

No. 39926-1-II  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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KAREN HOWARTH-TUOMEY,  
*RESPONDENT*

Vs.

RICHARD VINING AND RUBY VINING,  
*APPELLANTS*

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APPELLANTS' REPLY BRIEF

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**I.**  
**REPLY STATEMENT OF THE CASE**

Mr. and Mrs. Vining own two lots on Summit Lake Way, one on either side of the road. Their home is located on the downhill side while the upland side serves as a septic drain field. This is a common arrangement on this lake because the slopes adjacent to the lake are on bedrock. RP 188, 228 This case only involves the lakeside, or downhill property. Respondent's statement of the case is disingenuous and intentionally confusing. For example, the logging and crane use referred to by Respondent dealt with logging the upland side, around the drain field, in 2006. RP 73-74 It had nothing to do with the claims made in this case. There was some logging done on the lakeside lot, but it is undisputed that no crane was used in this logging, due to overhead power lines. RP 232 This case deals with a very short period of time when Mr. Laney was doing some excavation on the Vining property. Ms. Howarth-Tuomey testified that this involved three to four days work in 2007. RP 114-115 Ms. Howarth-Tuomey was not at home when this occurred. RP 113 She also admitted that her septic system was not damaged at any time. RP 112-113 Mr. Laney's truck was partially on Respondent's property for one day. RP 114-115 It was also admitted by Respondent that no trees on her property were damaged, cut, or removed. RP 94-96

Respondent's statement that this was a "dense stand of native vegetation" is unsupported by the record. Respondent testified that there were two Huckleberry bushes and some Salal growing in the area. RP 76-77. Mr. Laney described the area as "minimal weeds." RP 239. Mr. Laney did no excavation of this area. He used the path constructed by Mr. Seal. RP 330 Photographic evidence taken before and after

construction show that the Huckleberry and Salal are still there. EX 44, RP 252 The jury conclusively rejected the testimony of Mr. Wright on this subject. Mr. Laney used the same path as Mr. Seal. RP 247. Mr. Seal, who blasted rock with explosives and removed debris with excavators and dump trucks in the same area, testified that he did not damage the vegetation. RP 194-195 Mr. Vining testified, with photographic support, that the area in question looks the same now as it did in 2007. RP 252-253

Respondent has a prescriptive easement over part of the Vining's driveway. In the Complaint, Respondent alleged that she had an express easement. The Prescriptive claim was made only after it became clear that no express easement existed and in response to Vinings' Motion for Summary Judgment. CP 63-64 The driveway which serves Respondent's house also serves several other residences. RP 103 Mr. Laney referred to this as an "access road," and testified that these roads are common in this area, and since there were no signs or other indication that this was not a public way, he used this for the three to four days of excavating the Vining lot. RP 235-237 This is the area of the Respondent's property used by Vining's contractor. It was not damaged or excavated. All material was cleaned up at the end of Mr. Laney's work and all debris was removed. RP 335-336 Mr. Laney testified that the Vinings paid for a load of gravel he put down at the completion of work. RP 337 In response to a juror question, Mr. Laney testified that his excavator has special tracks, only 5/8 inch deep, to minimize damage to property. RP 340-341

Respondent also implies that concrete pours for the construction of the Vining home were on her property. There is no evidence of this in the record. The concrete pours were done in two ways. First, by direct pour from the Vining driveway; second, by

means of a concrete pump truck. The truck was parked on the Petit property, which is on the opposite side of the property from Respondent. This was done by arrangement with Mr. Petit. RP 248 Respondent admitted that the concrete trucks were never on her driveway or property. RP 117-119 She also admitted that the workers always moved their equipment to allow access when requested. RP 119

Respondent's Brief also implies that there was a history of discord between the parties. In fact, they hardly knew each other. RP 258 Both testified that they had only spoken a handful of times before the construction was complete. Even though she had called Mr. Vining on one prior occasion, she did not call him when she claims she found that a ramp had been dug on her property. RP 116, 258 Mr. Vining denied saying he did not ask for permission. RP 249.

The argument that a ramp had been dug, or that this is a heavily vegetated area was conclusively rebutted by the photographic evidence at trial. RP 227, 247, Ex.21-1, 44 The so-called ramp, if there was one, was constructed by Mr. Seal many years prior to the Vinings purchase of the property. It is clearly shown in pre-construction photographs. Ex. 21-1, 44 The statement that Mr. Seal accessed the downhill property from above is untrue. Photographs taken before any excavation show that access to the top of the property was blocked by large Douglas Fir trees. Mr. Seal admitted that the only way he could get equipment on the property or remove the blasted debris from the property was by crossing the same corner of Respondent's property. The claim that eight yards of dirt were removed by Mr. Laney was rebutted by his testimony. It is also clear that the jury rejected that argument. Respondent's only damage witness was Mr. Wright. He opined that Appellants' contractor caused \$5,000 in damages. The jury award is for \$650.00.

This case was about a technical trespass, with no material damage to Respondent's property during a 3-4 day period. The evidence did not support the claim of damage to the property and the jury made a nominal award. The case was really about the collection of attorney fees, not the compensation of the Plaintiff for the damages she alleged.

## II. ARGUMENT

### A. The Trial Court Should Have Dismissed the RCW 4.24.630 Claim.

Respondent is correct that Vinings moved to dismiss this claim twice. The first time was on Summary Judgment. The Court ruled that there were material issues of fact preventing the dismissal of the claim. Vinings also made a CR 50 Motion at the end of Plaintiff's case-in-chief. RP 261-262 The Court should have granted this motion. Plaintiff had failed to prove an essential element of the RCW 4.24.630 claim: an intent to injure her property or commit waste on her property. While a minor trespass over the corner of Plaintiff's property had been proven, there was no evidence that the defendants had intentionally damaged Plaintiff's property or removed anything of value. Respondent's Brief shows a misunderstanding of the law. In *Clipse v. Michels Pipeline Construction, Inc.*, 154 Wn. App. 573, 225 P.3d 492 (2010), it was established the merely going on the property of another does not fall within the statute. It states: "... wrongfulness cannot refer to the mere act of entry on the land." The term "wrongfulness" under this statute has been interpreted to mean intentional. Mere negligence or carelessness does not meet the requirements of the statute. *Borden v. City of Olympia*, 113 Wash. App. 359, 374, 53 P.3d 1020 (2002). It was not alleged that Vinings or D&L took anything from Respondent's property or that they damaged any

structure on the property. Therefore, the only way Plaintiffs could recover was to show that Vinings or D&L “(2) wrongfully causing waste or injury to the land.” There is no evidence in the record that Vinings or their independent contractor intentionally caused any waste or damage to Respondent’s property.

Respondent’s brief argues that acting “willfully” is the same thing as acting wrongfully under the statute in question. This is not correct. Respondent’s brief cites *Blake v. Grant*, 65 Wn.2d 410, 412, 397 P.2d 843 (1964) for this proposition. *Blake* is a case construing a different statute, RCW 64.12.030, the traditional timber trespass statute. That statute “requires an element of willfulness” to impose treble damages. *Bailey v. Hayden*, 65 Wash. 57, 117 P.720 (1911). Willfulness under the traditional timber trespass statute is not the same as intentional. As the *Blake* case points out at 412, merely failing to check the property line, an act of negligence, can establish the element of willfulness required for RCW 64.12.030. The standard for RCW 4.24.630 is different. Respondent also incorrectly relies on *Henrikson v. Lyons*, 33 Wn. App. 123, 652 P.2d 18 (1982) and *Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879, 289 P.2d 875 (1955), at page 22 of Respondent’s Brief. These are cases construing RCW 64.12.030. This is not timber trespass case. No claim based on this statute was ever made and it was admitted by Respondent that no trees were damaged or removed. RP 94-96 RCW 4.24.630(2) expressly excludes the application of the statute to any case covered by RCW 64.12.030. Respondent is attempting to apply the standards of a statute that has no application to the issues in this case.

The Courts have imposed a higher standard of proof on RCW 4.24.630, which has higher penalties. RCW 4.24.630 uses the word “wrongfully,” not willfully, to describe

the intentional element of the statute. As discussed above, this means intentionally. *Clipse, supra*, makes it clear that the intentional act that must be proven is the waste or damage to the land, not merely an intentional trespass. In order to recover, a plaintiff must show that the defendant intentionally committed waste or intentionally injured the plaintiff's property. \$650 damage can hardly be called waste. There is no evidence in the record to support a claim of intentional injury to Respondent's property.

In the absence of any evidence intentional injury to Respondent's land, the Court should have dismissed this claim at the end of Plaintiff's case. The judgment for treble damages, attorneys fees and costs should be reversed.

**B. The Finding That D&L Construction Did Not Commit An Intentional Act Of Waste Or Injury To Land Is Inconsistent With A Finding Against Vinings.**

Appellants have raised this issue as an assignment of error and an issue presented in the case. See Assignment of Error 1 and Issues Presented 2. The Vinings did no excavation on their property. They relied on their independent contractor. There is no evidence in the record that they instructed Mr. Laney to damage Respondents property or commit waste on her property. The jury found that D&L Construction did not commit waste or injury to Respondent's property. At most, the jury found that Mr. Vining allowed or instructed D&L to cross a corner of Respondent's property to do excavation on the Vining property. This could arguably show only an intentional trespass, not an intent to damage Plaintiff's property. As discussed above, mere trespass does not satisfy RCW 4.24.630. The Vinings only acted through their independent contractor. If Mr. Laney did not injure Respondent's property, then it was not injured. This forms another basis for the dismissal of the claim for treble damages and fees under RCW 4.24.630.

Respondent again confuses simple trespass with the intentional wrongful acts required to apply that statute

**C. Instruction 14 Should Have Contained the Entire Statute.**

Jury instructions are sufficient if, when read as a whole, the instructions properly inform the jury of the applicable law, permit each party to argue their theory of the case, and are not misleading. *Boeing Co. v. Key*, 101 Wn. App. 629, 632-633, 5 P.3d 16 (2000). Instructions are reviewed *de novo*. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001). The issue here is whether giving an instruction that quotes part of a statute, leaving out a key portion of that statute, is properly informing the jury of the law. A party is entitled to jury instructions that are a correct statement of the law. *State v. Haberman*, 105 Wn. App. 926, 936, 22 P.3d 264 (2001). Appellants contend that Instruction No. 14 misled the jury about the result of their finding. The jury was entitled to be instructed on the entire statute, not an abbreviated version, and to know that an award of damages included giving Plaintiff attorney fees and costs. If the jury had been aware that the award of nominal damages given would result in a substantial award of fees, it is quite likely they would have given no damages.

**D. Appellants Waived No Rights By Following The Court's Order To Craft An Order On Attorney Fees.**

The trial court, after hearing the arguments of both parties on the issue of attorney fees, instructed the parties to work out an agreed order and judgment. The Court determined that Plaintiff would be awarded about one-half of the fees requested. After extensive argument, the Court, at page 17 of the record of the post trial hearing, stated:

My sense is that probably about half of what was requested is really reasonable given the outcome of this case, but, as I said, I did not go through it with a fine tooth comb because I have too many other cases I am looking at to do that.

The Court at page 18 of this record, then instructed the parties to see if they could prepare an agreed order, based on the Court's ruling. The objections to awarding fees and costs at all, awarding specific costs, awarding fees for unsuccessful claims, and awarding fees greatly out of proportion to damages were extensively briefed and argued. Once the Court ruled, the parties drafted an agreed order in accordance with the Court's ruling. Under these circumstances, any argument that Appellants waived their rights on appeal is ridiculous.

A party does not have the right to reargue a motion when presenting an order based on the Court's prior ruling. Nor does a party have the right to disobey the Court's directives. Respondent cites no authority to support this argument. The case cited by Respondent, *Nguyen v. Sacred Heart Hospital*, 97 Wn. 2d 728, 987 P.2d 634 (1999), is not on point. That case deals with Plaintiff's who did not raise cause of action for outrage until their case was dismissed on Summary Judgment. The claim was only raised on appeal. *Nguyen, Supra*, at 736. That bears no resemblance to this case. Appellants extensively briefed and argued their objections to the fee and cost award before the trial court.

**E. The Award Of Attorney Fees Is Clearly Unreasonable.**

Appellants have fully briefed this issue in its opening brief. However, the court should consider the public policy implications of rewarding parties who bring suits solely for the purpose of running up attorney fees. By the time this case got to trial, the Plaintiff was seeking an award of damages of \$5000. Plaintiff had been offered more than that in

a CR 68 Offer of Judgment. The only reason to go to trial was to accrue attorney fees and costs. The award of fees is greatly out of proportion to the award of damages and clearly awards fees for work on unsuccessful claims. Appellants submit that the Court should not reach this issue because the RCW 4.24.630 claim should be dismissed. However, if this issue is reached, the Court should order that the fees be greatly reduced or eliminated.

### **III. CONCLUSION**

This case involved, at most, a minor trespass by Appellants' contractor over a small portion of Respondent's property. There is absolutely no evidence in the record that Mr. Vining or his independent contractor, D&L Construction, intentionally committed waste or intentionally harmed Ms. Howarth-Tuomey's property. No trees were cut or damaged, any dirt that was moved was replaced; extra gravel was placed on the easement; and the property was left as it was found. The excavation was only done on the Vining property. Respondent's continued assertions that the Vinings and Mr. Laney intentionally trespassed does not bring this case within the operation of RCW 4.24.630. Mere trespass is not enough to trigger this punitive statute. If it did, every time one stepped on a neighbor's rose bush would give rise to a cause of action. That statute, as construed by the Courts, requires proof of intentional waste or intentional harm to the Respondent's property. That evidence does not exist in the record of this case. The Court should reverse the Court below and dismiss the RCW 4.24.630 claim.

Plaintiff requested \$5000 in damages and were awarded a nominal sum of \$650. This was not a case about recovering damages for the client. This was a case about collecting attorney fees. This was not the result intended by the legislature when it

enacted RCW 4.24.630, and it is not a result that should be condoned or countenanced by this Court. Bringing lawsuits merely for the generation of fees is against public policy and should not be encouraged. In this case, the award of fees is completely out of proportion to the nominal award of damages.

The Trial Court should have dismissed the RCW 4.24.630 claim at the end of Plaintiff's case, pursuant to CR 50. There was a complete absence of evidence of intent to damage Respondent's property. That would have also eliminated the question of attorney fees and expenses. This Court should reverse this decision and remand the matter for an award of damages of \$650 and declaring the Appellants the prevailing party pursuant to CR 68.

Respectfully submitted,

**WALL LIEBERT & LUND P.S.**

A handwritten signature in black ink, appearing to read "Gregory J. Wall", is written over a horizontal line.

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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**

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Donna Terryll, under penalty of perjury under the laws of the State of Washington,  
hereby declares as follows:

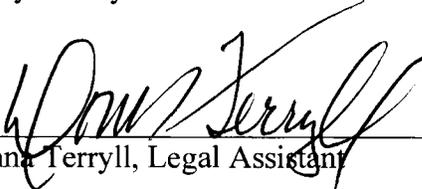
1. That I am over the age of eighteen (18) years, not a party to this action, and am competent to make this Declaration;
2. That on July 19, 2010, I sent via first class mail, original/copy of Appellants' Reply Brief, together with a copy of this Declaration, to:

Court of Appeals Division II  
950 Broadway, Suite 300  
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DATED this 19<sup>th</sup> day of July 2010.

  
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Donna Terryll, Legal Assistant