryser quoted CR 59(a)(5) and (6) and argued that the rule provided alternative grounds for relief based upon the trespass damages being so inadequate and there being an error in assessment for injury to property, respectively. Additionally, the trial court heard oral argument on the Motion for Additur or in the Alternative a New Trial on the Issue of Trespass Damages Only in which these grounds were also asserted to support the relief requested. There is simply no truth to Respondents' assertion that Ryser is raising these issues for the first time on appeal.

The cases cited by Respondents do not apply. In *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000), the appellate court refused to address a standing argument because the issue of standing had not been

raised with the trial court. In *Boeing Co. v. State*, 89 Wn.2d 443, 451, 572 P.2d 8 (1978), the appellate court refused to consider a new theory for dismissal on appeal because the theory had not been raised with the trial court. In *Brundridge v. Fluor Fed. Servs. Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008), the appellate court refused to consider arguments regarding non-contested elements where counsel acknowledged no contest in the trial court. In contrast to these cases, Ryser expressly raised the issues in his written motion and oral argument to the trial court that CR 59(a)(5) and (6) provided alternative grounds for the relief he requested.

E. Attorneys' fees are not discretionary under RCW 4.24.630.

Respondents John and Margaret Ernest statement of the standard of review is incorrect and does not apply in this case. Under RCW 4.24.630, attorneys' fees are mandatory. Once a plaintiff has proven the elements of statutory trespass under RCW 4.24.630, the defendant is liable for reasonable costs and attorneys' fees pursuant to the plain meaning of the statute. Unlike the Consumer Protection Act, RCW 19.86 and other similar statutes

that make the recovery of attorneys' fees discretionary, the language in RCW 4.24.630 is mandatory.

A careful review of the cases cited by Respondents also shows those cases are inapplicable. The cases Respondents cite fall into two categories, and neither category is applicable.

The first category is cases in which the jury had a choice of general verdict forms, chose the plaintiff's verdict form, but awarded zero dollars as a general verdict. *See e.g.*, *Meenach v. Triple E Meets*, 39 Wn.App. 635, 638, 694 P.2d 1125 (1985) and other cases cited on page 20 of John and Margaret Ernest' Brief. These cases are not applicable because the jury in this case did not have a choice between two general verdict forms and award zero dollars as a general verdict. When reviewing the verdict in light of the jury instructions, it is clear that the jury in this case did not render a defense verdict but rather a verdict for the plaintiff.

In this case, the jury answered specific interrogatories finding that plaintiff had proven his statutory trespass claims. The jury followed the court's instruction that required the jury to find plaintiff had proven each of the four elements in order to prove his trespass claim. Moreover, the jury answered another specific interrogatory finding plaintiff was damaged by the claims he proved.

Finally, the jury awarded Ryser over two hundred thousand dollars in economic damages. The first category of cases cited by Respondents simply does not apply to this case.

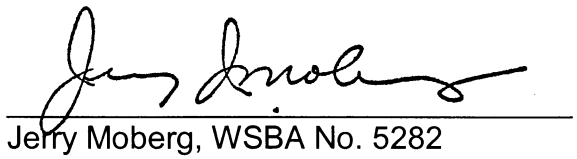
The second category is cases in which the jury found no proximate cause by special verdict. *See e.g., Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L.Ed. 2d 494 (1992); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) Here, the jury by special verdict interrogatories found plaintiff proved his statutory trespass claim and that plaintiff was damaged by his proven claims. The jury was instructed that in order to find plaintiff proved his trespass claim, the jury had to find all four elements in the instruction had been proven. By finding Ryser had proven his trespass claims, the jury necessarily found that plaintiff had proven respondents "wrongfully caused waste or injury to the land or improvements on the land." Appendix A, CP at 85. Moreover, the jury affirmatively answered Question No. 4 on the special verdict form that plaintiff was damaged by the claims proved. Like the first category of cases, the second category of cases Respondents cite simply does not apply.

III. CONCLUSION

The jury found the Ernests liable to Ryser for statutory trespass. It is beyond controversy that Ryser's former property had a greater value with an open accessible driveway and decreased in value after the Ernests trespassed and blocked the driveway's last switchback. The record shows the decrease in value of at least $249,000. The trial court's denial of Ryser's motion for additur or new trial should be reversed, and the case remanded for recalculation of the trespass damage with additur or a new trial only on that issue. Because Ryser proved his trespass claim, the Ernests are also liable for his costs, including reasonable attorneys' fees, under RCW 4.24.630(1) because such costs and fees are mandatory under the statute. The trial court's denial of Ryser's motion for attorneys' fees under the statute should be reversed, and the case remanded for determination of reasonable attorneys' fees regarding Ryser's trespass claim. Finally, Ryser should be awarded his costs, including reasonable attorneys' fees, on this appeal pursuant to RCW 4.24.630(1).

RESPECTFULLY submitted June 11, 2015.

JERRY MOBERG & ASSOCIATES, PS



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CERTIFICATE OF SERVICE

I certify that on June 11, 2015, I sent the above document to attorneys Emmelyn Hart and Ray Siderius, counsel for Defendants as stated below:

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