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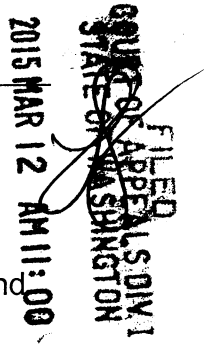
No. 72532-7 I

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

# OPENING BRIEF OF APPELLANTS

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

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## I. INTRODUCTION

There are two narrow issues on appeal: First, where the jury found the plaintiff (Appellant Christian Ryser) had proven his statutory trespass claim and found the plaintiff was damaged by the proven claim, but awarded "Zero" dollars for the proven claim, is the plaintiff entitled to additur or a new trial only on the issue of statutory trespass damages?

Second, under the trespass statute, RCW 4.24.630, is the plaintiff entitled to attorneys' fees on his proven statutory trespass claim?

A driveway is at the center of this dispute and the narrow issues on appeal. The driveway provided the only access to Ryser's former waterfront property and home on Vashon Island. The driveway began up hill on Respondents John and Margaret Ernest's vacation property, then traveled down the slope towards the water in a series of three switchbacks, and ended with a level parking area, partially on Ryser's former property and partially on the Ernests' property, near Quarter Master Harbor.

The last switchback, which is closest to Ryser's former home and the water, was on Ryser's former property. It is uncontested

that the Ernests do not own any portion of the land under the driveway's last switchback closest to Ryser's former home.

Ryser and his predecessors in interest had used the driveway for over three decades. In an earlier lawsuit regarding the driveway,[1] the Ernests conceded under oath that Ryser had the right to use those portions of the driveway - including the portion of the level parking area that crossed the Ernests' property - just as Ryser's predecessors in interest had used the driveway for decades. Despite these concessions under oath and their dismissal of their 2005 lawsuit against Ryser, the Ernests interfered in Ryser's attempts to sell his former property by claiming he lacked a legal right to use the driveway.[2]

In December 2009, after the failed sale of the property, Ryser filed for chapter 13 bankruptcy protection, which was eventually converted to a chapter 7 bankruptcy. The bankruptcy trustee attempted to sell Ryser's former property in order to pay

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[1] In 2005, John and Margaret Ernest brought a lawsuit against Ryser to quiet title, for conversion of boulders they placed in the driveway, and for trespass regarding the level parking area, King County Superior Court Cause No. 05-2-17239-8 SEA. The Ernests were deposed in 2006, and voluntarily dismissed their claims against Ryser shortly before trial was scheduled to begin.

[2] Presumably the jury found Ryser had proven his claim of intentional interference with business expectancy because the amount of economic damages found was the difference between the failed sale price and the debt owed.

creditors, but was unable to do so because of the Ernests' false statements that Ryser and any successor lacked a right to use the driveway. In November 2010, the bankruptcy was discharged and ownership of the property reverted back to Ryser. Also in November 2010, after Respondent Thomas Ernest, who is the son of John and Margaret Ernest, had parked a derelict truck at the bottom of the driveway blocking the parking area, Ryser obtained protection orders against the Ernest respondents restraining them from entering or being within 50 feet of Ryser's former residence. The last switchback is within 50 feet of Ryser's former residence.

Months after the bankruptcy was discharged, a landslide covered the last switchback of the driveway. In April 2011, Thomas Ernest left a rock and broken glass on the doorstep of Ryser's former home. In July 2011, John Ernest hired a contractor to bring in an excavator, clear the landslide debris off of the last switchback, and retrieve the derelict truck that Thomas Ernest had parked at the bottom of the driveway. Later, John Ernest had the contractor move the cleared landslide debris back onto the last switchback and to erect boulder barricades on the driveway.

Ryser's statutory trespass claims against the Ernests are based upon the Ernests actions while the protection orders were in

effect. The primary claim for trespass was summed up by the trial court:

> The point is, is that there was a period of time … -- after the Ernests had done what they did, where the road was passable. They could have left it that way. They chose not to. That's my point. They went back on his land, they trespassed on his land and made the road impassable – unpassable again. They decided to do that. The fact that the road was now unpassable is a damage to Mr. Ryser.

RP at 751. The two issues on appeal stem from Ryser's statutory trespass claims, which the jury found, by answer to interrogatories on a special verdict form, Ryser had proven at trial.

## II. Assignments of Error

### A. Assignments of Error

1. The trial court erred in denying Ryser's motion for additur or in the alternative a new trial only on the issue of statutory trespass damages by order entered on September 10, 2014. CP at 292.
2. The trial court erred in denying Ryser's motion for attorney fees on his proven statutory trespass claim by order entered on September 10, 2014. CP at 292.

### B. Issues Pertaining to Assignments of Error

1. Is Ryser entitled to either an additur to the verdict for statutory trespass damages or, in the alternative, a new trial limited only to the issue of damages for Ryser's statutory trespass claim where the jury found Ryser

proved his claim of statutory trespass and proved he was damaged by the proven claim of trespass, and the unrebutted testimony established the value of Ryser's property before the trespass with an open driveway and after the trespass with a blocked driveway? (Assignment of Error 1)

2. Is Ryser entitled to recovery of costs, including reasonable attorneys' fees, under RCW 4.24.630(1) where the jury found Ryser proved his statutory trespass claim? (Assignment of Error 2)

## III. Statement of the Case

### C. Procedural Statement of the Case

Ryser sued John and Margaret Ernest, husband and wife, and their son Thomas Ernest on July 31, 2012. CP at 1.[3] Ryser filed an Amended Complaint on February 4, 2014. CP at 36. Ryser alleged nuisance, assault, invasion of privacy, defamation, slander of title, interference with business expectancy, malicious harassment, unlawful harassment, negligence, cyberstalking, outrage, trespass, and easement interference. Ryser sought relief for actual damages, punitive damages (RCW 9A.36.083), treble

[3] Ryser also asserted claims against the Ernests' trust, Douglas Ernest, Kevin Bergin and wife, Bergin's bond, Larry and Vicky Dravis, and their limited liability company. Prior to the case being handed to the jury, the claims against these defendants were dismissed. CP at 31 (dismissal of Dravis and Indian Point defendants); CP at 34 (dismissal of Bergin defendants); CP at 75 (dismissal of Douglas Ernest estate).

damages (RCW 4.24.630), and costs and attorneys' fees (RCW 4.24.630).

Ryser's claims were tried to a jury beginning March 17, 2014. The claims submitted to the jury were: easement interference, trespass, nuisance, interference with business expectancy, and intentional infliction of emotional distress.[4] CP at 79. The Court's Instruction No. 5 on trespass is attached as Appendix A. CP at 85.

The jury returned its verdict on March 28, 2014. CP at 77. The Verdict is attached as Appendix B. The jury found: (a) Ryser proved his claim of trespass against John and Margaret Ernest and Thomas Ernest; (b) Ryser proved "any of his remaining claim(s) against Thomas Ernest, and/or John and Margaret Ernest;" and (c) Ryser was damaged by the claims proved. Appendix B; CP at 77. The jury awarded "Zero" for trespass, $201,581 for economic damages, and "Zero" for non-economic damages. *Id.*

Ryser moved the trial court for additur or new trial only on the issue of damages for his proven trespass claim. CP at 163. Ryser also moved the trial court for an award of costs including

[4] All other claims had been dismissed prior to trial on summary judgment or after plaintiff rested his case.

reasonable attorneys' fees for his proven trespass claim. CP at 100. The trial court denied Ryser's motions and entered final judgment. CP at 292 and 294.

Ryser appealed the trial court's denial of Ryser's motions for additur or new trial and for attorneys' fees under RCW 4.24.630(1). The Ernest respondents did not cross-appeal any issue.

### D. **Factual Statement of the Case**

In 2003, Appellant Ryser purchased an old home and waterfront property on Vashon Island and began to remodel the home. RP at 319. Quarter Master Harbor borders the property on the east. Since 1978, Respondents John and Margaret Ernest have owned property adjacent to Ryser's former property. RP at 181. Respondent Tom Ernest is their son. *See* RP at 185. The Ernest property has two parcels that border the west and south of the former Ryser property.

The driveway to reach the home on the former Ryser property began on the Ernest property uphill and to the west of Ryser's former property. The driveway has three switchbacks. Portions of the driveway are on Ernest property and portions are on the former Ryser property. The driveway ended with a flat parking area partially on the former Ryser property and partially on Ernest

parcel to the west. For many decades, all of Ryser's predecessors continually used the driveway to access the property and park their vehicles. RP at 165-66.

In a 2005 lawsuit regarding the driveway, John and Margaret Ernest admitted Ryser had a right to use the driveway as his predecessors had used it. RP at 177.

In 2008, Ryser had completed the remodel and put the property up for sale. RP at 287. Respondents John and Tom Ernest contacted Ryser's listing agent and disputed Ryser's right to use the portion of the driveway that crossed the Ernest property. RP at 289-90. Brian Nelson had indicated his willingness to purchase the property from Ryser. However, in 2009, Brian Nelson decided not to purchase the property because of the Ernest Respondents' allegations that Ryser did not have the right to use the driveway to access the waterfront property. RP at 293-94.

After the sale to Nelson failed, Ryser filed for bankruptcy under Chapter 13. RP at 295-97. The bankruptcy was later converted to Chapter 7. *See* RP at 9. In February 2010, John Ernest sent a letter to the Bankruptcy Court disputing Ryser's and any future owner's right to use those portions of the driveway that cross the Ernest property. RP at 15-6 and 166. The bankruptcy

trustee was unable to sell the property and it was abandoned when the bankruptcy was discharged in November 2010. RP at 24. At the time that the property was returned to Ryser from the bankruptcy court it was valued at $375,000. This was the owner's valuation of the property and was undisputed. RP at 24 and 412.

Also in November 2010, the dispute between the parties was escalating, and Ryser sought and was granted protection orders against John and Margaret Ernest and Thomas Ernest after Thomas Ernest parked a derelict truck at the bottom of the driveway blocking the parking area and the Ernests admitted to carrying guns around the property. RP at 299-300.

A few months later there was a landslide that blocked the driveway. RP at 439-42.The last switchback closest to Ryser's former home and the water was covered in debris. During July 2011, Ryser was out of town and a friend, Philip Balcom, was checking in on Ryser's former home and getting Ryser's mail. RP at 91. Balcom saw an excavator in Ryser's former front yard digging up the parking area at the end of the driveway. The Ernests had hired an excavation company to clear the debris from the landslide and open up the driveway so that they could retrieve the derelict truck parked at the bottom of the drive. RP at 92. The derelict truck

had been removed. Balcom walked up the driveway and noticed that the landslide blocking the driveway had been cleared and excavator work had been done "down the whole entire driveway." RP at 94-95 and 115.

When Balcom returned to the property the next week, the last switchback that had previously been cleared of debris now was again covered in debris. RP at 102. In addition, boulder barricades had been erected across the top of the driveway on the Ernest property completely cutting off access to the driveway. [5] John Ernest admitted that he had instructed the excavator to block the road after retrieving the derelict truck and that he had the excavator erect the barricades at the top of the drive. RP at 858-59 and 865.

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[5] Ryser contacted the authorities when he returned to the island. Deputy Sheriff Hancock came to the property to investigate. Hancock testified:

> A. Well, my -- the whole reason I was there really was to investigate a violation of an order. And so by talking to him, confirming that there is an order in existence, viewing the road, how it was blocked. I also in my investigation, I talked to Kevin Bergin, who was a contractor at the time. The pattern in which our conversation went led me to believe that a violation had occurred, if in fact this was a legal easement that [Mr. Ernest], supposedly Kevin said that he owned that property. Was told that he owned that and it was okay to do the work. So my job was to collect all the information and then forward it on. So I am investigating an anti-harassment order. And my determination after viewing the road, seeing the damage to the road, both upper, middle and then at the bottom there was also railroad ties and stuff strewn about. That if – if this indeed was legally an easement for Mr. Ryser, then a violation had occurred.

RP at 149-50.

Following Ernest's instructions, the excavator completely blocked[6] off Ryser's driveway at the top and the middle making the driveway impassible. RP at 146-48 and 153-54.

Ryser was unable to sell the property because of the lack of access and it was lost in foreclosure at the end of 2011. RP at 320. Ryser filed his complaint in July 2012 after losing the property in December of 2011. CP at 1. While the lawsuit was pending, Daniel Lincoln purchased the property from Freddie Mac for $126,000. Mr. Lincoln testified that the price he paid was for the property without any driveway access. He admitted that if access could be restored the property would substantially increase in value. RP at 547 and 549.

## IV. Argument

The jury found the Ernests liable for statutory trespass. It is undisputed that the Ernests opened up the driveway by clearing out the landslide debris from the last switchback. It was their most neighborly act. It is also beyond controversy that the property's value was greater with an open accessible driveway. It is also

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[6] Hancock testified:

> A. ...[I]t was just very apparent to me that this ongoing problem had escalated to the point – I mean the only way to get to this guy's property is down these switchbacks. And it was completely blocked. ...

RP at 146.

undisputed that while a protection order was in place, the Ernests had mud and debris mechanically dumped on the last switchback completely blocking the driveway. The uncontested testimony is that the property's value decreased with a blocked driveway. It was an error for the trial court to deny Ryser's motion for additur or new trial only on the issue of trespass damages. Likewise, it was error for the trial court to deny Ryser's motion for attorneys' fees under RCW 4.24.630(1) where the jury found Ryser proved his trespass claim.

### A. **Standard of Review for Additur or New Trial**

Denial of a motion for additur or a new trial under CR 59 is reviewed for abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P2d 597 (1997). A much lesser showing of abuse of discretion is required to set aside an order denying a new trial than an order granting a new trial because the denial of a new trial "concludes [the parties'] rights." *Palmer*, 132 Wn.2d at 197, (alteration in original) (quoting *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 437, 397 P.2d 857 (1964)); accord *Worthington v. Caldwell*, 65 Wn.2d 269, 278, 396 P.2d 797 (1964) ("[A] much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying

it."). Additionally, appellate courts review a trial court's denial of a new trial more critically than a grant of a new trial because a new trial places the parties where they were before. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn.App. 48, 81, 231 P.3d 1211 (2010) (citing *State v. Taylor*, 60 Wn.2d 32, 41-42, 371 P.2d 617 (1962)).

It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence, even though courts are reluctant to interfere with a jury's damage award because determination of the amount of damages is within the province of the jury. *Palmer*, 132 Wn.2d at 198. To determine whether the verdict is contrary to the evidence, the appellate court reviews the record to determine whether sufficient evidence supports the verdict. *Palmer*, 132 Wn.2d at 197. A verdict is contrary to the evidence if the damage award is outside the range of substantial evidence in the record. *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 636-637, 865 P.2d 527 (1993). To support a verdict, there must be substantial evidence, as distinguished from a mere scintilla of evidence;[7] that is there must be "evidence of a character which

[7] Washington courts have discarded the scintilla of evidence rule. The evidence to support a verdict must be substantial. *Evans v. Yakima Valley Transp. Co.*, 39 Wn.2d 841, 843, 239 P.2d 336 (1952).

would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Sommer v. Dept. of Social and Health Services*, 104 Wn.App. 160, 172, 15 P.3d 664 (2001) (internal quotations omitted) (quoting *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)).

In this case, by special verdict form, the jury found that Ryser "proved his claim of trespass against John and Margaret Ernest" and "proved his claim of trespass against Thomas Ernest." Appendix B; CP at 77 (Verdict, Questions 1 and 2). The jury also found that Ryser "was damaged by the claims proved against the [Ernest] Defendants." *Id*. (Verdict, Question 4). Because "Zero" for the Ernests' proven trespass is (a) inadequate, (b) an error for the amount of recovery for injury to property, (c) outside the range of substantial evidence and contrary to the evidence, and because substantial justice has not been done, Ryser moved the trial court for an additur pursuant to RCW 4.76.030, or in the alternative, a new trial pursuant to CR 59(a)(5)-(7) and (a)(9). CP at 163. The trial court abused its discretion in denying the motion.

B. **Ryser proved his statutory trespass claim.**

Ryser made statutory trespass claims against the Ernest respondents. Ryser claimed the Ernest respondents were liable to

him for damage to his land and property under RCW 4.24.630, which provides in relevant part:

> Every person who goes onto the land of another and who ... wrongfully causes waste or injury to the land, or wrongfully injures the personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of damages caused by the removal, waste, or injury. ...

RCW 4.24.630.

The Ernests asked the trial court for a directed verdict dismissing Ryser's statutory trespass claims. RP at 720. The trial court dismissed the trespass claim for damage to the bottom of the driveway parking area,[8] but ruled there was sufficient evidence of Ryser's statutory trespass claim for damage caused by the Ernest respondents having landslide debris deposited in the middle of the driveway on Ryser's property making his driveway impassable. In rendering its ruling, the trial court reasoned:

> ... 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

[8] "So as to the bottom [of the driveway parking area], that's not cognizable or recognizable trespass." RP at 753-754.

> 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. Ryser testified that the value of his property after bankruptcy was discharged and with a passable driveway was $375,000.[9] Ryser's testimony as to the value of the property after the bankruptcy was discharged and with access via a passable driveway was uncontroverted; the Ernest respondents did not present any testimony or evidence of a different valuation.

It was also undisputed that the Ernests hired a contractor to clear out the landslide debris and open the driveway, including gratuitously those portions of the driveway on Ryser's property.[10]

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[9] Ryser testified:

> A. After it came out of bankruptcy we had it valued at [$375,000] at that one time and then once those barricades went up and all of that -- we valued it as zero. Yes.
>
> Q. And the significance of the barricades was that it blocked access?
>
> A. Absolutely.

RP at 661.

[10] John Ernest testified:

> Q. And the only way you could get that done was to have [Bergin] clear out the landslide and open up the road, so that he could tow the truck back up to your house, correct?
>
> A. Right.
>
> Q. So you did ask [Bergin] to clear out the landslide –

Phillip Balcom also testified that the debris from the landslide had been cleared out of the driveway.[11]

After having the excavator open the driveway, it was undisputed that sometime[12] after the landslide debris had been removed from the driveway by the Ernests' excavator and the driveway had been opened to retrieve Thomas Ernest's truck from the parking area at the bottom of the driveway, John Ernest told his contractor to put the landslide debris back on the middle of the

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A. Yes.

RP at 858. John Ernest also testified:

Q. Okay. And when you cleared out the landslide and the road was open by Mr. Bergin, and this was before you put in this blockade?

A. Yes.

RP at 865.

[11] Balcom testified:

Q. Was it three to 6 feet high with mud and debris and trees?

A. It had been prior to the excavator being there. I mean there was – once the excavator came in he cleared the way.

Q. So when you walked up, this switchback was cleared of all that debris?

A. Yes.

RP at 94-95.

[12] There is a dispute as to when Mr. Ernest directed Mr. Bergin to block the driveway by dumping landslide debris on Ryser's property. The testimony ranges from hours to a week. The duration is immaterial. The trespass occurred when the driveway was blocked, regardless of the amount of time it was opened.

driveway on a switchback that was on Ryser's property.[13] The debris that the contractor put on the driveway completely blocked the driveway according to Deputy Sheriff Hancock, who was called out to investigate whether the Ernest respondents had violated the November 2010 restraining order Ryser obtained against them.[14]

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[13] John Ernest testified:

> Q. So if you cleared it anyway. So you went, cleared out the landslide, opened the road, drug the truck back up there. And then at a later time you told Mr. Bergin to take that material that you cleared out the landslide and put it back on Mr. Ryser's road, didn't you?
>
> A. Well, yes.

RP at 858-859 (emphasis added).

[14] Hancock testified:

> Q. What about the nature of the call [on August 2, 2011] that caught your attention to the point that you remember it today?
>
> A. Just that it was – it was—it was just very apparent to me that this ongoing problem had escalated to the point – I mean the only way to get to this guy's property is down these switchbacks. And it was completely blocked. ...

RP at 146.

> A. Okay. So you just want me to say what I observed with the road?
>
> Q. Yes. Yes.
>
> A. Well, when I came to his driveway where I would normally drive down to contact somebody it was just blocked, if I remember correctly there was a big mound of dirt with – I think just wood blocking it with just no way. And then down around the corner you could see a ton of dirt in the middle of the roadway.

RP at 147-148.

> Q. And the blockage was way up at the top?

Finally, it is undisputed that with the driveway impassable, Lincoln purchased the former Ryser property from the bank for $126,000. RP at 549. Ryser testified that after the Ernests trespassed by dumping landslide debris in the middle of the driveway on Ryser's former property, which blocked his driveway, his former property's valued dropped to zero. RP at 635-636. The Ernests offered no testimony other than the purchaser Lincoln as to the value of Ryser's former property after the proven trespass by the Ernests.

The jury was given Court's Instruction No. 5, which provided in relevant part:

> 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;

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> A. Well, there was blockage at the top. There was also blockage in the middle. It was just – it was very obvious to me that it had to have been like a mechanical – something had to have done that, it wasn't something just a couple guys could do.

RP at 153.

> Q Okay. And the dirt from like an excavation, or dirt from a landslide?
>
> A. Definitely from part and parcel to whatever machines had come to do at the top. I mean it just seemed like there was this intention to block the top and maybe do some work on the hill. I don't know. But it was not from a landslide. It was definitely –

RP at 153-154.

> (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).[15]

A special verdict form was used, and the first two questions asked the jury whether Ryser had proved his claim of trespass. The jury answered "Yes" to both questions, meaning the jury found Ryser had proved all four elements of his trespass claims. Appendix B; CP at 77 (Verdict, Questions 1 and 2). Additionally, the jury found that Ryser "was damaged by the claims proved against the [Ernests]," meaning the jury found Ryser was damaged by the proven trespass claims. Appendix B; CP at 77 (Verdict, Question 4). The jury's answers to the special interrogatories is

[15] Instruction No. 5 is now the law of the case. *See Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).

clear, the jury found the Ernest respondents liable to Ryser for statutory trespass.[16]

The only controversy is the amount of damages for the proven statutory trespass claim because "Zero" is contrary to and outside the range of substantial evidence in the record. Additionally, "zero" is contrary to the jury's affirmative findings that (a) Ryser had proven the Ernests had "wrongfully caused waste or injury" to his property[17]; (b) Ryser had proven the amount of damages caused by the Ernest defendants' "wrongful actions"[18]; and (c) Ryser was damaged by the claims he proved – trespass being a claim he proved - against the Ernest defendants.[19] Thus, an additur or a new trial limited to the issue of damages for the proven trespass claim is warranted to address the erroneous verdict. *See Lofgren v. Western Washington Corp. Seventh Day Adventist*, 65 Wn.2d 144, 153, 396 P.2d 139 (1964)(a new trial limited to the issue of damages is proper when liability is clear and the amount of damages is the crux of the controversy).

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[16] Unchallenged findings are verities on appeal. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

[17] Second element of trespass as set forth on Court's Instruction No. 5. Appendix A.

[18] Fourth element of trespass as set forth on Court's Instruction No. 5. Appendix A.

[19] Jury Verdict, Question 4. Appendix B; CP at 77.

### C. "Zero" for the proven trespass claim is contrary to and outside the range of evidence.

The adequacy of a verdict turns on the evidence. *Palmer v. Jensen*, 132 Wn.2d at 201. The uncontroverted evidence in the record shows that the former Ryser property was worth $375,000 with an open driveway and access before the Ernests' proven trespass, and the property's value declined to between $0[20] and $126,000[21] after the Ernests' proven trespass blocked access and the driveway on the former Ryser property.

The Ernests did not produce any evidence to show that the property was worth the same amount (a) with access and an open driveway before the Ernests' proven trespass, and (b) without access and a blocked driveway after the Ernests' proven trespass. The uncontroverted evidence is to the contrary. It is beyond legitimate controversy[22] that the property value without driveway access significantly decreased from its value with access via an open driveway. It is also uncontroverted that the decrease in value was as a result of the Ernests' proven trespass blocking the

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[20] RP at 661 (Ryser testimony).
[21] RP at 549 (Lincoln testimony).
[22] *Ide v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955) (accept as established those items of damages that are conceded, undisputed, and beyond legitimate controversy); *see also Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 636, 865 P.2d 527 (1995).

driveway on Ryser's former property with mud and debris. Accordingly, the range of substantial evidence in the record for the amount of damage caused by the Ernests' proven trespass is from $249,000[23] to $375,000.[24] The jury's verdict of zero damages for the trespass is outside of the range of the evidence.

### D. Ryser is entitled to additur or a new trial on the issue of damages for his proven trespass claim.

#### 1. On its face, "Zero" is proven trespass claims is so inadequate to justify additur

The increase of a verdict as an alternative to a new trial is a procedure designed to achieve a just result and to avoid multiple trials encouraged by appellate courts. *Benjamin v. Randell*, 2 Wn.App. 50, 54, 467 P.2d 196 (1970). RCW 4.76.030 provides, in relevant part:

> If the trial court shall, upon motion for a new trial, find the damages awarded by a jury to be so ... inadequate as unmistakably to indicate that the amount thereof must have been the result of ... prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the

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[23] Difference in value of former Ryser property with an open driveway before Ernests' trespass and the value Lincoln paid to purchase the property after Ernests' trespass with a blocked driveway ($375,000 - $126,000 = $249,000). RP at 549 and 661.

[24] Difference in value of former Ryser property with open driveway before Ernests' trespass and the value, according to Ryser's testimony, of the property after the Ernests' trespass with a blocked driveway ($375,000 - $0 = $375,000). RP at 661.

> party affected shall consent to a[n] … increase of such verdict, …

RCW 4.76.030. Under the statute, additur is justified if the verdict on its face is so inadequate as to unmistakably indicate the amount was the result of passion or prejudice. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 161, 776 P.2d 676 (1989). In making the determination, the court must accept as established those items of damages which are conceded, undisputed, and beyond legitimate controversy. *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 636, 865 P.2d 527 (1993).

In this case, the "Zero" trespass damage verdict contradicted the undisputed evidence that Ryser's former property was worth more with an open accessible driveway before the proven statutory trespass and that the property value decreased as a result of the proven trespass which completely blocked off a portion of the driveway on Ryser's former property making it inaccessible. Accordingly, the verdict is so inadequate on its face, and the trial court was obligated to correct the error with additur or a new trial under RCW 4.76.030.

### 2. Ryser is entitled to a new trial on the issue of damages for his proven trespass claims.

The jury cannot reasonably return a zero award, where the jury has found that defendants' wrongfully caused waste or injury to plaintiff's property and that plaintiff was damaged by the proven claim. Where a verdict indicates that the jury disregarded the court's instructions, a new trial is proper. *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).

After having found that Ryser proved his statutory trespass claim (Appendix B; CP at 77 (Questions 1 and 2)) and that Ryser was damaged by the proven claim (*Id*. (Question 4)), the jury necessarily had to award trespass damages within the range of substantial evidence. Appendix A; CP at 85 (Court's Instruction No. 5); *See Nichols*, 58 Wn.App. at 907. In this case, the range of substantial evidence (the unrebutted testimony of Ryser and Lincoln as to value of the property) is that Ryser's former property decreased in value between $249,000 and $375,000 after the opened and accessible driveway was blocked by the Ernests' proven trespass.

CR 59(a) provides four grounds for a new trial that are relevant in this case. The rule provides, in relevant part:

> (a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any of the following causes materially affecting the substantial rights of such parties:
> ...
> (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
> (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
> ...
> (9) That substantial justice has not been done.

The analysis under CR 59(a)(5) is similar to the analysis under RCW 4.76.030. It is beyond legitimate controversy that Ryser's former property decreased in value when the Ernest respondents intentionally blocked his driveway with mud and debris. The range of substantial evidence in the record is that the property value decreased from $375,000 to either $126,000 or $0. RP at 549 and 661. Therefore, any trespass damage award outside

of the range of $249,000 to $375,000 is contrary to the evidence. The omission of any trespass damage award is, therefore, so inadequate as to unmistakably indicate that the verdict was the result of passion or prejudice. Accordingly, Ryser is entitled, under CR 59(a)(5), to a new trial on the trespass damages issue.

CR 59(a)(6) provides another ground for a new trial or for the court to correct the verdict instead of granting a new trial because an exact computation is possible based upon the uncontroverted evidence in the record. The action was for injury to property and there was an error in the assessment of the amount of recovery based upon the substantial evidence in the record. Using the evidence most favorable to the Ernest respondents, the court may subtract the value of the land after the proven trespass (the $126,000 Lincoln paid for the property) from the value of the land before the proven trespass with an open driveway for access ($375,000) to calculate trespass damages of $249,000.[25]

CR 59(a)(7) also provides another ground for a new trial on the issue of damages for the proven statutory trespass claims. The

[25] *Cf. Sunland Investments Inc. v. Graham*, 54 Wn. App. 361, 364-65, 773 P.2d 873 (1989)(reversed nominal damages award and remanded to trial court for recalculation of damages where evidence at trial of land values declined from $55,000 to $35,000, and thus, damages of at least $20,000 sustained).

unchallenged jury findings in response to the special verdict interrogatories are verities on appeal.[26] Thus, it is undisputed that appellant Ryser proved all of the elements of a statutory trespass claim and that Ryser proved he was damaged by the proven statutory trespass claim. Appendix B; CR 77 (Verdict, Questions 1, 2 and 4); Appendix A (Court's Instruction No. 5). A zero damage award for the proven trespass claims is not supported by substantial evidence; but rather is outside the range of substantial evidence in the record. It also indicates that the jury ignored the trial court's instructions, and therefor is also contrary to law. Because the evidence does not justify a zero award for the proven trespass claims, Ryser is entitled to a new trial on the issue of the amount of damages for his proven trespass claims.

CR 59(a)(9) provides yet another ground for a new trial on the issue of damages for the proven trespass claims. In *Cyrus v. Martin*, 64 Wn.2d 810, 394 P.2d 369 (1964), an order for a new trial under CR 59(a)(9) on the grounds that substantial justice had not been done was affirmed. The *Cyrus* court reasoned that where a

[26] None of the Ernest respondents have cross-appealed any issue. Accordingly, the jury's unchallenged findings on the special verdict form are verities on appeal, and the judgment fixes the law of the case at to them. *See Eckley v. Bonded Adj. Co.*, 30 Wn.2d 96, 109, 190 P.2d 718 (1948).

jury failed to take into account and it was unreasonable to reject or disregard all of the evidence, which was unrebutted, on one element of damages, the jury arrived at an erroneous verdict and substantial justice was not done. *Cyrus*, 64 Wn.2d at 811-812. In this case, the jury similarly failed to take into account all of the unrebutted evidence on one element of damages - the property's value before and after the Ernests' trespass – and it could not be reasonable for the jury to reject all of the unrebutted testimony. Thus, like the jury in *Cyrus*, the jury in this case arrived at an erroneous verdict and substantial justice has not been done.

**3. The trial court abused its discretion.**

If there is not substantial evidence to support the verdict, then the court must adjust the trespass damages award to within the range of substantial evidence in the record, or order a new trial on the damages issue for the proven statutory trespass claim. It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. *Palmer*, 132 Wn.2d at 197; *Krivanek*, 72 Wn.App. at 636-637; CR 59(a)(7).

## E. **Standard of Review for Attorney Fees**

Whether a party is entitled to attorneys' fees pursuant to a statute, contract, or recognized ground of equity is an issue of law

reviewed de novo. *Little v. King*, 147 Wn.App. 883, 890, 19 P.3d 525 (2008).

### F. **Appellant Ryser is entitled to reasonable attorney fees and costs under RCW 4.24.630(1).**

The jury found Ryser proved his statutory trespass claims against the Ernest respondents. Appendix B; CP at 77 (Verdict, Questions 1 and 2). This finding is unchallenged. The jury also found Ryser was damaged by the claims he proved, which includes statutory trespass, against the Ernest respondents. *Id.* (Verdict, Question 4). This finding is also unchallenged. The statute unambiguously entitles the injured party to reimbursement of reasonable attorneys' fees and costs from the person who committed statutory trespass.

RCW 4.24.630 provides, in relevant part: "… *In addition*, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs." RCW 4.24.630(1) (emphasis added).

The plain language of the statute is unambiguous. If a statute's meaning is plain on its face, then the court will give effect to that plain meaning. *State ex rel Citizens Against Tolls v. Murphy*,

151 Wn.2d 226, 242, 88 p.3d 375 (2004). The term "the person" refers to "[e]very person who goes onto the land of another and who ... wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land." RCW 4.24.630(1). Costs, including attorneys' fees, are an *additional* remedy that the injured party is entitled to recover, separate from the remedy of treble damages. RCW 4.24.630(1). Once a plaintiff has established the elements of statutory trespass under RCW 4.24.630, the defendant is liable to the plaintiff for both treble the amount of damages caused[27] and reasonable costs and attorneys' fees.[28]

To establish a claim for reasonable costs and attorneys' fees under the statute, a plaintiff must show that the defendants intentionally and unreasonably committed one or more acts for which they knew or had reason to know they lacked authorization. *See Clipse v. Michels Pipeline Const., Inc.*, 154 Wn.App. 573, 574-575, 225 P.3d 492 (2010). In this case, the jury in response to

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[27] "Every person who [commits statutory trespass] is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. ..." RCW 4.24.630(1).

[28] "In addition, the person [who commits statutory trespass] is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs." RCW 4.24.630(1).

specific interrogatories on the special verdict form found Ryser proved statutory trespass and was damaged by the proven statutory trespass. Appendix B; CP at 77 (Verdict, Questions 1, 2 and 4). These unchallenged findings (*i.e.* verities on appeal) establish the Ernests' liability to Ryser for costs, including attorneys' fees, under RCW 4.24.630(1). It was an error for the trial court to deny Ryser's motion for attorneys' fees and costs.

The jury's zero trespass damage award does not preclude the Ernests' liability to Ryser, the injured party, for costs including attorneys' fees under RCW 4.24.630(1). The statute does not require a plaintiff to prove a minimum amount of damages before the plaintiff is entitled to reasonable attorneys' fees and other litigation-related costs. RCW 4.24.630(1); *cf. Miles v. F.E.R.M. Enterprises, Inc.*, 29 Wn.App. 61, 70, 627 P.2d 564 (1981)(citing *Browning v. Slenderella Systems*, 54 Wn.2d 440, 450, 341 P.2d 859 (1959)(the legislature set no minimum award for statutory violation proven to the jury, thus plaintiff was entitled to nominal damages of $100 even though jury found no pecuniary damages), *overruled on other grounds by Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 805 P.2d 800 (1991)). Having proved his statutory

trespass claim, Ryser is entitled to the additional remedy of an award of costs, including attorneys' fees.

Proof of an invasion of a legally protected interest is sufficient injury. *Cf. Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508, 517, 910 P.2d 462 (1996)(proof of an invasion of a legally protected interest is sufficient to establish damage under RCW 90.14.190). The common law definition of "injury" is an invasion of any legally protected interest of another. *Rettkowski*, 128 Wn.2d at 518.

Additionally, under the common law at the time the statute was enacted, "any trespass entitled the landowner to recover nominal or punitive damages." *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 691, 709 P.2d 782 (1985); *see also Miles*, 29 Wn.App. at 68 ("If the plaintiff proves a wrong, he may recover nominal damages.")(citing C. McCormick, Damages §§ 23, 24 (1935); D. Dobbs, Remedies § 3.8 at 192 (1973)). Washington courts look to the historical view of trespass instead of the modern view because the meaning of the words used when the trespass statutes were adopted "is usually the best guide for ascertaining legislative intent." *Jongeward v. BNSF Railway Co.*, 174 Wn.2d 586, 596, 278 P.3d 157 (2012) (quoting *Bloomer v. Todd*, 3 Wash.

Terr. 599, 615, 19 P. 135 (1888). A later change in the common law does not impact the court's statutory analysis. *Jongeward*, 174 Wn.2d at 597.

In reviewing the common law of trespass because of its analogy to discrimination and civil rights actions, the *Miles* court observed that in a successful trespass action, the law's regard for a person's property was so great that damages were presumed. *Miles*, 29 Wn.App. at 66-67 (citing *Zimmer v. Stephenson*, 66 Wn.2d 477, 479-80, 403 P.2d 343 (1965); *Welch v. Seattle & Montana R.R.*, 56 Wash. 97, 99, 105 P. 166 (1909)). A verdict for zero dollars in a successful common law trespass case did not show a failure of the plaintiff to prove his action because damages were presumed by the wrongful trespass. *Miles*, 29 Wn.App. at 66.

Just as the *Miles* court looked to trespass cases by analogy, this court may look to discrimination and civil rights cases by analogy because both types of action involve intentional torts. In *Miles*, the jury returned a verdict for the plaintiff, finding discrimination, but wrote "$0" in the space for damages. The trial court entered judgment for the defendant based upon the zero dollar award, which was reversed on appeal. *Miles*, 29 Wn.App. at 73. In reaching its holding to reverse the trial court, the *Miles* court

approvingly cited the reasoning in *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970). In *Joseph*, which was a civil rights action, the plaintiff received a jury verdict for zero dollars. The *Joseph* court reasoned that if the verdict had been for nominal damages, there would be no question that it was a verdict for the plaintiff. Additionally, because courts have upheld plaintiffs' verdicts for nominal damages as low as six cents, the *Joseph* court concluded it would be putting form over substance to hold a verdict for plaintiff for zero dollars is a defense verdict. *Miles*, 29 Wn.App. at 67-68. *Miles* held that where the jury found for the plaintiff on the issue of discrimination, damages are presumed, and the judgment must be for the plaintiffs at least in a nominal amount to be fixed by the trial court. *Miles*, 29 Wn.App. at 73. Similarly, damages in a statutory trespass claim are presumed.

In this case, Ryser is entitled to the additional remedy of attorneys' fees and costs on his successful statutory trespass claims. There is no doubt that the jury found Ryser proved his statutory trespass claims and that Ryser was damaged by the proven statutory trespass claims. Appendix B; CP at 77. The Ernests did not challenge these findings, and thus they are verities on appeal. Unlike other statutes where it is within the trial court's

discretion to award the prevailing party attorneys' fees and costs,[29] RCW 4.24.630(1) does not make the additional remedy of an award of attorneys' fees contingent on the trial court exercising its discretion. That is the trial court has no discretion under the plain language of RCW 4.24.630(1) to deny an award of attorneys' fees and costs to a plaintiff who proved the elements of his statutory trespass claim. Accordingly, it was an abuse of discretion for the trial court to deny Ryser's motion for attorneys' fees and costs for his successful statutory trespass claims.

### G. **Request for Attorney's Fees and Costs on Appeal**

Appellant Ryser requests reasonable attorneys' fees and costs on appeal pursuant to RCW 4.24.630(1) and RAP 18.1(a). As a prevailing plaintiff on his statutory trespass claims, Ryser is entitled to reimbursement by the Ernests for his reasonable attorneys' fees and costs incurred on appeal pursuant to RCW 4.24.630(1).

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[29] For example, RCW 64.38.050 grants the trial court discretion to award attorney fees "in an appropriate case." Another example is RCW 90.14.190, which grants the trial court discretion to award reasonable attorney fees.

## V. 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 liable for his costs, including reasonable attorneys' fees, under RCW 4.24.630(1). 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 March 10, 2015.

Jerry Moberg, WSBA No. 5282
Barbara J. Rhoads-Weaver, WSBA No. 34230
Attorneys for Appellant

## CERTIFICATE OF SERVICE

I certify that on March 10, 2015, I sent the above document to attorneys Emmelyn Hart and Ray Siderius, counsel for Defendants as stated below:

Via US Mail, postage prepaid to:

Emmelyn Hart
For Defendants Ernest & Ernest Trust
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Raymond H. Siderius
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Via email to:
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Submitted this 10th day of March, 2015

Mary Moberg

Mary Moberg, Legal Assistant

# Appendix

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CHRISTIAN W.C. RYSER,

Plaintiffs,

vs.

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

Defendants.

No. 12-2-25731-1 SEA

VERDICT FORM A



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: _____

3. We, the jury, find that the Plaintiff proved any of his remaining claim(s) against Thomas Ernest, and/or John and Margaret Ernest:

   Yes: ✓ No: _____

*Instruction: If you have answered "No" to questions 1, 2, and 3, skip the next questions and have the presiding juror sign and date the verdict form. If you have answered "Yes" to any of these questions, answer the remaining questions.*

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

   Yes: ✓ No: _____

5. We, the jury, find for the Plaintiff in the following sums:

   Trespass: Zero

Economic Damages: $201,581

Non-Economic Damages: Zero

DATE: 3/30/14

Presiding Juror

INSTRUCTION NO. 5

**TRESPASS**

In order to prove his trespass claim, Christian Ryser must prove the following elements took place after July 31, 2009:

(1) The defendant entered onto 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.

For purposes of the second element of Trespass, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration.

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.