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Division I
State of Washington

No. 72532-7-I

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

CHRISTIAN W.C. RYSER,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS JOHN E. ERNEST and MARGARET F. ERNEST

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I. INTRODUCTION

This case arises out of a long-standing property dispute between neighbors Christian Ryser and John and Margaret Ernest.[1] Ryser ultimately sought damages from the Ernests, alleging among other claims that they trespassed on his property, interfered with his ability to sell his property, forced him into bankruptcy, and caused him to lose his home in a foreclosure sale.

Following a lengthy jury trial, the jury determined Ryser had proven his trespass claim against the Ernests and also proven "any of his remaining claim(s) against them." The jury concluded Ryser was damaged by "the claims proved" and awarded him $0 damages on his trespass claim and more than $200,000 in economic damages on his other claims. It also awarded him $0 damages for his non-economic claims. Ryser moved for an additur or, alternatively, a new trial only on the issue of the damages for his trespass claim, contending the verdict was inadequate, lacking in evidence, and the result of passion or prejudice. The trial court, the Honorable Kenneth Schubert, disagreed and denied the motion.

Ryser also filed a post-trial motion for treble damages and

[1] A map of the parties' properties can be found at CP 330 and 332. Copies are included in the Appendix for the Court's convenience. The Ernest properties are labeled Parcel A and Parcel B.

attorney fees and costs, asserting an entitlement to those fees and costs pursuant to RCW 4.24.630. The trial court denied the motion.

Ryser appeals the orders denying his motions for additur or new trial and for attorney fees and costs. The Court should uphold the jury's verdict and affirm the judgment in all respects. Except for Ryser's conspicuous attempt to misstate the jury's verdict, his opening brief is otherwise unremarkable and offers no reasons why the Court should reverse the verdict. Credible evidence supports the jury's verdict and demonstrates that it was not the result of unmistakable passion or prejudice. The trial court correctly accepted the verdict. The trial court also appropriately declined to award attorney fees and costs where the jury's verdict amounts to a defense verdict. For these reasons, the Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

The Ernests acknowledge Ryser's assignments of error, but believe the issues associated with those errors are more appropriately formulated as follows:

> 1. Did the trial court properly deny the plaintiff's motion for an additur to the jury's verdict on his statutory trespass claim where the verdict was consistent with the substantial evidence presented at trial and was not the unmistakable result of passion or prejudice?

2. Did the trial court properly deny the plaintiff's alternative motion for a new trial on his statutory trespass claim where he did not present grounds to grant the motion under any cause listed in CR 59(a)?

3. Did the trial court appropriately reject the plaintiff's request for attorney fees and costs under RCW 4.24.630 where he was not the prevailing party because the jury's verdict constituted a defense verdict?

III. COUNTERSTATEMENT OF THE CASE

Ryser's introduction and statement of the case are, while accurate, written in a perceptibly lopsided manner meant to curry favor with the Court. His approach ignores or downplays a number of significant facts impacting his alleged damages and supporting the jury's verdict.

For example, Ryser casually mentions that he put his property on the market in July 2008. Br. of Appellant at 8. But he fails to mention that he received no written offers for it. CP 374; *See, e.g.,* RP I:285-86, 429.[2] He also self-servingly claims that his friend Brian Nelson decided not to purchase the property despite their verbal agreement because of the Ernests' interference with his access rights. Br. of Appellant at 8. On the contrary, Nelson was aware of Ryser's previous litigation with the Ernests over those

[2] "RP I" refers to the consecutively paginated partial verbatim report of proceedings designated by Ryser in his second amended statement of arrangements. That partial transcript includes pages 1-953.

rights and "everything that was going on with the property." CP 381; RP I:433. Despite Nelson's willingness to buy the property, however, Ryser rejected his offer to test the market. *Id.*; RP I:286-87. Nelson lost interest in purchasing the property before Ryser filed for bankruptcy. RP I:395, 640.

Tellingly, Ryser neglects to mention he significantly reduced the price of the property a number of times while it was on the market and actually removed and relisted it over the course of more than a year. CP 366, 374, 421.

Ryser then evaluates his bankruptcy proceedings in only general terms and practically ignores any mention of the foreclosure proceedings, except to insinuate the Ernests were to blame. Br. of Appellant at 2-3, 8, 11. In fact, Ryser intentionally stopped paying his mortgage in February 2009 and was nearly $25,000 in arrears by September 2009. CP 436-39. He was also significantly over-leveraged on the remodel. CP 366-67; RP I:295, 402-07, 505. The bank Trustee filed a notice of intent to sell the property, but removed the listing in November 2009. CP 424-32; 436-39.

Ryser filed for bankruptcy protection in December 2009. CP 443-54; RP I:40. The bankruptcy court appointed a Trustee to

liquidate Ryser's assets, including his home. CP 448. At the time, Ryser valued the property at $590,000 and confirmed it carried a secured claim of $498,419. RP I:33-34, 50, 403. He submitted an amended property schedule in April 2010, stating the value of the property at $375,000. RP I:41, 50.

The bankruptcy court discharged Ryser's debts in December 2010 and ownership of the home reverted to Ryser. CP 421, 453. He moved out the same month. CP 467; RP 319-20. By September 2011, he was in arrears on his mortgage for more than $87,000. CP 474; RP I:399 The bank Trustee filed an amended notice of sale and eventually sold the property at public auction in November 2011. CP 473-76, 478-79.

Ryser continues to complain about the derelict truck that the Ernests' son, Tom Ernest, parked at the bottom of the switchback road in 2010. Br. of Appellant at 3, 9. Photographs document the location of the truck on Parcel B of the Ernests' property. CP 481-82. Tom parked the truck on the southwest portion of Parcel B because the Ernest family was concerned that potential buyers of Ryser's property would think they were buying the parking area and beachfront of Parcel B, which belong to the Ernests. CP 333, 414, 486. Tom parked the truck entirely within the boundary of Parcel B,

leaving enough space for another car to pass. CP 413, 481-85, 487; RP II:39.[3] Co-defendant Kevin Bergin hauled the truck back to Parcel A in August 2011 at the Ernests' request. CP 493, 497; RP I:74-75.

Finally, Ryser misrepresents the jury's verdict. Contrary to his factual assertion, br. of appellant at 1, 3, the jury did not determine he suffered actual damages from the Ernests' trespass. Rather, the jury determined generally that he was "damaged by the *claims* proved" against the Ernests. CP 77 (emphasis added). Ryser's "claims" included claims for easement interference, trespass, nuisance, interference with business expectancy, and infliction of emotional distress. CP 84-86, 89, 91. The only claim for which Ryser requested a specified sum in damages was his trespass claim. CP 77. The jury determined that Ryser suffered no damages on that claim. *Id.* The only inference that can be drawn from the jury's verdict is that the award of more than $200,000 in general damages was an award for one or more of Ryser's other claims.

[3] "RP II" refers to the partial verbatim report of proceedings designated by the Ernests, which is consecutively numbered pages 1-112.

IV. ARGUMENT

A. Standards of Review

This Court reviews the denial of a motion for new trial or for additur for an abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997). Juries have considerable latitude in assessing damages; consequently, a jury verdict will not be lightly overturned. *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007). This Court will not disturb a jury award unless it is outside the range of substantial evidence, shocks the conscience of the Court, or was the result of passion or prejudice. *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 274, 135 P.3d 955 (2006); *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005). *See also, Herriman*, 142 Wn. App. at 232 ("A trial court has no discretion to disturb a verdict within the range of evidence.").

The Court presumes the amount of damages awarded by the jury's verdict was correct. RCW 4.76.030; *Bunch*, 155 Wn.2d at 179. But if the record reflects the damages awarded by a jury verdict were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice, a new trial or additur may be an appropriate

remedy. RCW 4.76.030; *Robinson v. Safeway Stores*, Inc., 113 Wn.2d 154, 161, 776 P.2d 676 (1989).

To determine whether the trial court has abused its discretion, the Court reviews the trial record. *Palmer*, 132 Wn.2d at 197. If sufficient evidence supports the verdict, the trial court abuses its discretion by ordering a new trial. *Id.* at 198. Evidence is sufficient to support the verdict where it is substantial. *Haft v. N. Pac. Ry. Co.*, 64 Wn.2d 957, 960, 395 P.2d 482 (1964). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). The Court reviews the evidence and all reasonable inferences that the evidence allows in favor of the Ernests, the non-moving party here. *Haft*, 64 Wn.2d at 960.

The Court applies a two-part standard when reviewing a trial court's decision to grant or deny a request for attorney fees. *Ethridge v. Hwang*, 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001). The Court reviews *de novo* whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). It then reviews for an abuse of discretion the

discretionary decision to award or to deny attorney fees and the reasonableness of the fees awarded. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. *Ethridge*, 105 Wn. App. at 460 (citing *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993)).

B. The Trial Court's Decision to Deny An Additur or A New Trial Was An Appropriate Exercise of Discretion

Disappointed with the jury's verdict and suffering from an apparent case of sour grapes, Ryser contends he is entitled to an increase in the jury's verdict or, alternatively, a new trial. Br. of Appellant at 23. According to Ryser, the trial court abused its discretion by denying his motion for an additur because the jury's award of $0 for his trespass damages is inadequate and contradicts what he characterizes as "undisputed" evidence of the value of his property with an open and accessible driveway. Br. of Appellant at 24. He also argues the trial court abused its discretion by refusing to grant a new trial because the verdict is contrary to the evidence and prevents him from receiving substantial justice. Br. of Appellant at 27-28. His arguments are unavailing.

First, Ryser fails to articulate how the jury's verdict is so inadequate as to unmistakably be the result of passion or prejudice. The jury's verdict was within the range of credible evidence. Second, there is no evidence the jury committed error when assessing damages or that any error in the law occurred. The jury rendered a verdict after assessing all of the evidence. Finally, Ryser cannot establish that substantial justice has not been had. The trial court's rulings were proper and within its discretion. This Court should affirm.

1. An additur to the jury's verdict was not warranted

Ryser contends the trial court abused its discretion by refusing to grant an additur because the jury's award on his trespass claim was inadequate and not within the range of evidence presented at trial. Br. of Appellant at 23. He is mistaken. The trial court here did not abuse its discretion by denying his motion. There is no evidence that the jury's refusal to award damages on Ryser's trespass claim was unmistakably the result of passion or prejudice.

Determining the amount of damages is within the jury's province, and courts are reluctant to interfere with a jury's damage

award. *Palmer*, 132 Wn.2d at 197. Nonetheless, RCW 4.76.030[4] allows an additur where the award is so excessive or inadequate as to *unmistakably* indicate that the amount must have been the result of passion or prejudice. *Green v. McAllister*, 103 Wn. App 452, 462, 14 P.3d 795 (2000). Before passion or prejudice can justify modification of a jury verdict, however, it must be of such manifest clarity as to make it unmistakable. *Delahunty v. Cahoon*, 66 Wn.App. 829, 832 P.2d 1378 (1992); *James v. Robeck*, 79 Wn.2d 864, 870, 490 P.2d 878 (1971). A jury's verdict does not carry its own death warrant solely by reason of its size. *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 394, 261 P.2d 692 (1953).

The trial court here did not abuse its discretion by denying Ryser's motion for an additur to the jury's verdict. This is not a case wherein the judgment of the jury has been so distorted by passion generated at trial that the trial court had the duty to substitute reason for retribution. Other than the amount of the verdict, the record in this case discloses nothing to suggest that the jury was

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[4] RCW 4.76.030 more fully provides:

> If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict[.]

prejudiced against Ryser or that it was incited by passion to regard his case unfairly. *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 836, 699 P.2d 1230 (1985). Rather, the jury could have properly questioned Ryser's credibility due to the inconsistencies in his testimony relating to the value of his home and also to his damages. Ryser's failure to demonstrate that the jury's verdict was the unmistakable result of passion or prejudice is fatal to his request for relief. Accordingly, the trial court did not abuse its discretion in denying the motion for an additur.

2. A new trial was unnecessary

Ryser next argues the trial court abused its discretion by denying his alternative request for a new trial under CR 59(a).[5] Br. of Appellant at 25-29. No such abuse occurred here.

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[5] CR 59(a) states, in pertinent part and as relevant here, that a verdict may be vacated and a new trial granted for any one of the following causes materially affecting the substantial rights of the 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;

CR 59(a) provides an aggrieved party with limited grounds to request a new trial, including among other reasons an award of inadequate damages resulting from the jury's passion or prejudice, an error in the assessment of the amount of recovery, the absence of evidence to justify the decision, or the lack of substantial justice. CR 59(a)(5-7, 9). The trial court properly refused to grant Ryser a new trial because he did not present grounds to grant the motion under any cause listed in the rule.

(a) The jury did not award inadequate damages based on passion or prejudice or improperly assess recovery

Ryser first argues he is entitled to a new trial under CR 59(a)(5) and (6) because the jury's award of damages was so inadequate as to be the result of passion or prejudice and because the jury erred in assessing the amount of his recovery. Br. of Appellant at 27. But he neglects to mention that he never adequately argued to the trial court that he was entitled to relief under those particular subsections of CR 59(a) and offers no explanation for his failure to do so. It was, therefore, not an abuse of discretion for the trial court to have denied Ryser relief on those

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. . .

(9) That substantial justice has not been done.

bases. *See generally, King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 660, 860 P.2d 1024 (1993) (holding that only when parties brief and argue an issue in the lower court, and the lower court rules on an issue, is the issue properly raised on appeal).

Further, Ryser's failure to adequately argue below that CR 59(a)(5) and (6) provide grounds for a new trial precludes this Court's review of the issue. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000) (declining to consider inadequately argued issues. Where Ryser did not raise the arguments below, this Court should decline to consider them for the first time on appeal. RAP 2.5(a). *See also, Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008) (noting the appellate courts will not entertain issues raised for the first time on appeal); *Boeing Co. v. State*, 89 Wn.2d 443, 451, 572 P.2d 8 (1978) (declining to consider an argument raised for the first time on appeal).

(b) The jury's decision is not contrary to the evidence

Ryser next argues he is entitled to a new trial under CR 59(a)(7) because there is insufficient evidence to support the jury's award of $0 trespass damages. Br. of Appellant at 27-28. He

is mistaken. The record contains more than sufficient evidence to support the verdict.

For example, the evidence adduced at trial established that the landslide in December 2010 blocked the switchback road on the curve that included properties owned by Ryser and Larry Dravis. RP I:13, 61. For the next eight months, the landslide remained intact and made Ryser's property inaccessible and essentially worth nothing. During those months, Ryser did not live at the property, did not list the property for sale, and did not make any effort to clear the slide thereby re-opening access to it.

In late July and early August of 2010, the Ernests hired Kevin Bergin to retrieve their son Tom's dilapidated truck from Parcel B. CP 493, 497; RP I:74-75. Bergin and his crew had to push the slide debris aside and onto Dravis's property to gain access to the truck. RP 69. When Dravis complained about the debris a few hours later, Bergin returned the debris to its original position on the curve. RP I:71, 75-76. Both Bergin and John Ernest testified the switchback road was only re-opened for a few hours before the slide debris was replaced. RP I:75, 861, 863.

During closing arguments, Ryser's counsel asked the jury to award Ryser trespass damages of $375,000 based on the

testimony of real estate agent Crist Granum. RP II:988-969, 107. Granum had opined on the value of Ryser's property with open and unrestricted access. CP 259. The Ernests challenged Ryser's argument, suggesting it would be absurd to award Ryser such significant damages for the approximately three to four hour window the property was accessible when Ryser chose not to re-open the road after the slide, had not lived in the house for months, and had not re-listed the property for sale. CP 257.

Viewing this evidence in the light most favorable to the defense, which the Court is required to do, it is clear that the jury was persuaded that Bergin's replacement of the landslide debris to its original location approximately four hours after he had moved it caused Ryser no actual damages. In light of the sufficient evidence that supports the jury's verdict, it was not an abuse of discretion for the trial court to decline to order a new trial.

(c) Substantial justice was done

Ryser's last contention is that the trial court abused its discretion by failing to grant a new trial where there was an absence of substantial justice. Br. of Appellant at 28-29. But he fails to address how or why justice has not been served.

CR 59(a)(9) provides that an order may be vacated and a new trial granted where substantial justice has not been done. Generally, a new trial based on a lack of substantial justice is rare, due to the other broad grounds afforded under CR 59(a). *Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964); *Sligar v. Odell,* 156 Wn. App. 720, 734, 233 P.3d 914 (2010). The authority of the trial court, and, in turn, this Court to grant a new trial on the ground that substantial justice has not been done is severely limited. *Cerjance v. Kehres*, 26 Wn. App. 436, 440, 613 P.2d 192 (1980). The Court is not allowed simply to substitute its judgment for that of the jury. *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968); *Pac. Nat'l Bank of Wash. v. Morrissey*, 17 Wn. App. 525, 529, 564 P.2d 337 (1977).

Ryser's argument that substantial justice has not been done is the same argument that he advances to show the verdict is contrary to the evidence. The Court should reject his final argument for the same reasons its rejects his earlier arguments.

More pointedly, Ryser's disappointment with the jury's verdict does not mean that substantial justice was ultimately not had. The fundamental flaw in Ryser's argument is his failure to recognize that the weight of evidence and questions of credibility

are the province of fact finder. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). The jury plainly found the Ernests' version of events and supporting evidence with respect to the landslide and the damages Ryser allegedly sustained to be persuasive and rejected Ryser's contradicting evidence. This is not a case for application of the substantial justice standard. A new trial was not warranted.

C. The Trial Court Did Not Abuse Its Discretion by Denying Ryser's Motion for Attorney Fees and Costs

Ryser claims the trial court erred by denying his motion for attorney fees and costs under RCW 4.24.630(1), which authorizes an award of fees and costs where a defendant is found liable for damage wrongfully caused by waste or injury to land.[6] Br. of Appellant at 30-36. But Ryser is not the prevailing party with respect to this claim. When the jury determined that Ryser was not entitled to monetary damages, including nominal damages, for the

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[6] RCW 4.24.630(1) provides, in pertinent part:

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

Ernests' trespass, it granted a defense verdict. Ryser provides no authority that would entitle him to fees and costs under RCW 4.23.060 in this circumstance. The trial court did not abuse its discretion by denying the motion.

According to Ryser, he is entitled to attorney fees and costs because he showed that the Ernests intentionally and unreasonably committed an act for which they knew or had reason to know they lacked authorization. Br. of Appellant at 31-32. His argument neglects the second condition of RCW 4.24.630(1), which requires him to demonstrate injury or damage to his land before he can recover his attorney fees and costs. While the jury was convinced that Ryser successfully prosecuted his statutory trespass claim against the Ernests, it was not persuaded that he suffered any monetary damages from that trespass. CP 77. A verdict for Ryser with $0 damages is a defense verdict, and not without precedent.

Nationally, courts have construed similar verdicts in four ways: the verdict is invalid; it is a defense verdict unless evidence in the record establishes damages; it is a straight defense verdict; or it is a verdict for the plaintiff. *Miles v. F.E.R.M. Enters., Inc.*, 29 Wn. App. 61, 65, 627 P.2d 564 (1981) (quoting 49 A.L.R.2d 1328 (1956)). But Washington courts have found that the best approach

is to view the verdict in light of the instructions and the record to see if the clear intent of the jury can be established. *Meenach v. Triple E Meats*, 39 Wn. App. 635, 638, 694 P.2d 1125 (1985). A decision that a verdict must be the same in all cases is too inflexible and does not give due regard to the intent of the jury. *Id.*

Sheldon v. Imhoff, 198 Wn. 66, 87 P.2d 103 (1939) and *Haney v. Cheatham*, 8 Wn.2d 310, 111 P.2d 1003 (1941) are instructive. In *Sheldon*, the jury signed the plaintiff's verdict form on a personal injury claim, but indicated a damage award of "none." The verdict was upheld as a defense verdict. *Sheldon*, 198 Wn. App. at 70. In *Haney*, a $1 verdict for the plaintiff in a personal injury case was likewise held to be a defense verdict. 8 Wn.2d at 325

Here, the jury made its intent clear. It effectively found that Ryser experienced a technical trespass, but suffered no damages from it. CP 77. Consequently, he did not prevail and is not entitled to recover damages.

In a last-ditch effort to convince this Court to reverse the attorney fee award, Ryser turns to *Miles*, 29 Wn. App. at 73, and *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970) for support. Br. of Appellant at 34-36. His reliance on those civil rights cases is

misplaced. Civil rights cases governed by federal statutes have no application here.

In both *Miles* and *Joseph*, the plaintiffs filed discrimination claims under federal civil rights laws. The juries found that discrimination occurred, but awarded zero or nominal damages.[7] In deciding the fee issues on appeal, the appellate courts noted that attorney fee awards to the "prevailing party" are discretionary in civil rights cases pursuant to 42 U.S.C. § 1988. While a plaintiff given nominal damages may technically be considered the "prevailing party," the plaintiff is not necessarily entitled to fees. Indeed, it may be an abuse of discretion to award attorney fees to a plaintiff who seeks compensatory damages but receives only nominal damages. *See discussion generally*, *Ermine v. City of Spokane*, 100 Wn. App. 115, 119-22, 996 P.2d 624 (2000).

Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L.Ed. 2d 494 (1992) exposes the fundamental flaw in Ryser's analysis. In *Farrar*, the plaintiffs brought an action under 42 U.S.C. § 1983 and § 1985 alleging due process violations arising out of the state's closure of a private school for troubled teenagers. *Farrar*, 506 U.S.

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[7] Nominal damages are often awarded to compensate a plaintiff for hurt feelings, embarrassment and humiliation which flow from a discriminatory act. *Minger v. Reinhard Dist. Co.*, 87 Wn. App. 941, 947, 943 P.2d 400 (1997).

at 105-06. The plaintiff sought damages of $17 million, but was awarded only $1 in nominal damages. The *Farrar* court reversed the district court's award of attorney fees, concluding "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Id.* at 115 (citations omitted). The *Farrar* court further determined that "[w]here recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.* at 114 (quotation omitted). In other words, "the degree of success" is the most critical factor in determining the reasonableness of a fee award to a prevailing party. *Id.*

As Justice Sandra Day O'Connor noted in her special concurrence, "'a technical victory may be so insignificant . . . as to be insufficient' to support an award of attorney's fees." *Id.* at 117 (quoting Te*xas State Teachers Ass'n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)). She added, however, that § 1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private

attorney general theory." *Id.* at 122. As narrowed by Justice O'Connor's concurring opinion, *Farrar* essentially holds that a technical victory evidenced by only nominal damages precludes an award of fees unless the finding of liability serves a public purpose.

The Washington Supreme Court has applied the *Farrar* analysis. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997). There, the plaintiff brought suit under 42 U.S.C. § 1983 for deprivation of substantive due process rights and unconstitutional taking arising out of the city's enforcement of a housing preservation ordinance. The plaintiff claimed losses in the millions, but recovered only $3 in nominal damages. *Sintra*, 131 Wn.2d at 665. The trial court awarded nearly $200,000 in fees.

Applying the *Farrar* analysis, the *Sintra* court determined that trial courts awarding attorney fees under § 1988 should give primary consideration to the amount of damages sought by the plaintiff as compared to the nominal damages awarded. *Sintra*, 131 Wn.2d at 666. The *Sintra* court reversed the award of fees because the trial court correctly stated the "central issue," but did not consider it to be a primary factor in its findings and considered other factors such as the difficulty of the case, the undesirability of the

case, and the level of skill necessary to properly pursue the case. *Id.* at 665.

Here, Ryser cites no Washington case applying the federal civil rights framework to RCW 4.24.630. But even if this jurisprudence were analogous, his claim for fees and costs fails because the jury's finding that he proved his trespass claim against the Ernests did not materially alter the legal relationship between the parties by modifying the Ernest's behavior in a way that directly benefits him. By the time Ryser filed suit, *he had already lost his property through foreclosure*. A finding that the Ernests trespassed on Ryser's property does not change their behavior to Ryser's benefit, which means that he is not the prevailing party. Further, he sought only private damages. His lawsuit did not result in a public benefit and there is no basis to award fees on that ground. Accordingly, the trial court did not abuse its discretion by refusing to grant Ryser's motion for attorney fees and costs.

D. This Court Should Not Award Ryser Attorney Fees and Costs on Appeal

Citing RCW 4.24.630(1), Ryser requests reasonable attorney fees and costs on appeal. Br. of App. at 36. Under RAP 18.1, the prevailing party is entitled to attorney fees on appeal when applicable law authorizes the award. *See, e.g., McGuire v. Bates*,

169 Wn.2d 185, 191, 234 P.3d 205 (2010). The Court should deny Ryser's request where he is not the prevailing party on appeal.

V. CONCLUSION

Ryser is not entitled to an additur or a new trial because he is disappointed with the jury's verdict. Absent evidence that the jury's verdict was the unmistakable result of passion or prejudice, additur is not an available remedy. Similarly, he is not entitled to a new trial where the jury based its verdict upon its assessment of the evidence and no error of law occurred. Substantial justice has been done. The trial court properly accepted the jury's verdict.

In a desperate attempt to recover attorney fees under the trespass statue, Ryser misrepresents the jury's verdict. The jury granted a defense verdict on Ryser's trespass claim. He provides no controlling authority to support an award of attorney fees and costs in this circumstance. The trial court properly denied his post-trial request for fees and costs.

This Court should affirm and deny attorney fees and costs on appeal to Ryser.

DATED this 11th day of May, 2015.

Respectfully submitted,

Emmelyn M. Hart, WSBA #28820
Heather Jensen, WSBA #29635
LEWIS BRISBOIS BISGAARD & SMITH LLP
2101 4th Ave., Suite 700
Seattle, WA 98121
(206) 436-2020
Attorneys for Respondents
John and Margaret Ernest

Appendix

LEGAL DESCRIPTION

PARCEL A

THAT PORTION OF GOVERNMENT LOT 1 OF SECTION 25, TOWNSHIP 22 NORTH, RANGE 2 EAST, W.M., IN KING COUNTY, WASHINGTON, LYING BETWEEN THE EAST LINE OF A STRIP OF LAND DEEDED TO STATE OF WASHINGTON FOR VASHON ISLAND HIGHWAY BY INSTRUMENT RECORDED UNDER AUDITOR'S FILE NO. 2702739, AND THE WEST LINE OF THE EAST 10.20 ACRES OF SAID GOVERNMENT LOT; EXCEPT THE NORTH 1050.00 FEET IN WIDTH THEREOF AND EXCEPT THAT PORTION THEREOF DEEDED TO KING COUNTY FOR C.A. PILLSBURY ROAD BY DEED RECORDED UNDER AUDITOR'S FILE NO. 2782391;

PARCEL B

THAT PORTION OF GOVERNMENT LOT 1 OF SECTION 25, TOWNSHIP 22 NORTH, RANGE 2 EAST, W.M., IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

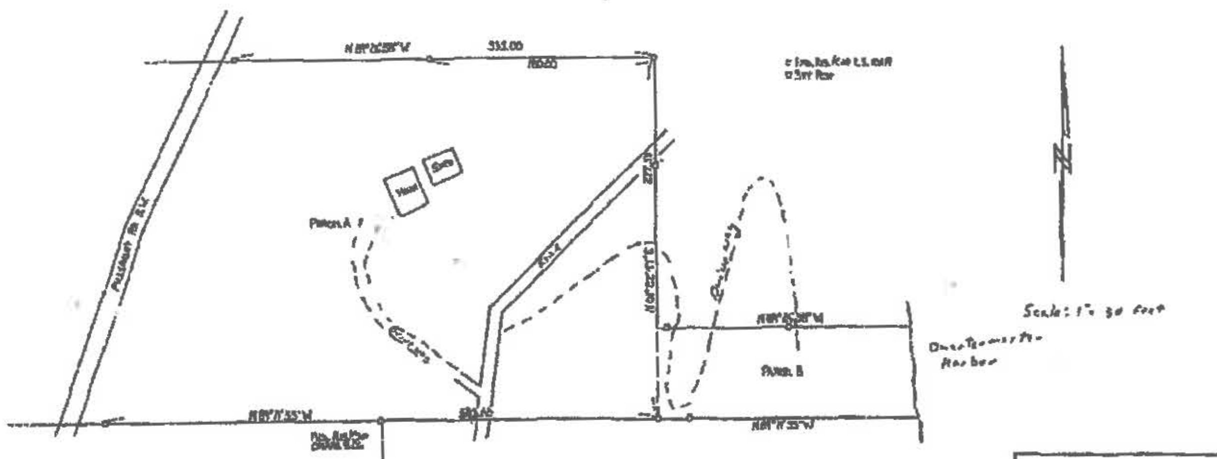
BEGINNING AT THE SOUTHEAST CORNER OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 24, TOWNSHIP 22 NORTH, RANGE 2 EAST, W.M., IN KING COUNTY, WASHINGTON; THENCE RUNNING SOUTH PARALLEL TO THE NORTH AND SOUTH LINES OF SAID SECTION TO THE SOUTH BOUNDARY LINE OF LOT 1 IN SECTION 25, SAID TOWNSHIP AND RANGE; THENCE RUNNING EAST ALONG THE SOUTH BOUNDARY LINE OF LOT 1 TO THE EAST BOUNDARY THEREOF; THENCE RUNNING NORTHERLY AND NORTHEASTERLY ALONG THE EAST BOUNDARY OF SAID LOT 1 TO THE NORTH BOUNDARY OF SAID LOT 1; THENCE RUNNING WEST ALONG SAID NORTH BOUNDARY OF SAID LOT 1 TO THE POINT OF BEGINNING; EXCEPT THE NORTH 1240.00 FEET THEREOF.

SURVEYOR'S CERTIFICATE

This map correctly represents a retracement of surveys recorded in Volume 18 of Surveys on page 112, Records of King County, Washington.

JEROLD D. O'HARE
Professional Land Surveyor
Certificate No. 9598
August 28, 2100

Instrument - Unit Set 3 Total Station
Control survey.
Basis for bearing: Assumed



Government Lot 1
Section 25, Twp. 22 North, Rge. 2 East, W.M.
King County, Washington

Survey for: John Ernest

JEROLD D. O'HARE

RYSER001395

LEGAL DESCRIPTION

PARCEL A

THAT PORTION OF GOVERNMENT LOT 1 OF SECTION 29, TOWNSHIP 22 NORTH, RANGE 2 EAST, W.M., IN KING COUNTY, WASHINGTON, LYING BETWEEN THE EAST LINE OF A STRIP OF LAND DEEDED TO STATE OF WASHINGTON FOR VASHON ISLAND HIGHWAY BY INSTRUMENT RECORDED UNDER AUDITOR'S FILE NO. 3728796, AND THE WEST LINE OF THE EAST 19.20 ACRES OF SAID GOVERNMENT LOT; EXCEPT THE NORTH 1650.00 FEET IN WIDTH THEREOF AND EXCEPT THAT PORTION THEREOF DEEDED TO KING COUNTY FOR C.H. PELLSBURY ROAD BY DEED RECORDED UNDER AUDITOR'S FILE NO. 2785301;

PARCEL B

THAT PORTION OF GOVERNMENT LOT 1 OF SECTION 29, TOWNSHIP 22 NORTH, RANGE 2 EAST, W.M., IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

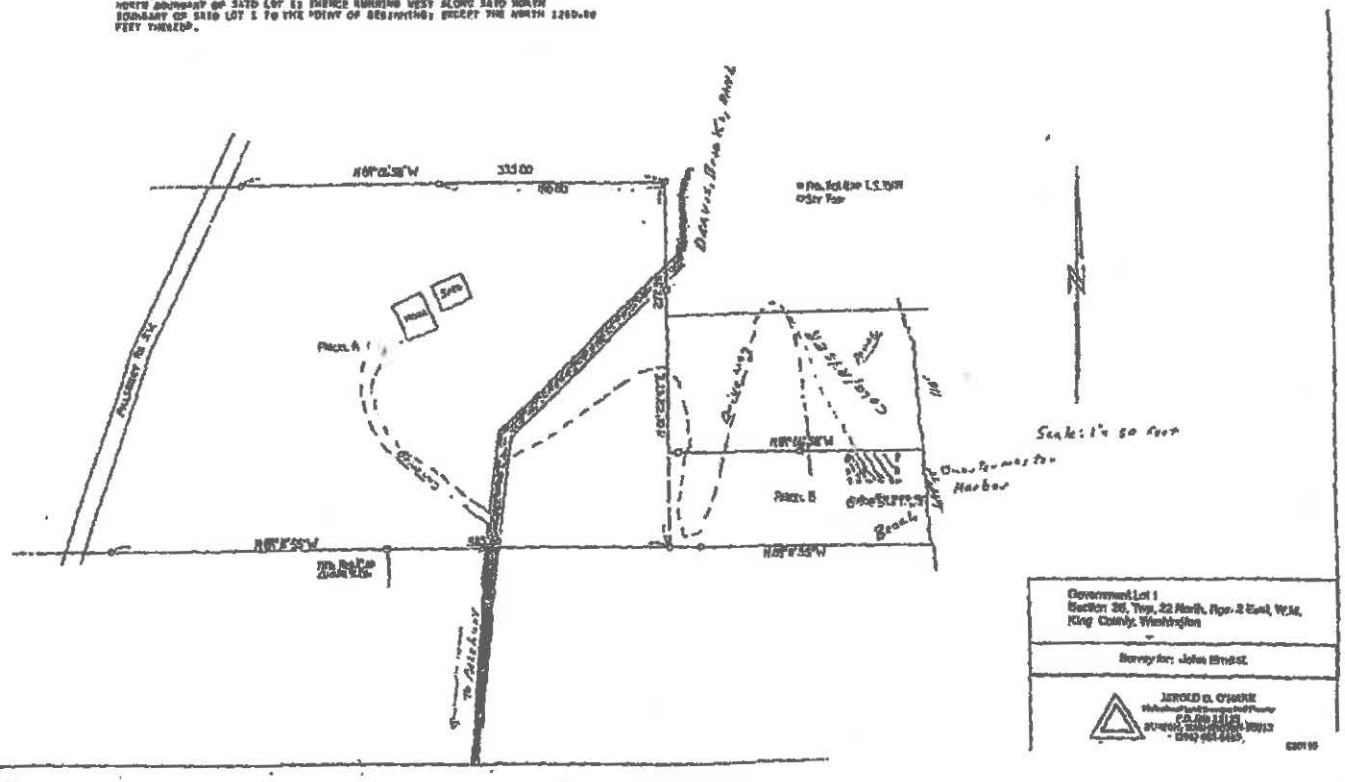
BEGINNING AT THE SOUTHEAST CORNER OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 24, TOWNSHIP 22 NORTH, RANGE 2 EAST, W.M., IN KING COUNTY, WASHINGTON; THENCE RUNNING SOUTH PARALLEL TO THE NORTH AND SOUTH LINES OF SAID SECTION TO THE SOUTH BOUNDARY LINE OF LOT 1 IN SECTION 29, SAID TOWNSHIP AND RANGE; THENCE RUNNING EAST ALONG THE SOUTH BOUNDARY LINE OF LOT 1 TO THE EAST BOUNDARY THEREOF; THENCE RUNNING NORTHERLY AND NORTHEASTERLY ALONG THE EAST BOUNDARY OF SAID LOT 1 TO THE NORTH BOUNDARY OF SAID LOT 1; THENCE RUNNING WEST ALONG SAID NORTH BOUNDARY OF SAID LOT 1 TO THE POINT OF BEGINNING; EXCEPT THE NORTH 1260.00 FEET THEREOF.

SURVEYOR'S CERTIFICATE

This map correctly represents a retracement of surveys recorded in Volume 18 of Surveys on page 182, Records of King County, Washington.

JERROLD D. O'HARE
Professional Land Surveyor
Certificate No. 9085
August 23, 2009

Instrument - Leica Set 3 Total Station
General survey
Basis for bearings: Assumed



RYSER001398

DECLARATION OF SERVICE

The undersigned declares and states that on the date listed below I deposited with the U.S. Postal Service, postage prepaid, a true and accurate copy of the **Brief of Respondents John and Margaret Ernest** for service on the following parties:

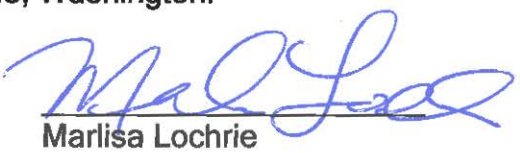
Jerry J. Moberg	☐	via Electronic Service
124 3rd Ave. SW	☐	via Legal Messenger
Ephrata, WA 98823	☑	via U.S. Mail
jmoberg@jmlawps.com	☑	via Electronic Mail (courtesy copy)
	☐	via Facsimile

Frank Siderius	☐	via Electronic Service
500 Union Street, Suite 847	☐	via Legal Messenger
Seattle, WA 98101-2394	☑	via U.S. Mail
franks@sidlon.com	☑	via Electronic Mail (courtesy copy)
	☐	via Facsimile

Original and one copy filed by hand delivery with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 11th day of May, 2015 at Seattle, Washington.



Marlisa Lochrie