

FILED
COURT OF APPEALS
JULY 10 11:21
STATE OF WASHINGTON
BY SW
CLERK

No. 39926-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KAREN HOWARTH-TUOMEY,

RESPONDENT

Vs.

RICHARD VINING AND RUBY VINING,

APPELLANT

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES	iii
II. INTRODUCTION	1
III. ASSIGNMENTS OF ERROR	2
IV. ISSUES PRESENTED	3
V. STATEMENT OF THE CASE	4
VI. ARGUMENT	12
A. The RCW4.24.630 Claim	12
B. Instruction Error	19
C. The award of attorney fees	20
D. Fees Incurred pursuing unsuccessful claims	23
VII. CONCLUSION	25

TABLE OF AUTHORITES

Statutes

RCW 4.24.6301, 2, 4, 12,13, 14,15,16, 17, 20, 21, 22, 23, 25, 26, 27, 29	
<u>Laws of 1994</u> , Ch. 280, §2	12

Cases

Bailey v. Hayden, 65 Wash. 57, 117 P. 720 (1911)	16
<i>Bloor v. Fritz</i> , 143 Wash. App. 718, 747, 180 P.2d 805 (2008).....	23
<i>Borden v. City of Olympia</i> , 113 Wash. App. 359, 53 P.3d 1020 (2002)...	15
<i>Bowers v. Transamerica Title Insurance</i> , 100 Wn.2d 581, 597, 600, 975 P.2d 193 (1983)	23
<i>Clipse v. Michels Pipeline Construction, Inc.</i> , 154 Wn. App. 573, 225 P.3d 492 (2010)	13, 14
<i>Colwell v. Etzell</i> , 119 Wash. App. 432, 81 P.2d 895 (2003).....	15
<i>Department of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 9, 43 P.3d 4 (2002)	12
<i>Henriksen v. Lyons</i> , 33 Wn. App. 123, 125, 652 P.2d 18 (1982).....	16
<i>Hensley v. Eckerhart</i> , 421 U.S. 424, 103 S.Ct. 1933 (1983)	22, 23

<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998).....	22
<i>Marassi v. Lau</i> , 71 Wn. App. 912, 916, 859 P.2d 605, (1993)	21, 22
<i>Saddle Mountain Minerals, L.L.C. v. Santiago Homes, Inc.</i> , 146 Wn. App. 69, 189 P.2d 821 (2008).....	17, 18
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wn.2d 141, 148, 859 P.2d. 1210 (1993). 22	
<i>Skamania Boom Co. v. Youmans</i> , 64 Wash. 94, 116 P. 645 (1911).....	16
<i>State v. Goree</i> , 36 Wn. App. 205, 208, 673 P.2d 194 (1983).....	19
<i>State v. J.M.</i> , 144 Wn.2d 472, 480, 28 P.3d 720 (2001)	12
<i>Transpac Dev., Inc. V. Young Suk Oh</i> , 132 Wn. App. 212, 219-220, 130 P.3d 892 (2006)	22
<i>Ventoza v. Anderson</i> , 14 Wn. App. 882, 895, 545 P.2d 1219 (1976).....	17
<i>Wallace v. Lewis County</i> , 134 Wn. App. 1, 15, 137 P.3d 101 (2006).....	16

INTRODUCTION

This case arises from a dispute between two neighbors. The parties own adjacent lots on Summit Lake, in Thurston County. Respondent, Mrs. Howarth-Tuomey, brought this suit alleging that the Vinings and their contractor trespassed and damaged her property during construction of the Vinings' home. It was alleged that shrubbery was damaged and dirt moved. It was never alleged that any trees were cut or damaged by the construction. Plaintiff also made claims of loss of lateral support and for injunctive relief, seeking hundreds of thousands of dollars in damages. Those claims were dismissed by Summary Judgment. At trial, Mrs. Howarth-Tuomey sought damages of \$5,000 and attorney fees. The attorney fees claim was based on the alleged violation of RCW 4.24.630.

The jury was given an instruction on RCW 4.24.630 with the provision dealing with an award of attorneys fees and costs was omitted. Defendant Vining took exception to this incomplete instruction, number fourteen. The jury found that a trespass had occurred and awarded damages of \$650.00. The jury found that Mr. Laney had not damaged Plaintiff. Plaintiff asked the Court for an award of fees and costs in excess of \$50,000. The trial court awarded \$25,000 and costs.

Appellants submit that the facts in this case, dealing with minor trespass and unintentional nominal damage, do not fall within the scope of the waste statute, RCW 4.24.630. The motions to dismiss this allegation should have been granted. Defendants also submit that the jury should have been aware that an award of damages under the statute could also lead to an award of attorney fees. Defendants submit that the award of fees and costs in this case is not reasonable and is so out of proportion to the damages that it constitutes an abuse of discretion.

ASSIGNMENTS OF ERROR

1. The Trial Court committed error by failing to dismiss the Plaintiff's claims under RCW 4.24.630 in the absence of any proof of intentional and substantial damage by the Defendants.
2. The Trial Court committed error by failing to give the complete text of RCW 4.24.630 in an instruction to the jury.
3. The Trial Court committed error by awarding attorney fees, pursuant to RCW 4.24.630, which were out of proportion to the \$650.00 award of damages and which were incurred in pursuit of unsuccessful claims.

ISSUES PRESENTED

1. Did the Trial Court commit reversible error by failing to dismiss claims brought under RCW 4.24.630 when there was no evidence that Defendants intentionally damaged Plaintiff's property and no evidence of removing trees, removing valuable substances, and no substantial damage or waste to Plaintiff's property?
2. Can Appellant be liable for a damages pursuant to RCW 4.24.630 if the party doing the work, D&L Construction, is found to be fault free?
3. Did the Trial Court commit reversible error by instructing the jury on the contents of RCW 4.24.630, but omitting the attorneys' fee provision over the exception of Defendants?
4. Did the Trial Court commit reversible error by awarding attorney fees, pursuant to RCW 4.24.630, which were out of proportion to the \$650.00 award of damages?
5. Did the Trial Court commit reversible error by granting attorney fees which were not incurred in the support of successful claims?

STATEMENT OF THE CASE

The parties to this case are neighbors. They own adjacent lots on Summit Lake Shore Road NW, in Thurston County. RP 64-65 These are waterfront lots consisting of very steep, but stable hillsides. RP 100 Ms. Howarth-Tuomey has lived there since 1993. RP 65 Her home is located at the base of the slope, next to the lake, which means the area allegedly damaged was not visible from her home. RP 126 The access to her home is a staircase with 82 steps. RP 100 The Vining home starts at the top of the slope and has three levels that “step down” the slope. RP 239-240 Vinings bought their lot in 2005. RP 197-198, 228 At that time there was no house on the lot, it was a partially wooded hillside. RP 229-230 Vinings also own the lot across the road, which houses a septic drainfield shared by the Vinings and Ms. Howarth-Tuomey. RP 188-190 When Vinings constructed their home, they complied with all permitting requirements. Todd Laney, who does business as D&L Construction, was Vinings’ excavation contractor. RP 323

While both properties front Summit Lake Shore Road, there is an unpaved access that starts on Vinings’ property and connects several properties, including the Howarth-Tuomey property. RP 103 There was no recorded easement for this access, but it was stipulated, during this case, that Respondent and the other neighbors had a prescriptive easement

across the Vining driveway. CP 208-215, RP 103 This is common at Summit Lake. RP 326 Respondent initially alleged that she had a recorded easement across the Vining driveway and that construction of the Vining Home would block her access. CP 9-12 Neither allegation proved correct. Mrs. Howarth-Tuomey admitted that the Vining driveway does not block her access to the easement. RP 121-122, EX 165 These claims were dismissed on summary Judgment. CP 208-215

Mrs. Howarth-Tuomey also made a claim for loss of lateral support on the common property line. CP 9-12 Photographic evidence showed that the excavation of this area pre-dated the Vinings' ownership of the land. EX 21-1 It was also undisputed that there had been no earth movement on this common property line. CP 63-64 This claim was also dismissed on Summary Judgment. CP 208-215

This was not the first construction on the Vining property, although it was the first construction while Mrs. Howarth-Toumey lived there. RP 72 In 1991 the prior owner, Trevor Seal, had partially cleared the property and constructed two ledges or shelves that step down the slope. RP 188-191, 324 The rock in this area is so hard that Mr. Trevor was required to use explosives. RP 186 This was done prior to Respondent's purchase of her home. RP 72 The evidence showed that Mr. Seal built a ramp or access to the property from the easement, in order

to move equipment in and debris out. RP 101-103, RP 191-192 While Respondent alleged that Vinings built this access, the pre-construction photographs proved otherwise. RP 277, Exhibit 21-1 Mrs. Howarth-Tuomey and Mr. Seal also testified that the placement of trees and the topography make this the only possible access to the Vining property. RP 102-103, 211-213 Mr. Laney concurred. RP 328-329 Pre-construction photographs also showed that Mr. Seal excavated along the common border between the Vining and Respondent's property. RP 232 The evidence is clear that was that Vinings did not excavate in that area. EX 21

The claims tried in this case were limited to nuisance, trespass, and damage to native vegetation. RP 123, CP 45-48 Respondent made no claim for emotional damages. RP 94-96 Plaintiff also made no claim for removal or damage to trees on her property. It is undisputed that no trees on Respondent's property were damaged or removed by Vinings. RP 94-96

Mrs. Howarth-Tuomey's trespass claims were primarily based on Vinings' contractor using the access road to move equipment in and out for 3-4 days. RP 114-115 The claim for damages under RCW 4.24.630 is based on the alleged damage to some native shrubbery. EX 123 RP 94 The claim for nuisance was based on being delayed from using the access

road a few times due to construction activity. RP 119 The total damages claimed came to \$5,000. Prior to trial, Vinings made a CR 68 Offer of Judgment in excess of this amount. CP 383-384 The jury awarded \$650.00 in damages. They specifically found that Defendant D&L were not liable for damages. With the exception of the attorney fee claim, this case could have been handled in Small Claims Court. The only reason this case went to trial was to incur attorney fees.

Respondent alleged that Vinings or their contractor trespassed on Plaintiff's property and removed dirt and vegetation. The report of their expert, Galen Wright, shows that there were, at most, 8.2 yards of dirt removed and some native vegetation was disturbed. RP 160 This was disputed by Mr. Laney. RP 331 Mr. Wright is erroneously including the pre-existing ramp in his estimate. RP 169-170 Mr. Wright was not shown pre-construction photograph, that clearly showed that this "ramp" was a pre-existing structure created by Mr. Seal, before he formed his opinions. He first saw them during cross examination. RP 170-172, EX 45, EX 167 The evidence in the record shows that the only damage to Plaintiff's property was the trampling of a small amount of native vegetation, referred to as "minimal weeds" by Mr. Laney. RP328-329 That area has now grown back to its natural state. RP 94 The jury apparently gave Mr. Wright's testimony no weight.

Respondent admitted that any dirt that was removed by Mr. Laney was replaced prior to the end of construction. RP 94 Mr. Laney testified that he crossed Plaintiffs property to gain access to the Vining Property, at the beginning and end of the job. RP 329 The excavation took only a few days. RP 329 Respondent also admits that Mr. Laney was on site for a maximum of four days, and only disturbed the dirt on her property once. RP 80 Due to her work schedule, Respondent was never present when Mr. Laney was working. RP 113 She also admits she never spoke to Mr. Vining or Mr. Laney about the excavation. RP 115-116

Mr. Laney's testimony was that he was on site for two or three days. RP 329. Mr. Vining agreed with this. RP 245 When he arrived, there was a cleared area, with "minimal weeds" that allowed access to the Vining property. RP 328-329, RP 247 This is the "ramp" described by Plaintiff. Photographs taken prior to construction show that it was in place and was not heavily vegetated prior to Mr. Laney's work. EX 44, 45, 46. Mr. Laney testified that he did no excavation in this area and that he only crossed it twice. RP 329-330 The excavators he used were John Deere 80's. RP 340-341 These are eight feet wide. RP 340-341 In response to a juror question, Mr. Laney testified that these machines are tracked and that they have "walking tracks," which are only 5/8" deep and which do minimal damage to the ground crossed. RP 340-341 Mr. Laney did not

remove 8.2 yards of dirt from the Plaintiff's land. RP 331 All debris was cleaned at the end of his job and the access road was improved by the addition of gravel. RP 335 The jury apparently gave Mr. Laney's testimony considerable weight, since they found that he had not caused any damage. CP 379-382

Respondent claims a violation of RCW 4.24.630, the waste statute, for the inadvertent removal of Salal bushes and other native vegetation. RP 94 Vinings contend that, even if this were true, RCW 4.24.630 does not apply under the facts of this case. While there was evidence of a technical trespass, in that someone walked on Respondent's property, there was no evidence of an intentional injury or substantial damage to Mrs. Howarth-Tuomey's property. The amount of the jury award verifies that any damage was minimal. Plaintiff did not meet the burden of proof required for the application of RCW 4.24.630.

Mr. Vining is not a builder. He has no experience in excavation, concrete, or building structures. RP 227-228, 245 Mr. Vining testified that he was at the site at most a few hours a day, every few days, while the excavation and concrete pouring was taking place. RP 245-246 He assumed that Mr. Laney would obtain any permission needed to use the access road. The road was not posted with no trespassing signs and Mr. Laney testified that it is common for contractors to use these roads. RP

326 Mr. Laney did no permanent damage to her property and replaced any dirt that was inadvertently removed. RP 335 Mr. Laney even spread additional gravel on the access road when he completed the job. RP 336 The trespass, if there was one, was on respondents driveway, not in her front yard. RP 336-337 There is no evidence in the record that Mr. Laney or Appellants intentionally damaged Mrs. Howarth-Tuomey's property.

Plaintiff's nuisance claim was based on delays caused by construction equipment. The construction of the Vining home involved a considerable amount of concrete pouring. RP 249-251 Respondent admitted that this was not done on the access road or on Respondent's property. RP 117-119 The testimony at trial was that the pours were done on the Vining driveway. RP 332-334 There was some pumping of concrete, but Mr. Petit, who lives on the side opposite to Respondent's property, allowed the pump to be placed on his property. RP 248-249, 334 The presence of the concrete trucks did inconvenience neighbors, but Mrs. Howarth-Tuomey testified that the truck drivers always moved their equipment when she asked. RP 119 Respondent called her brother-in-law, David Brewer, to testify that he was delayed two to three minutes by a concrete truck in Vining's driveway. RP 131-137 The Court, over the objection of Vinings allowed this testimony and also awarded the cost of

bringing the witness from Texas for this brief, irrelevant testimony. The jury awarded no damages for nuisance. CP 379-382

Appellants submit that this case was always about the Plaintiff's attorneys recovering fees. There was no real damage to the Howarth-Tuomey property and no evidence of any monetary loss. There certainly was no waste. No timber was damaged or removed. Any damage done was by the Appellants' contractor, not Appellants. There is no evidence in the record that Appellants intentionally damaged Respondent's property or removed any valuable property or trees. None of the elements necessary for an award of damages or fees under RCW 4.24.630 is present in this case. This is a punitive statute that should not be applied to one neighbor stepping on another's shrubbery. In addition, the attorney fee award in this case is completely out of proportion the damages alleged or recovered. The fee award also includes work on unsuccessful legal claims. At best, the fees should have been halted when the Offer of Judgment was made by Defendants.

ARGUMENT

A. The RCW4.24.630 Claim

Statutory interpretation is a matter for the Court and it is reviewed *de novo* on appeal. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The objective is to determine and carry out the legislature's intent, if possible by the plain meaning of the statute. The entire statute should be construed. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In this case, the statute in question was designed to prevent the theft of publicly owned timber, minerals and valuable property, as well as preventing intentional waste or destruction on public lands. Laws of 1994, Ch. 280, §2. The statute was modified in 1994 to include private property. It is a punitive statute, and it was never intended to apply in a case in which one neighbor merely steps on another's property or a trespasser unintentionally causes nominal damages. It is not a general trespass statute.

There is no allegation that the Vinings or their contractor, Todd Laney, removed or damaged any trees. At most, they damaged a small amount of native vegetation. RCW 4.24.630 is a statute designed to

prevent waste of real property and the theft of lumber and other resources.

That is not even alleged in this case. RCW 4.24.630 is as follows:

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, 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. 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.

(2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

The case law construing the statute makes it clear that it is intended to apply to intentional acts that cause serious damage. Mere trespass, even if it is intentional, is not enough to invoke this statute. There must also be proof on an intentional injury to the land or theft from the land. In a recent case, *Clipse v. Michels Pipeline Construction, Inc.*, 154 Wn. App. 573, 225 P.3d 492 (2010), the Court of Appeals held that merely going on the Plaintiff's property was not enough to satisfy the statute. The Court

held at 574:

On this certified question of statutory interpretation, we hold that a plaintiff may establish a claim for treble damages for wrongful trespass under RCW 4.24.630 only by showing that defendants intentionally and unreasonably committed one or more acts for which they knew or had reason to know they lacked authorization.

In *Cclipse, Supra*, the plaintiff alleged that a contractor performing work on the Plaintiff's sewer connection did not have permission to be on the property and that the contractor's negligence had caused damage to Plaintiff's property. The issue was what elements must be proven for the statute to apply. The Court states at 577-578:

There is no way to read "wrongfully" as describing the mere act of coming onto the land. The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land. By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. Presence on the land is required for all three. Thus, wrongfulness cannot refer to the mere act of entry upon the land.

In other words, there must be a specific intent to remove valuable property from the land, cause waste or injury to the land, or wrongfully injure personal property or improvements on the land. It is not sufficient to show an intentional trespass. There is no evidence in this case to support an allegation that the Vinings or their contractor had any intent to damage

Respondent's land. Without such evidence, the claim for damages under RCW 4.24.630 fails.

Other Courts have also construed this statute to interpret "wrongful" to mean intentional. In *Borden v. City of Olympia*, 113 Wash. App. 359, 53 P.3d 1020 (2002), the Court of Appeals denied relief under RCW 4.24.630 in a case involving flooding allegedly caused by improper development. The Court held, at 374:

By that statute's plain terms, a claimant must show that the defendant "wrongfully" caused waste or injury to land, and a defendant acts "wrongfully" only if he or she acts "intentionally." The evidence here does not support an inference that the City intentionally, as opposed to negligently, caused waste or injury to the Bordens' land. Accordingly, the trial court did not err by dismissing this claim.

In a case involving allegations of interference with an easement, *Colwell v. Etzell*, 119 Wash. App. 432, 81 P.2d 895 (2003), the trial court's application of RCW 4.24.630 was reversed. The Court held that "...RCW 4.24.630 is premised upon a wrongful invasion or physical trespass upon another's property, a commission of intentional and unreasonable acts upon another's property, and subsequent destruction of physical or personal property by the invader to another's property" Punitive damages are not favored in Washington. RCW 4.24.630 is a punitive statute, and punitive, or penal statutes are strictly construed.

Henriksen v. Lyons, 33 Wn. App. 123, 125, 652 P.2d 18 (1982), *Bailey v. Hayden*, 65 Wash. 57, 117 P. 720 (1911), *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 P. 645 (1911). Incidental and unintentional damage to some easily replaced native plants does not warrant the drastic remedy of this statute.

The facts of this case do not even support a claim for common law intentional trespass. Mrs. Howarth-Tuomey claims are basically for hurt feelings and annoyance. Since she was not at home when the work was done, this case is not even an inconvenience. In order to show an intentional trespass, Plaintiff must show that certain elements are present. Intentional trespass occurs only where there is "(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages." *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006). In this case, there are no actual and substantial damages, and nobody interfered with Plaintiff's possessory interest. She is also lacking "actual and substantial" damages. The jury awarded nominal damages in this case. There is no lasting damage to Plaintiffs property.

In this case, it is alleged that at most, a few native bushes were damaged by Vinings' contractor. No trees were cut down or

damaged. Mr. Laney testified that he did not intentionally harm any plants, and the jury apparently believed him. The facts of this case do not meet the requirements to apply this punitive statute. Finally, there is no evidence from which the trier of fact could draw an inference that Vinings or their contractors intentionally damaged the Howarth-Tuomey property. The trial court committed error by allowing this issue to go to the jury.

It is also clear from the record that Mr. Laney's Company, D&L Builders, was an independent contractor. Plaintiff's allegations all apply to actions of independent contractors. Vinings are not liable for the willful or illegal acts of their independent contractors in most cases. In this case, the subcontractor was found without fault. Appellant submits that the principal cannot be liable if the contractor is not, when the contractor performed the acts the claim is based upon. The following jury instruction was approved in *Ventoza v. Anderson*, 14 Wn. App. 882, 895, 545 P.2d 1219 (1976):

One who engages an independent contractor to perform logging operations is not liable to landowners for the trespasses of the independent contractor or those employed by the independent contractor, whether as agents or independent contractors themselves, unless the trespass is the result of the advice or direction of the principal, or unless the principal has notice of the trespass and fails to interfere.

The instruction was also approved in *Saddle Mountain Minerals, L.L.C. v.*

Santiago Homes, Inc., 146 Wn. App. 69, 189 P.2d 821 (2008). The evidence in this case is that Plaintiff never spoke to the contractor or the Vinings about her concerns over the alleged trespass. She never reported a crime. Mr. Vining's testimony was that he did not tell his contractors how to do their job and, if they needed permission to go on Plaintiff's property, he would leave it to the contractor to make such arrangements. Mr. Vining is not responsible for torts committed by his independent contractors.

The claim for treble damages and attorney fees under RCW 4.24.630 should have been dismissed on Summary Judgment or at the conclusion of Plaintiff's case in chief. There is no evidence to show that either defendant intentionally damaged the Howarth-Toumey property. The elements required to bring such a claim are not present in this case.

B. Instruction error: Failure to give the complete text of RCW 4.24.630 to the jury.

The Trial Court failed to give the entire text of the statute to the jury. This had the effect of misleading the jury about the seriousness of their findings. Had they known that Plaintiff would be receiving an award of attorney fees, it is unlikely that they would have awarded any damages. Instructions are proper when they permit each party to argue its theory of

the case, do not mislead the jury and properly inform the jury of the applicable law. *State v. Goree*, 36 Wn. App. 205, 208, 673 P.2d 194 (1983). In this case, by leaving out a key portion of the statute, the jury was not accurately informed of the law. If the jury were aware of an additional penalty for applying the statute, they may have been less likely to apply the statute. The nominal nature of the damage award in this case is an indication that the jury did not think the Plaintiff suffered actual and substantial damage. Had they known that Plaintiff would be able to recover attorney fees, it is quite likely they would have given no damages.

Defendants Proposed Instruction Number 14 initially had the entire text of RCW 4.24.630. This includes the award of attorney fees and costs. The Court redacted this portion of the instruction. Defendant Vining took an exception on the record to the new instruction. RP 353 In giving an instruction on the statute, the jury should know what the entire statute says, otherwise it is misleading. The argument that, because the Court, rather than the jury, would decide the amount of any award, the jury did not need to see the redacted portion of the statute. This argument ignores the juries need to know the extent of damages that are being awarded. Had the jury known that attorney fees would have been added to the \$650.00 they awarded, it is unlikely that any damages would have been awarded.

C. The award of attorney fees

If the Court decides that RCW 4.24.630 applies, the award of fees and costs in this case is excessive and should be reversed. Plaintiff received over \$30,000 in attorney fees and costs in a case in which the jury found damages of \$650.00. The jury awarded nominal damages of \$650 on one claim. Plaintiff asked for \$5000 in closing, and the award is about 13% of the requested damages. The percentage of the jury award to Plaintiff's original claims was much smaller.

In her answers to interrogatories, Plaintiff asked for these damages:

“18. State, in an itemized fashion, all damages you are claiming in this action.

Answer:

- a. Repair costs of \$123,500 per attached 4/23/08 estimate of Quality Services, Inc., trebled pursuant to RCW 4.24.630.
- b. Damages to vegetation and shrubbery of \$5,000 per attached report and estimate of Washington Forestry Consultants, Inc. trebled pursuant to RCW 4.24.630.
- c. General damages of \$50,000 for trespass and nuisance.”

The total damages alleged by Plaintiff come to \$178,500. \$650 is about 0.36%. One third of one percent. The award of any fees should be in similar proportion.

There is authority in Washington for awarding fees in proportion to

the recovery of damages. In *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605, (1993), the Court of Appeals, in ruling on a case involving the sale of a home, ruled that any award of attorney fees should be in proportion to Plaintiff's success. While that was a contract case dealing with a clause that granted fees to the prevailing party, the facts regarding unsuccessful claims and withdrawn claims are similar to this case. The Court states, at 816:

In the case at hand, the Marassis did receive an affirmative judgment, but on only 2 of the original 12 claims. In this circumstance, we believe that application of the net affirmative judgment rule or "substantially prevailing" standard does not obtain a fair or just result. Under the affirmative judgment rule, the Marassis are prevailing parties because they received an affirmative judgment in their favor, even though Dynasty successfully defended against the majority of the claims. Similarly, the substantially prevailing standard set forth in *Rowe v. Floyd, supra*, does not adequately resolve the issue. Although appropriate in some cases, it fails on facts such as these where multiple distinct and severable contract claims are at issue. In such a situation, the question of which party has substantially prevailed becomes extremely subjective and difficult to assess.

We hold that when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate. A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset.

The facts in this case support a proportionality approach. Our Supreme

Court has held that trial courts should take an active role in determining the reasonableness of fee awards. See: *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 148, 859 P.2d. 1210 (1993). The Court has also said that the trial court should examine the fees claimed for reasonableness, and not simply accept counsel's fee affidavit. *Mahler v. Szucs*, 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998). The holding in *Marassi, Supra*, has been cited often and is the established rule of law in Washington, at least in contract cases. See: *Transpac Dev., Inc. V. Young Suk Oh*, 132 Wn. App. 212, 219-220, 130 P.3d 892 (2006). The Court may also be guided by federal law in this area. In *Hensley v. Eckerhart*, 421 U.S. 424, 103 S.Ct. 1933 (1983), the Supreme Court was faced with the issue of Plaintiff's claiming a large fee in a case with limited success and many unsuccessful claims. This was a claim under 42 USC §1988, which, like RCW 4.24.630, defines attorney's fees as a "cost." *Hensley*, at 103 S.Ct. 426. The Court states, at 103 S.Ct. 436: "Again, the most critical factor is the degree of success obtained." The Court goes on to state, at 103 S.Ct. 440:

We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not

adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

In this case, Plaintiff started the case by alleging a number of untenable claims, made six figure demands, and wound up with a jury award of \$650. The amount of any fee award should be in proportion to the amount of damages recovered.

D. Fees Incurred pursuing unsuccessful claims

Mrs. Howarth-Tuomey is not entitled to recover fees and costs for her unsuccessful claims and the claims outside the scope of RCW 4.24.630. See *Bloor v. Fritz*, 143 Wash. App. 718, 747, 180 P.2d 805 (2008) and *Bowers v. Transamerica Title Insurance*, 100 Wn.2d 581, 597, 600, 975 P.2d 193 (1983). Mrs. Howarth-Tuomey originally alleged claims for violation of a recorded easement, nuisance, loss of lateral support, trespass and damage to property. At trial Plaintiff asked for damages of inconvenience and annoyance. All of these claims were dismissed by the Court or resulted in no damage award from the jury. The expenses of Plaintiff's experts McClure and Mr. Goodrum (Quality Services, Inc.) were related to claims dismissed prior to the case going to trial. None of these expenses, or the fees for meeting with these experts, the work done pursuing the dismissed claims, the claims against D&L

Builders, or time spent resisting summary judgment on these claims are awardable under any theory. The trial court awarded the travel expenses of Mr. Brewer, who testified in support of the unsuccessful nuisance claim, against Vinings. This was clearly erroneous and not related to RCW 4.24.630.

Plaintiff's Amended Complaint and the Partial Summary Judgment motion made by Plaintiff to state a claim for a prescriptive easement also had nothing to do with the claim under RCW 4.24.630. This would include investigation of Plaintiff's claim of a prescriptive easement. Defendants did not resist this claim or Plaintiff's motion.

Mrs. Howarth-Tuomey sued Todd Laney, d/b/a D&L Builders as well as the Vinings. D&L was added to the case by an amended complaint. Plaintiff was unsuccessful in all claims against D&L. None of the time spent pursuing this claim can properly be awarded against Defendants Vining, under any theory.

The affidavit submitted in support of a claim for fees is found at CP 445. Most of the time spent on the \$5,000 claim is not reflected in the bills attached to the declaration of Mrs. Howarth-Tuomey's counsel. While this trial took several days, the costs and fees associated with the trial could have been avoided by accepting the Offer of Judgment. The \$5,000 offer was increased to \$7,500 prior to trial. CP 393 Trials are not

supposed to be for the benefits of the attorneys. Mrs. Howarth-Tuomey had very little to gain by going to trial and will get a pittance compared to the amount paid to her attorneys if this case is upheld.

CONCLUSION

The facts of this case show a mountain being made out of a molehill and then reduced back to a molehill. By the time this case went to trial, Mrs. Howarth-Tuomey's monetary claims against her neighbor had been dismissed. She was seeking small portion of the damages she originally claimed, and the jury awarded her only nominal damages. The most she could have received in trial was \$5,000. Why take such a case to trial? The answer is to attempt to recover a bonanza in attorney fees. There is no other reason.

The record in this case does not show any proof that Vinings or Mr. Laney intentionally caused damage to her property or that Respondent sustained actual and substantial damages. It is true that Mr. Laney drove some equipment over a remote corner of her property and may have walked on her property, but there is no evidence of damages. The jury made no award against Mr. Laney. However, mere trespass is insufficient to bring this case within the coverage of RCW 4.24.630. There must also be proof of the theft of trees or other valuable property or the intentional

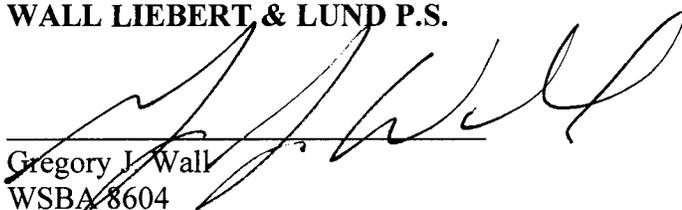
damage to Respondent's property. There is no proof of these required elements. The work was done by an independent contractor, who the jury exonerated of any fault. If the contractor did nothing wrong, the principal should also be exonerated. The claim based on that statute is the sole basis for an award of attorney fees and costs. That claim should not have been allowed to go to the jury. It should have been dismissed on Summary Judgment or at the conclusion of Plaintiff's case. This Court should reverse the judgment in this case and dismiss this action.

The award of attorney fees and costs in this case is unwarranted, even if this were a proper case for such an award. The Court did not carefully analyze the fee request. It contains a great deal of work done on unsuccessful claims, work that did not need to be done and work that took place after settlement offers that would have given the Plaintiff a larger recovery than the jury award. The award of attorney fees and costs is completely disproportionate to the damage award. The award is over \$30,000.00, based on a damage award of 650.00. Awards such as this encourage litigation for litigation's sake. Proportionality has been approved by our Supreme Court and by the Supreme Court of the United States. It prevents the injustice of the party who kept litigation going for the purpose of running up fees from benefiting from that tactic. At a minimum, the award should be reduced to an amount in proportion to the

jury award. This case should be reversed.

Respectfully submitted,

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COURT OF APPEALS
DIVISION II

10 MAY 18 PM 12:20
STATE OF WASHINGTON
BY Sandra Rivas
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KAREN A. HOWARTH-TUOMEY, an
unmarried person,

Plaintiff/Respondent,

vs.
RICHARD VINING AND RUBY VINING,
husband and wife, and the marital community
thereof;

Defendants/Appellants.

NO. 39926-1-II

DECLARATION OF MAILING

Sandra Rivas, under penalty of perjury under the laws of the State of Washington,
hereby declares as follows:

1. That I am over the age of eighteen (18) years, not a party to this action, and am
competent to make this Declaration;
2. That on May 17, 2010, I sent via first class mail, a copy of the Appellants' Reply
Brief, together with a copy of this Declaration to the Court of Appeals, Division II,
and to the attorneys for Respondent.

Court of Appeals or the State of Washington
Division II
950 Broadway, Suite 300, MS TB-06
Tacoma, WA 98402-4454

Attorney for Respondent:
J. Michael Morgan

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5 DATED this 17th day of May, 2010.

6 
7 Sandra Rivas