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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**KAREN A. HOWARTH-TUOMEY,**

Respondent,

v.

**RICHARD AND RUBY VINING, et al.,**

Appellants.

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**BRIEF OF RESPONDENT KAREN A. HOWARTH-TUOMEY**

---

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**ORIGINAL**

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## I. INTRODUCTION

Petitioner Richard Vining (Vining) and Respondent Karen Tuomey (Tuomey) own adjacent lots facing Summit Lake in the Olympia area. The lots are narrow and steep, and Tuomey's is heavily forested. In 2006 Vining logged his property and in spring 2007 began the excavation and site work to build a three-story home. Vining's contractor, Todd Laney of D & L Builders, determined that the only practical access into the Vining lot was over part of the southwest corner of the Tuomey property, over which Vining has no legal right of entry. Vining knew he had no permission to go on any part of the Tuomey property, and had reason to believe that such permission would not be forthcoming, because the previous summer Tuomey had told him she did not want any equipment on her property.

Vining told Laney to take equipment over Tuomey's driveway anyway. One day while Tuomey was at work, D & L dug out a berm and shrubbery on Tuomey's side of the boundary line, lowering her grade by four feet, cutting a ramp to enable excavating machinery to enter the Vining property from the side. For several weeks, Vining's contractors ran dump trucks, excavating machines, pickup trucks and other equipment as they pleased over Tuomey's driveway and parking area. Vining directed or at a minimum supervised and monitored the damage and

trespassing. Much of the compelling trial evidence consisted of numerous photographs taken by Vining while he personally trespassed on the Tuomey property. Vining's contractors ultimately partially backfilled the damaged area, but left it one to two feet lower than its historic level and denuded of vegetation.

Tuomey sued for injunctive relief; to confirm a prescriptive easement for part of her driveway running over the Vining property; and for damages based on theories of nuisance, removal of lateral support, negligence and willful damage to property per RCW 4.24.630. Less than three weeks before trial, the parties dismissed the claims for injunction, prescriptive easement and loss of lateral support by agreed order.

The jury found that Vining and D & L had committed common law trespass but with zero damages, but found against Vining on the RCW 4.24.630 claim, with damages of \$650.00. After trial, the trial court trebled the damage award and entered judgment for \$1,950.00 damages, \$6,241.56 costs and \$25,000.00 attorney's fees per RCW 4.24.630.

Vining's arguments in this appeal are almost totally fact based and devoid of merit.

First, the trial evidence supported every element that Vining wrongfully damaged Tuomey's property per RCW 4.24.630.

Second, the trial court correctly omitted from Instruction No. 14 the language of RCW 4.24.630 regarding mandatory reimbursement of costs and attorney's fees, because such language relates to a question of law to be decided by the court, with no action from the jury. The jury thus correctly based its verdict on the evidence, and not on improper speculation about legal costs.

Third, there is no merit to Vining's contention that he cannot be held liable for violating RCW 4.24.630 when D & L Builders was not. The jury correctly applied Instruction 13, finding that Vining had the requisite intent per Instruction No. 14 when Laney did not. Vining did not make any assignment of error on this point, and failed to preserve error because he failed to raise the argument or request differently worded jury instructions below. He provides no legal authority or analysis to support his argument on such issue. Finally, Washington law does not support his position.

Fourth, the trial court properly awarded \$25,000.00 attorney's fees to Tuomey as a cost per RCW 4.24.630(1). Tuomey originally asked the court to award approximately \$50,000.00 in attorney's fees. Vining's counsel argued that the claimed amount was excessive because it included the prosecution of issues that had settled out of the case before trial. The judge indicated that her sense was that a reasonable amount of attorney's

fees would be somewhere about half of the claimed amount, and directed counsel to step into the hallway and try to reach agreement as to what were or were not related to the RCW 4.24.630 claim. Counsel did so, and Tuomey's counsel conceded a blanket 50% reduction in his claimed fees based on the court's comments. Vining's attorney signed a stipulated judgment awarding such amount, which the court entered without further argument or objection. By stipulating to the final judgment, appellant's counsel waived the disingenuous argument that the final judgment included attorney's fees that were either (1) excessive or (2) not reasonably related to the claims that got tried. Moreover, although the court did not make a formal ruling, the fact that the parties stipulated to a figure that was in accordance with her comments amounted to a discretionary ruling that should be upheld.

## **II. RESTATEMENT OF THE ISSUES**

A. Whether the trial court properly denied Vining's motions to dismiss the RCW 4.24.630 claims?

B. Whether RCW 4.24.630(1) applies where one party goes onto the property of another and wrongfully damages the land or improvements thereto, even where the trier of fact awards a small damages figure?

C. Whether Vining acted “wrongfully” under RCW 4.24.630 by intentionally directing his contractors to trespass on Tuomey’s property and where he had actual knowledge of the trespassing and damage, but received the benefit of and failed to stop such actions?

D. Whether substantial evidence supported the jury’s award of actual damages?

E. Whether judgment was properly entered against Vining for his violation of RCW 4.24.630, even though the jury did not find such a violation on the part of D & L Builders?

F. Whether the trial court correctly omitted the statutory language of RCW 4.24.630 regarding costs and attorney’s fees from Instruction No. 14 because such related to a question of law not to be determined by the jury?

G. Whether the trial court properly awarded \$25,000.00 in attorney’s fees as an appropriate exercise of discretion?

H. Whether Vining waived the right to challenge the attorney’s fees award on appeal, where his attorney stipulated to a 50% reduction in the claimed attorney’s fees as an accord and satisfaction as to which fees related to the matters that got tried and which fees did not?

I. Whether this court should award Tuomey her attorney’s fees and costs on appeal?

### **III. RESPONDENT'S STATEMENT OF THE CASE**

#### **1. FACTUAL SUMMARY**

Tuomey has owned and lived at 945 Summit Lake Shore Road NW in Olympia since 1993. (RP 65) Vining owns the adjacent property to the southwest at 943 Summit Lake Shore Road, NW. Both properties face Summit Lake, in the Olympia area. (Ex. 34)

Tuomey's home is at the base of a steep forested slope, next to the lake. RP 99-100, 235. Tuomey's access is a driveway off of Summit Lake Shore Road. One of Tuomey's claims that settled before trial was for a prescriptive easement over a small portion of her driveway passing over Vining's property. (RP 189; CP 208-215)

The Tuomey property has a parking area at the top of the slope demarcated by telephone poles lying on the ground. Prior to Vining's project, a berm and a dense stand of native vegetation on Tuomey's side of the property line and behind the telephone poles formed a natural barrier between the properties. (RP 75-77, 78, 175)

Vining bought his property from Trevor Seal in 2006. In the early 1990s, Seal cut two large shelves in the lot, which required blasting and removal of rock. (RP 188) Seal's excavators had accessed the lot directly from the street. (RP 189) Some of his equipment did traverse what is now the Tuomey property, with the permission of Tuomey's predecessor, over

an area closer to the street (to the southwest) than the area of damage in the present case. Such activity did not involve any excavation on or removal of vegetation from Tuomey's lot. (RP 194-195) Seal had planned to build a log home, which would have involved setting the logs down from the street side of the lot. His plans did not involve any need to use part of Tuomey's property. (RP 191-195)

Prior to beginning his home construction project, Vining had the site professionally surveyed, with the lines and corners clearly marked. (RP 51-54, 78, 268-269; EX 34, EX 15-A)

Vining has no easement over any part of Tuomey's property. (RP 189) In the summer of 2006, Vining asked Tuomey's permission for his loggers to place a crane on her property. She refused his request, telling Vining she did not want any heavy equipment on her property. (RP 73-74) The Vinings on two different occasions asked Tuomey if they could remove trees from her property. She declined those requests. (RP 74) Karen's partner Greg Bray reiterated to Vining's loggers that there was to be no heavy equipment on Tuomey's property. (RP 142, 233) Thereafter, Vining never asked Tuomey for permission to have his contractors enter. (RP 142, 189, 270-271) Vining knew that if he asked, such permission would not be forthcoming. Karen Tuomey testified:

He [Vining] walked over and said “What do you want me to do?” And I said “I want you to stay on your side of the line.” And he said “**Well, I would have asked, but I knew what the answer was going to be.**”<sup>1</sup>

Vining hired Todd Laney dba D & L Builders to excavate the site and, through his subcontractors, to build the forms and pour concrete for the new home’s massive foundation. (RP 242, 244) Karen returned home after work one day to find D & L’s two large excavating machines parked on and blocking her driveway. D & L had dug a large hole, lowering the grade on her side of the line by four feet to form a ramp down into the Vining property. (RP 75, 79, 139)

Vining never told the contractors to stay off of the Tuomey property; never told them not to damage it; and never asked permission from Karen to have his contractors go on her property. (RP 271, 273-274) There was substantial evidence from which the jury could conclude not only that Vining was aware of the trespassing and damage and failed to stop it, but also that he directed it. As Laney testified:

Q: Did anyone ever give you permission to be on any part of the Tuomey property?

A: No. I mean, **Mr. Vining told us that we can go through that access road**, but I wasn’t given permission from the Tuomeys directly.

Q: That was a decision that Mr. Vining made for you to go on that side?

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<sup>1</sup> RP 88 (Emphasis added).

A: I don't know. He might have had permission from her. I don't know that.<sup>2</sup>

The excavation of the foundation continued for three to four days. (RP 70-80) During this time, D & L took out 15 – 20 dump truck loads per day, heavily using Tuomey's driveway and parking area as a staging area. RP 80, 331 After the excavation was completed, D & L's concrete subcontractor built forms and poured concrete for the foundation. For two to three weeks, Karen and her family were inconvenienced by daily repeated parking on her property by the workers and by their throwing of trash and construction debris on her land. (RP 83-84) Vining was on the site at least every other day. (RP 245) Tuomey erected a fence consisting of posts and silt fencing material a few inches her side of the line to give the workers the message to stay on Vining's side of the line. The workers cut the fence, threw it aside and went on with their trespassing and damage to Tuomey's property. Vining personally took several photographs documenting this. (RP 81-82; 246; 249-250; 272-274) Vining took many of his photographs while he personally trespassed on Tuomey's property.

The contractors finally partially backfilled the damaged area. However, Tuomey's property had sustained destruction of vegetation and removal of dirt with lowering of the grade. Karen Tuomey testified that

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<sup>2</sup> RP 339 Emphasis added.

where her berm and vegetation had been destroyed, the vegetation originally had previously extended more than five feet further to the south (CP 76) and that the overall excavated area on her property measured eight by ten feet. (CP 129-130) Vining's expert Jesse Binford, PE concluded that an approximately 25 square foot area of vegetation had been destroyed on the Tuomey property. (CP 294-295) Tuomey's expert Galen Wright opined that her property had been damaged in the shape of an oblique triangle measuring 20' x 16' x 18' (RP 160-162; CP 160; EX 36 and 37) Surveyor Jeff Andresen observed and mapped exposed chunks of concrete, buried concrete and soil conditions that were different than native in the damaged area on Tuomey's property. (RP 55-56) Trevor Seal testified that bushes had been removed from Tuomey's side of the line, and that a depression existed in the grade that had not existed prior to construction. (RP 193) Greg Bray testified that the preconstruction grade had been eighteen to twenty-four inches higher than post-construction. (RP 193) Todd Laney testified that D & L had used an excavator with a blade and an 8' wide track needing to make a 10 degree turn to get into the Vining property. Laney described the damaged area as a 10' x 12' carved area. RP 327, 330, 337-338)

Any pretense of good faith on the part of Vining was not only undermined by his own photographs and witnesses, but also by his unapologetic arrogance. He testified:

Q: Sir, I haven't heard you express any remorse in your testimony for what happened on Karen Tuomey's property. Do you feel any?

A: **Remorse? No sir.**<sup>3</sup>

## **B. PROCEDURAL HISTORY**

### **1. Dismissal of Claims Before Trial.**

Tuomey sued for injunctive relief, a prescriptive easement, and for damages based on loss of lateral support, trespass, nuisance, negligence and willful damage to property. (CP 20-23) Tuomey brought a motion for summary judgment to confirm her prescriptive easement over a portion of the Vining property, and Vining filed a motion seeking a summary judgment dismissing Tuomey's claims for loss of lateral support and damages under RCW 4.24.630. Less than three weeks before trial, the parties entered a stipulated order confirming Tuomey's easement and dismissing her claim for injunction and loss of lateral support. (CP 208-215) After argument, the court denied Vining's motion to dismiss the RCW 4.24.630 claims. The court entered a pretrial Order in Limine

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<sup>3</sup> RP 275

precluding, among other things, references to the loss of lateral support claims that were no longer in the case. (CP 376-378)

## **2. The Trial.**

The remaining claims were tried to the jury on 9/14/09 through 9/17/09. It had to have been obvious to the jury from the elaborate exhibits and expert workups that the issues at trial were much smaller in scope than the issues that had driven the litigation over the previous 1 ½ years.

After the plaintiff had rested, Vining moved to dismiss Tuomey's case, making the same fact-based arguments he now makes on appeal *i.e.* that the factual evidence of alleged damages was not substantial enough to warrant application of RCW 4.24.630. The court denied this motion.

Tuomey requested unspecified general nuisance damages, as well as \$5,000.00 damages in site restoration costs as testified to by her expert arborist, Galen Wright. (RP 167) The jury returned a defense verdict as to nuisance and negligence. The jury found that D & L and Vining had committed trespass, but with zero damages. The jury concluded that Vining had wrongfully damaged Karen's property, and awarded \$650.00. (CP 379-382)

**3. Post Trial Motion for Attorney's Fees and Costs.**

Tuomey moved post-trial per RCW 4.24.630 for her reasonable attorney's fees and costs. In the overall litigation, Tuomey had incurred \$59,188.00 in attorney's fees and \$ 12,019.54 in costs. In her Motion for Attorney's Fees and Costs (CP 434-441) Tuomey reduced her claim by amounts attributable to the dismissed claims, requesting that the court award \$50,062.50 in fees and \$ 6,679.06 in costs. (CP 442-471) The trial judge rejected Vining's argument that the small jury award justified a de minimis award of attorney's fees:

I think they intended to tell Mr. Vining that he did not get to do that and that he did intentionally and purposely make a choice that a cost of building his house he was going to do what he wanted to do. I think that is significant.

(10/9/09 RP 15) However, she commented that "probably about half of what was requested is what is really reasonable given the outcome in this case" (10/9/09 RP 17-18) and directed counsel to attempt to reach agreement as to which of the attorney's fee entries were reasonably related to just the litigated issues.

**4. Entry of Judgment.**

Counsel for both parties stepped out in the hall and did so, and signed a stipulated Judgment fixing the attorney's fees amount at \$25,000.00 (half the original claim), awarding \$1,950.00 trebled damages

and including the \$6,241.56 costs amount that had been ruled on by the court. The Court entered the stipulated Judgment without further objection from Vining's counsel. (CP 424-426)

#### IV. ARGUMENT

##### ***A. The Trial Court Properly Denied Vining's Motions to Dismiss the RCW 4.24.630 Claims.***

Vining does not specify whether his Assignment of Error No. 1 is directed to denial of his motion for summary judgment or denial of his motion to dismiss during trial. He does not cite any applicable rules or standards of review, and provides no analysis or citation to authority concerning the bases of the alleged error. For these reasons alone, this Court should refuse to consider Assignment of Error No. 1. See *State v. Stepp*, 18 Wn. App. 304, 312, 569 P.2d 1169 (1977), *rev. den.*, 89 Wn.2d 1015 (1978) (assignments of error that are not supported by cited authority need not be considered on appeal).

Since denials of summary judgment are normally not reviewable,<sup>4</sup> Tuomey can only assume Vining assigns error to the denial of his motion for judgment as a matter of law per Rule 50. This Court reviews denial of such a motion de novo, applying the same standard as the trial court.

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<sup>4</sup> To the extent the assignment of error refers to the trial court's denial of summary judgment, such issue is not reviewable by this Court. Once a case has been tried on its merits, review of a pretrial order denying summary judgment is neither possible nor appropriate. *Cook v. Selland Const., Inc.*, 81 Wn. App. 98, 101, 912 P.2d 1088 (1996).

*Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003).

The court properly denies such a motion if, viewing the evidence most favorably to the nonmoving party, it can say as a matter of law that there is substantial evidence to sustain a verdict for the nonmoving party. *Sing v. John L Scott, Inc.*, 134 Wn.2d 24, 29, 946 P.2d 816 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

As explained below, substantial evidence supported both the jury's verdict and the trial court's denial of Vining's motion to dismiss as to each critical element of RCW 4.24.630. The motion was properly denied.

***B. RCW 4.24.630 Applies to this Case.***

Vining confuses the common law of trespass, whose purpose is to compensate for actual damages, with the public policy behind punitive statutes like RCW 4.24.630 and RCW 64.12.030, to make a completely fact-based argument that the \$650.00 jury award was not "serious" or "substantial" enough for RCW 4.24.630 to apply. This argument has no support in either the statutory language, legislative purpose or case law. To establish intentional trespass, plaintiff must show (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 damage. *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006); *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 692-93, 709 P.2d 782 (1985).

Punitive damages are not available in a common law trespass case, in which the goal of awarding damages is to fully compensate the plaintiff for loss or injury. *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 533-544, 871 P.2d 601 (1994)<sup>5</sup>. This is because the object of civil money judgments is to place the injured party in a position as close as possible to that in which he would have been if the injury had not occurred. *Aker Verdal A/S v. Neal F. Lampson, Inc.*, 65 Wn. App. 177, 184, 828 P.2d 610 (1992).

However, punitive statutes such as the wrongful damage to property statute, RCW 4.24.630 and the general timber trespass statute, RCW 64.12.030 go beyond the tort common law objective of simply making the victim whole. Because these statutes are contrary to Washington's policy against punitive damages, they require willful conduct. Some of the older timber trespass cases cogently explain this difference in public policy:

Although the award of treble damages conflicts with the more general policy against punitive damages, it is thought to be justified in this context because (1) it

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<sup>5</sup> Overruled on other grounds by *Phillips v. King County*, 87 Wn. App. 468, 943 P.2d 306 (1997).

discourages the practice of private eminent domain; (2) it provides a rough estimate of future damages, especially for premature harvesting of trees; and (3) it punishes the voluntary trespasser.

...

Because punitive damages are disfavored, however, our Supreme Court has reasoned that treble damages should be awarded only where there is “an ‘element of willfulness’ on the part of the trespasser.”

*Henrikson v. Lyons*, 33 Wn. App. 123, 125-126, 652 P.2d 18 (1982).

It is obvious that the increased measure [of damages] is allowed, not as compensation to the person wronged, but as punishment to the wrongdoer. . . . It is plain that the person whose trees are cut suffers exactly the same injury where the trespass is involuntary as where it is willful. In each case he suffers the loss of his trees.

*Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879, 883-884, 289 P.2d 975 (1955).

Vining argues that the Legislature only intended the statute to apply to cases involving “serious damages.”<sup>6</sup> However, the statute does not say this. A person who acts “wrongfully” is liable “for treble the amount of *the damages* caused by the removal, waste or injury.”<sup>7</sup> This wording is consistent with a legislative purpose to deter intentional private takings, and to punish wrongdoers, even if the provable damages are small.

The plain language of RCW 4.24.630 does not set any minimum

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<sup>6</sup> Brief of Appellant, p. 13, 16.

<sup>7</sup> RCW 4.24.630(1)(Emphasis added).

standard for damages. Where a statute is clear on its face, its meaning is to be derived from the language of the statute alone. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 1585 (2006). Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute, *Killian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Any imposition of a minimum damage threshold by this Court would usurp the role of the Legislature. A contrary holding would lead to the absurd and unfair result that so long as the deliberate trespasser kept the intentional damages to a small level, one could engage in a private taking of private property for any construction project, factoring actual damages only as a cost of doing business, secure in the knowledge that there could be no upside risk for legal costs or punitive damages. The Legislature intended RCW 4.24.630 to have exactly the opposite deterrent effect. The result in this case was just and should be upheld.

*C. Vining Acted “Wrongfully” Under RCW 4.24.630.*

RCW 4.24.630 states in relevant part:

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

Whether one acts willfully is question of fact. See *Blake v. Grant*, 65 Wn.2d 410, 412, 397 P.3d 843 (1964). Here, substantial evidence supported the finding that Vining acted willfully and therefore intentionally for purposes of the statute. *Clipse v. Michels Pipeline Construction, Inc.*, 154 Wn. App. 573, 225 P.3d 492 (2010) and *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002), are authority for Tuomey’s position, not that of Vining. In *Clipse*, defendant Pipe Experts, LLC, the drainage subcontractor on a public sewer project, entered on and damaged the plaintiff’s property. The parties disagreed as to whether the defendant had permission. *Clipse*, 154 Wn. App. at 575-576.<sup>8</sup> The property owner contended that the language “intentionally and unreasonably commits the act” in RCW 4.24.630 should be read disjunctively from “or acts while knowing, or having reason to know, that he or she lacks authorization to so act”, as though there were a comma between “act” and “or acts”. 154 Wn. App. at 578. Division I rejected this argument, citing *Borden, supra* in holding that “intentional conduct is a necessary element of an action under RCW 4.24.630, not one of two alternative bases of liability.” *Id.*, at 580.

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<sup>8</sup> Since the purpose of the King County’s project was to rehabilitate side sewer pipes on private property, although not explicitly stated in the opinion, one can deduce that King County had an underlying legal right, such as a recorded right of way, to enter on private property to refurbish the sewer pipes in the first place.

Vining's contentions that he did not intend to trespass, did not intend for damage to occur and/or that he was unaware of what his contractors were doing are factual arguments that the jury did not accept. Fact-based arguments concerned with the weight and credibility of the evidence presented to the jury, are not reviewable. See *Davis v. Department of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980) (reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence); *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

However on the merits, the evidence supported every element of a violation by Vining of RCW 4.24.630. Vining deliberately went onto Tuomey's land and directed others to do so and/or told them it would be all right for them to enter across Tuomey's driveway. A trespass may be by the defendant in person, as when the defendant personally travels onto the plaintiff's land. See *Hirt v. Entus*, 37 Wn.2d 418, 224 P.2d 620 (1950) (entering and destroying trees); *Heybrook v. Index Lumber Co.*, 49 Wn. 378, 95 P. 324 (1908) (entering and cutting timber). D & L intentionally dug a ramp across Tuomey's property. Such damage was caused under the direction of and/or the complicity of Vining, who copiously documented the trespassing and damage by taking numerous photos. D &

L and others, while under the direction and/or with the complicity of Vining, continued the trespassing and damage. All the while, Vining knew he lacked authorization to so act, and in fact having been told to keep equipment off her land. In summary, substantial evidence supported the jury's conclusion that Vining acted intentionally and unreasonably, while knowing he lacked authorization.

***D. Substantial Evidence Supported the Jury's Award of Actual Damages, Under RCW 4.24.630.***

Here, although the damages award was small, it was based on competent expert testimony concerning the cost of replacing soil and planting replacement shrubbery. As is discussed in the statement of facts *supra*, several witnesses corroborated the fact of actual damage in the form of soil removal and destruction of vegetation on Tuomey's side of the line. The evidence supports the notion that the \$650.00 verdict was not a "nominal" damage award based upon a trespass theory, but rather, based upon repair costs supported by expert testimony. While the jury did not accept all of the damages testified to by Mr. Wright, it did award part of his estimated repair costs after hearing and weighing the evidence. An appellate court will not disturb a jury award supported by substantial evidence. *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 758, 637 P.2d 998 (1981).

***E. Judgment was properly entered against Vining for his violation of RCW 4.24.630, even though the jury did not find such a violation on the part of D & L Builders.***

Vining argues for the first time on appeal that he should not be liable for damages pursuant to RCW 4.24.630 “if the party doing the work, D & L Construction, is found to be fault free[.]” (App. Br. at 3) this Court should refuse to consider any argument on this issue. A party may not raise an issue for the first time on appeal that it did not raise below. RAP 2.5(a); *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). Vining fails to relate such issue to any assignment of error or to provide argument or citation to support such issue. A party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error precludes appellate consideration of an alleged error. *Emmerson v. Weilep*, 126 Wn. App. 930, 110 P.3d 214 (2005), *rev. den.* 155 Wn. 2d 1026, 126 P.3d 820 (2005).

However, the jury verdict against Vining only was appropriate on the merits. Instruction No. 13 (to which Vining did not assign error), read:

If you find that the independent contractors hired by Vining committed the trespass, nuisance, or willful damage to property, defendants Vining are still liable if (1) they directed such activities or (2) defendants Vining had notice of such activities and failed to interfere.

Substantial evidence supported a finding of deliberate intent on the part of

Vining on the bases that (1) he directed such activity by telling D & L to enter his property over Tuomey's driveway *and* (2) by the fact that he had notice of the trespassing and damage and failed to interfere. The jury could have found that Vining, with wrongful intent, lied to his contractors about whether they had permission to use Tuomey's property. The jury could have found that D & L, as an innocent intermediary, caused the damage but did not act with wrongful intent.

The jury's verdict was entirely consistent with Instruction No. 13, under which a trier of fact could find "wrongful" intent on the part of the party ordering the trespass and damage while concurrently finding that an innocent intermediary such as a contractor, acting on false information would lack the requisite "wrongful" intent.

Vining essentially implies that Instruction No. 13 should have been worded differently. However, he waived such argument by failing to except to the instruction below. A litigant who disagrees with the jury instruction is required to identify the particular instruction objected to and state the exact grounds for said objection. Failure to do so precludes appellate review of the instruction. *Barrett v. Lucky Seven Salon, Inc.*, 152 Wn.2d 259, 281, 96 P.3d 386 (2004).

If Vining's position were the law, any party could hire a contractor, falsely telling him that he had permission to go on a neighbor's

property and to damage it. So long as the contractor acting on the false information remained sufficiently ignorant and acted in good faith, the party motivating the trespass could never be held liable under RCW 4.24.630. So long as intentional wrongdoers committed their trespass and damage through innocent intermediaries, no plaintiff would ever have a remedy for wrongful damage to property under RCW 4.24.630 against the instigator. Such unfair and absurd result is not the law in Washington, and this court should reject Vining's argument.

***F. Jury Instruction No. 14 correctly omitted the statutory language concerning costs and attorney's fees.***

Assignment of Error No. 2 is devoid of merit. Instruction 14 as worded fully allowed Vining to argue his theory of the case and correctly focused the jury's inquiry on Vining's intent and proof of actual damages.

Jury instructions are reviewed de novo. *Thompson v. King Feed & Nutrition*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). If an instruction contains an erroneous statement of the applicable law that prejudices a party, it is reversible error. *Id.* Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). Even if an instruction is misleading it will not be reversed unless

prejudice is shown. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Error is prejudicial if it affects or presumptively affects the outcome of the trial. *Id.*

RCW 4.24.630(1) specifically categorizes attorney's fees as a cost. "Whether a party is entitled to an award of attorney fees is a question of law." *Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805 (2008). "When authorized, the determination of a reasonable attorney fee award is a matter within the discretion of the trial court." *Jacob's Meadow Owners Ass'n. v. Plateau 44 II, LLC*, 139 Wn. App. 743, 759, 162 P.3d 1153 (2007) (citing *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987)). "A party is not, therefore, entitled to have such a determination made by a jury. *Id.* (citing *In re Marriage of Furchau*, 88 Wn.2d 109, 114-15, 558 P.2d 194 (1977)).

Vining claims it was erroneous to prevent him from arguing that the case was not about evidence of Vining's intent but rather about attorney's fees. The litigation had involved extensive expert workups and discovery for over 1 ½ years, only to have two major issues (claims of loss of lateral support and to a prescriptive easement) settle out of the case less than three weeks before trial. Vining's counsel wanted the attorney's fees language included in the jury instruction so that he could paint an unfair and misleading picture that the extensive depositions, expert workups, etc.

were an abuse of the court system on Tuomey's part solely to generate fees over a few square feet of dirt. Such argument would have been unfairly prejudicial because Tuomey was precluded by the Order in Limine from fair rebuttal by discussing the other claims that had dropped out of the case.

However, of greater importance is the fact that inviting the jury to improperly speculate on attorney's fee issues would have confused the issues and wasted the jury's time. RCW 4.24.630(1) provides for mandatory reimbursement of costs subject to reasonableness determination by the court, and involves no action by the jury. Such inquiry was therefore irrelevant. Instruction No. 14 as written gave both parties the opportunity to fully argue the merits of their case, without derailing the jury on collateral issues having nothing to do with the jury's fact finding.

***G. The trial court properly awarded costs and attorney fees.***

The trial court did not abuse its discretion in awarding attorneys' fees to the Respondent. The reasonableness of attorney's fees rests with the sound discretion of the trial court *Boeing Co. v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002). Discretion is abused if it is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* A trial court has broad discretion in determining the reasonableness of a fee

award. *Ethridge v. Hwang*, 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001). Using the lodestar method, the court multiplies the reasonable hourly rate by the number reasonably spent on the lawsuit. *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 773, 115 P.3d 349 (2005). While the court should exclude any wasteful or duplicative hours and any hours for unsuccessful theories or claims, “an explicit hour-by-hour analysis of which lawyer’s timesheets” is unnecessary as long as the court considers relevant factors and gives reasons for the amount awarded. *Progressive Animal Welfare Society v. University of Wash.*, 54 Wn. App. 180, 187, 773 P.2d 114 (1989).<sup>9</sup>

Here, the record demonstrates that the trial court weighed all the factors based upon its first-hand experience with the parties through multiple proceedings. The trial judge indicated in dicta that her sense was that a reasonable amount of attorney’s fees related to the claims that got tried was in the range of half the \$50,000.00 originally sought by Tuomey’s counsel. The court directed the parties to try to agree to an amount, consistent with the court’s determination, which the parties did, resulting in an agreed judgment.

Under these circumstances, Vining’s counsel waived the right to assign error to the award. Where a party’s counsel voluntarily participates

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<sup>9</sup> Reversed on other grounds, 114 Wn.2d 677, 790 P.2d 604 (1990).

with the court and opposing counsel in settling a disputed issue in open court, without any reservation on the record, that party cannot later reverse field and claim an appealable error against the trial court. *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 987 P.2d. 634 (1999). The attorney's fees award was proper and should stand, both as an exercise of discretion by the trial court and on the basis that counsel waived objection by stipulating to an agreed judgment.

***H. Tuomey is entitled to costs and attorney's fees on appeal.***

Tuomey requests that this court award her costs and reasonable attorney's fees on appeal per RCW 4.24.630(1), which authorizes attorney fees. Where a statute allows an award of attorney fees to the prevailing party at trial, the appellate court has inherent authority to make such an award on appeal. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001).

**IV. CONCLUSION**

In conclusion, substantial evidence supported every element of a finding that Vining was liable for treble damages, costs and attorney's fees pursuant to RCW 4.24.630(1). Instruction No. 14 as it was given, which states relevant portions of RCW 4.24.630 verbatim, allowed both parties to argue their theories of the case without wasting time and confusing the issues with irrelevant speculation about attorney's fees. Vining failed to

argue or object at trial or to assign error to jury Instruction No. 13, whereby the jury found Vining's conduct "wrongful" while finding that D & L lacked the requisite intent. By signing a stipulated judgment after receiving a 50% concession in attorney's fees from Tuomey's counsel in response to the trial judge's comments, and by making no further objection or argument on the record, Vining's counsel waived any argument on appeal that such fees were excessive and/or unrelated to the trial issues. In any event, the \$25,000.00 that was awarded represents a sound exercise of discretion by the trial judge. Finally, Tuomey is entitled to an award of her attorney's fees and costs on appeal pursuant to RCW 4.24.630. In conclusion, this Court should affirm the judgment entered on the jury verdict.

DATED this 16 day of June 2010.

J. MICHAEL MORGAN, PLLC

  
J. Michael Morgan, WSBA No. 18404  
Attorney for Respondent Howarth-Tuomey

**DECLARATION OF SERVICE**

The undersigned declared under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on this 16<sup>th</sup> day of June, 2010, I caused the foregoing document to be served on all counsel of record by United States mail, postage, prepaid, at the below-listed addresses:

Gregory J. Wall  
Wall Liebert & Lund  
1521 SE Piperberry Way, Suite 102  
Port Orchard, WA 98366

DATED at Olympia, Washington this 16<sup>th</sup> day of June, 2010.

  
\_\_\_\_\_  
Jamie A. Wall

FILED  
COURT OF APPEALS  
10 JUN 17 PM 1:21  
STATE OF WASHINGTON  
BY  \_\_\_\_\_  
CLERK