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No.72532-7-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

CHRISTIAN RYSER,

Appellant,

v.

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

Respondents.

RESPONSE BRIEF OF RESPONDENT THOMAS ERNEST

Frank R. Siderius WSBA 7759
SIDERIUS LONERGAN & MARTIN, LLP
500 Union Street, Suite 847
Seattle, WA 98101
206/624-2800

Attorneys for Respondent Thomas Ernest

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I. INTRODUCTION

Respondent Thomas Ernest is the adult son of respondents John and Margaret Ernest. The claims of plaintiff in this case were brought against John and Margaret Ernest and their marital community as well as Thomas Ernest.

The jury found that "Plaintiff proved his claim of trespass..." The jury further found that "Plaintiff was damaged by the claims proved against the Defendants." Those "claims" were for Easement Interference, Trespass, Nuisance, Interference with Business Expectancy and Infliction of Emotional Distress. The jury awarded economic damages of $201,581 and "zero" non-economic damages. The jury awarded "zero" on the trespass claim. The verdict form does not specify which of the claims (other than trespass) formed the basis of the verdict of $201,581. Similarly, it is impossible to determine which causes of action (other than trespass) led to the verdict amount. (CP 77, Verdict Form A.)

We do know from the verdict form that no damages were awarded for trespass. Thus, the award of damages was based upon the jury's determination of easement interference, nuisance,

interference with business expectancies or infliction of emotional distress.

The jury verdict should be upheld without additur. There is no factual or legal basis for a new trial on the issue of trespass damages. There is no evidence the jury verdict was a result of passion or prejudice. The jury rendered a verdict after consideration of disputed evidence. The jury clearly determined there was a trespass, but no resulting damage.

The only basis for an award of attorney's fees to plaintiff is pursuant to the trespass statute, RCW 4.24.630(1). Under Washington law, a verdict for zero damages is a defense verdict. Civil rights cases governed by federal statutes have no applicability to the present action. Additionally, RCW 4.24.630(1) requires waste, injury or damage to property. A finding of zero damages resulting from a trespass fails to satisfy one of the elements of statutory trespass and therefore negates a claim for attorney's fees.

II. STATEMENT OF THE CASE

Respondent Thomas Ernest joins in the response brief filed by his parents, John and Margaret Ernest. The Counterstatement of the

case provided therein accurately sets forth the position of all respondents.

III. ARGUMENT

A. Additur or New Trial is Unwarranted. Appellant claims entitlement to a new trial on the issue of damages for his trespass claim pursuant to CR 59. Yet the jury specifically found "zero" damages on the trespass claim.

CR 59 sets forth specific grounds for vacating the verdict and granting a new trial. Appellant relies upon the grounds stated in CR 59(a)(5)-(9) but fails to articulate how the verdict was so inadequate as to unmistakably be the result of passion or prejudice. Additionally, there is no evidence that the jury committed error in the assessment of the amount of recovery or that any error in law occurred. The jury provided a verdict based upon its assessment of the evidence and appellant cannot establish that substantial justice has not been done.

RCW 4.76.030 is the statute governing an increase in a verdict as an alternative to a new trial. Passion or prejudice is a necessary component. Where the trial court rules that a trial was fair and the jury was not influenced by passion or prejudice, and the record supports such a conclusion, the court is not empowered to substitute

its assessment of the damages for that of the jury. See *Green v. McAllister*, 103 Wn.App. 452, 14 P.3d 795 (2000).

Courts must be extremely hesitant to interfere with a jury verdict. *Allen v. Union Pac. R.R.*, 80 Wn.App. 734, 519 P.2d 99 (1973). A verdict is accorded a strong presumption of validity. *Beam v. Beam*, 18 Wn.App. 444, 569 P.2d 719 (1977). Under RCW 4.76.030 and Washington Constitution, Article I, Sec. 21, there is a strong presumption that a verdict is adequate and the court cannot, after a fair trial, substitute its conclusions for that of the jury. *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 422 P.2d 515 (1967).

If a jury verdict is within the range of credible evidence, the trial court has no discretion to find that passion or prejudice affected the verdict for the purpose of ordering an additur. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 161-162, 776 P.2d 676 (1989).

B. *The Jury Verdict Resulted from Disputed Evidence on All Issues.* Where substantial evidence is presented on both sides of an issue, the jury's finding is final and a trial court abuses its discretion by granting a new trial or otherwise changing the verdict. In the present action, there was substantial and conflicting evidence on the value of plaintiff's real property before, during and after his

bankruptcy proceeding. The jury heard evidence of various listing prices, different values provided by appellant in his bankruptcy schedules, the amount of mortgage liens during foreclosure and bankruptcy, and the "offer" of Mr. Nelson to buy the property. Any determination of property value at a specified time was for the jury to resolve. Determination of the amount of damages is within the province of the jury, and courts are reluctant to interfere with the jury's damage award when fairly made. *Washington State Physicians Ins. Exch. & Assoc. v. Fisons Corp.,* 122 Wn.2d 299, 329, 858 P.2d 1054 (1993). The law strongly presumes the adequacy of a jury verdict. *Cox v. Charles Wright Academy, Inc., supra* at p. 176.

Appellant relies upon CR 59(a)(7) as necessitating a new trial. That subsection requires that there be "no evidence or reasonable inference from the evidence to justify the verdict . . . " If sufficient evidence exists to support a verdict, it is an abuse of discretion to grant a new trial. *McUne v. Fuqua*, 45 Wn.2d 650, 652, 277 P.2d 324 (1954). A trial court has no discretion to disturb the verdict within the range of the evidence. *Harriman v. May*, 142 Wn.App. 226, 232, 174 P.3d 156 (2007).

In the present action, appellant focuses solely on the zero damage award for trespasses and fails to recognize the jury's verdict on the other claims. There is simply no evidence before the court that this verdict is contrary to the evidence presented at trial. Disputed evidence was presented from which the jury could arrive at its verdict of $201,581.

C. ***A Zero Damage Award for Trespass is a Defense Verdict***. In isolating the trespass claim, appellant seeks an additur or new trial to justify an award of attorney's fees pursuant to RCW 4.24.630(1). A jury verdict of zero damages on the trespass claim is a defense verdict and negates a statutory award of fees. Additionally, the necessary element of injury and resulting damages required by RCW 4.24.630(1) has not been met.

Meenach v. Triple E Meats, Inc., 39 Wn.App. 635, 694 P.2d 1125 (1985) was an action for a real estate commission based on an alleged breach of contract. The jury found a breach of the agreement to pay the commission but awarded zero damages. The court held the verdict to be a defense verdict and further found "no inconsistency making the jury's resolution of the ultimate issue impossible to determine." *Meenach, supra* at p. 638. See also *Sheldon v.*

Imhoff, 198 Wash. 66, 87 P.2d 103 (1939) in which the jury signed a plaintiff's verdict form but entered "none" in the spaces for dollar amounts. The verdict was upheld as a defense verdict. Similarly in *Haney v. Cheatham*, 8 Wn.2d 310, 325, 111 P.2d 1003 (1941), a verdict for plaintiff in the amount of $1 in a personal injury action was held to be a verdict for the defendant.

In the present action, multiple causes of action were considered by the jury. The jury made an award of damages on a cause of action other than the trespass claim. The jury's verdict finding economic damages only, is not inconsistent with the evidence presented on the multiple causes of action. Contrary to appellant's repeated assertions, the jury did not find that appellant was damaged by trespass.

Appellant's request for attorney's fees is dependent upon this court changing the verdict to impose damages for statutory trespass. In *Grungy v. Brack*, 151 Wn.App. 57, 213 P.3d 619 (2009), the appellate court reversed an award of attorney's fees under RCW 4.24.630(1). In that case, a neighbor raised a sea wall bulkhead resulting in sea water and debris splashing onto adjoining property. In analyzing the test for statutory trespass, the court rejected the

trespass claim and the award of attorney's fees. The court stated at p. 568 that the plaintiff's "failure to prove substantial injury is fatal to her claim."

Similarly, in the present action the jury's determination of zero damages for trespass, for whatever reason, negates the statutory trespass claim and any claim for attorney's fees under that statute.

D. Appellant is not Entitled to Reasonable Attorney's Fees and Costs under RCW 4.24.630(1). Appellant claims the jury found he "was damaged by the claims he proved, which include statutory trespass, against the Ernest respondents." Opening Brief of Appellant at p. 30.

This is a blatant misrepresentation. The jury made no such specific finding. The jury Verdict Form A, Question 4 (CP 77), found affirmatively that "Plaintiff was damaged by the claims proved against the Defendants." The only claim for which a specific sum was requested was for trespass. The jury found "zero" on this claim. The only inference that can be drawn is the verdict for $201,581 was an award for one or more of the other claims.

E. *Civil Rights Cases Provide No Support for Appellant's Claim for Attorney's Fees.* Failing to cite any

persuasive authority for additur or new trial, and further failing to find support for attorney's fees under the trespass statute, appellant turns to cases involving civil rights discrimination.

Appellant's reliance on *Miles v. F.U.R.M. Enterprises, Inc.*, 29 Wn.App. 61, 627 P.2d 564 (1981) is misplaced. A jury found race discrimination but awarded zero damages. The court held that in this civil rights case, which is an assault, damages are presumed by statute. Therefore, if a jury finds discrimination, the judgment is for the plaintiffs.

The *Miles* case was distinguished in the *Meenach, supra* case which found that a verdict for zero damages was a verdict for defendants. In *Meenach* the court distinguished *Miles* at p. 638 as follows:

> In *Miles*, the court reversed a finding of a defense verdict on a plaintiff's verdict form with a finding "0" damages. Since the case was a civil rights case, damages were presumed and the case was remanded to the trial court for a determination of nominal damages. *Miles* at 67, further indicates a determination of defendant's or plaintiff's verdict must be based upon the instructions and the record to 'discern the intent of the jury . . . '

Under the Civil Rights Attorney's Fees Awards Act of 1976, 42 USC § 1988, trial courts are granted the discretion to award attorney's

fees to "prevailing parties." A plaintiff awarded nominal damages is a prevailing party under Section 1988. *Farrar v. Hobby,* 506 U.S. 103, 112, 113 S.Ct. 556, 121 L.Ed.2d 494 (1992). However, a prevailing party is not always entitled to an award of attorney's fees. In some circumstances it is an abuse of discretion to award attorney's fees to plaintiffs who receive only nominal damages. *Farrar*, *supra* at 115.

In any event, the *Farrar* case is instructive on the issue of attorney's fees in nominal award cases. The U.S. Supreme Court in *Farrar* determined that although the "technical" nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under §1988. See *Farrar*, at p. 114. Specifically, determining the reasonableness of a fee award is based upon the degree of success obtained. In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. In fact, that was the result in *Farrar* and the U.S. Supreme Court affirmed the Court of Appeals reversal of a fee award. The *Farrar* court held specifically that where a plaintiff recovers only nominal damages, the only reasonable fee is no fee at all.

In *Buckhannon Board & Care Home v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), plaintiffs attorneys had filed a class action against West Virginia alleging that a statutory requirement that residential board and care homes be capable of moving themselves from situations involving immediate danger, violated the Fair Housing Amendments Act of 1988, and the Americans with Disabilities Act of 1990. While the class action was pending the requirement was statutorily eliminated by the West Virginia Legislature at which point the petitioner plaintiffs sought an award of attorney's fees as the "prevailing party" under the statutes.

The United States Supreme Court held that even though petitioners had obtained the relief they sought, statutory attorney's fees were precluded since petitioners could not be deemed the "prevailing party." Although petitioners' lawsuit brought about the desired voluntary change by respondents, there was no alteration in the legal relationship with the parties and no judgment in favor of petitioners was entered. Justice Scalia, holding with the majority, stated as follows: "The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such

as 42 USC § 1988, 3613(c) (2) unless there has been an enforceable 'alteration of the legal relationship of the parties.' That is the normal meaning of 'prevailing party' in litigation and there is no proper basis for departing from that normal meaning."

Appellant misstates the holding in *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970). Attorney's fees were not at issue. Plaintiff moved for a new trial on the issue of damages and the court affirmed denial of his request for a new trial.

Contrary to appellant's assertion, the *Joseph* case does not stand for the proposition that a verdict for zero dollars or nominal damages is a verdict for plaintiff. The *Joseph* plaintiff was in effect arguing that a verdict of $1 or six cents would stand, but a verdict of zero dollars must fail as a matter of law. In refusing to grant a new trial, the court rejected this argument stating that any distinction between an award of six cents and 'zero" damages is more of form than substance. See *Joseph* at p. 1013.

IV. CONCLUSION

Based upon the foregoing, and the arguments and authorities set forth in the Brief of Respondents, John and Margaret Ernest,

respondent Thomas Ernest respectfully requests the verdict of the jury be upheld and the trial court judgment be affirmed.

Respectfully submitted this 11th day of May, 2015.

Frank R. Siderius WSBA 7759
SIDERIUS LONERGAN & MARTIN, LLP
Attorneys for Respondent Thomas Ernest

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date below, I mailed via U.S. Mail, First Class, postage prepaid, and sent via electronic mail and/or caused delivery by legal messenger of a true copy of this document to:

Barbara J. Rhoads-Weaver
Sustainable Law, PLLC
P.O. Box 47
Vashon, WA 98070
barb@sustainablelawpllc.com

Jerry Moberg
Jerry Moberg & Associates, PS
P.O. Box 130
Ephrata, WA 98823-0130
jmoberg@jmlawps.com

Emmelyn Hart
Lewis, Brisbois, Bisgaard & Smith LLP
2101 - 4th Avenue, Ste 700
Seattle, WA 98121
emmelyn.hart@lewisbrisbois.com

Dated: May 11th, 2015, at Seattle, Washington.

Mary Berghammer