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NO. 40036-7-II

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

**(Pierce County Superior
Court No. 08-2-07707-7)**

**Tricia Shoblom,
Appellant (Plaintiff)**

v.

**Kristina Dyer and E.E. Pichler
Respondents (Defendants)**

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case arises out of a dispute between neighbors. As is the unfortunate and frequent case of such disputes, this case involves not merely acts of isolated trespass and conflict, but a pattern of harrassment and petty humiliations. The record reflects that Appellant Tricia Shoblom was the victim of repeated acts of trespass by her neighbors, Kristina Dyer and E. E. Pichler, which included setting up a sprinkler on a motion sensor to spray her when she was on her driveway. (CP 64-77, 223-229.)

However, rather than recognizing the full complexity of the facts of this case, the trial court was hostile to the case from the start as a breach of neighborly courtesy. The record of the final motion for summary judgment, from which this appeal arises, starkly shows a judge making rulings from personal feelings and idiosyncratic standards, rather than from a sound legal analysis. The Court starts by expressing that it is "all for shooting this horse" (RP 11/7/06, p.39, ll. 15-16). The Court then explained his standard, which was a standard based on neighborliness and community spiritedness, not the law or a system of private property rights. (RP 11/7/06, p.39, l. 16 - p.41, l. 2). Finally, after noting special concern about a sprinkler being placed on a motion sensor such that it would spray the appellant with water as she was going to and from her house (RP 11/7/09, p.42, ll. 6-15) (an allegation that was admitted, in part, by the

Respondent's attorney (RP 11/7/09, p.43, ll. 17-22), the Court invited Mr. Pichler to make an unsworn statement, over the objection of Ms. Shoblom's counsel, and used the information received in this irregular way as a rebuttal of the material facts raised in support of Ms. Shoblom's claims, granting summary judgment and dismissing the case. (RP 11/7/09, p.44, l. 20 - p.46, l. 4).

Following this extraordinary ruling, the Court compounded its error by granting the Respondent's motion for attorney's fees under RCW 4.84.250-300 (which applies to cases unambiguously seeking damages of less than \$10,000). Ms. Shoblom had pled her case in the alternative, as potentially stating eight separate claims based on separate incidents, in which case each claim was for less than \$10,000, or, alternatively, as stating a single claim for a pattern of trespass, harassment and other intentional torts, in which case the combined claim was in excess of \$10,000 and which further justified equitable relief in addition to money damages. Despite the clear evidence that Ms. Shoblom had elected to pursue her case as a unified single claim (as seen by the repeated argument about the "pattern of harassment" in the hearing on 11/7/09 and in the documents submitted in response to the motion for fees (CP 280-305, 279-388), the Court disregarded Ms. Shoblom's election of remedies and election of claim and awarded attorney's fees.

This record shows a premature dismissal of a righteous claim based on extra-legal considerations by the Trial Court, followed up with an improper and unsound award of attorney's fees against a doubly aggrieved Ms. Shoblom. This Court should reverse and remand this matter to allow Ms. Shoblom to seek and receive the relief she is entitled to at trial.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Trial Court erred in granting summary judgment dismissing all claims made by Tricia Shoblom, including claims for intentional trespass, along with the consequent claim for emotional distress damages, despite the material factual disputes on the legitimate record, after receiving improper information in the form of an unsworn statement of E.E. Pichler, which he made at the invitation of the Trial Court and over objection.

2. The Trial Court erred in dismissing all claims, including claims for battery and harassment, along with their consequent claim for emotional distress damages, by failing to recognize the existence of those claims in addition to the trespass claim, despite a pending motion to amend.

3. The Trial Court erred in dismissing a statutory claim, under RCW 58.04.015, on the basis that the claim was moot given the Court's subsequent ruling that the surveyed boundary was not the true boundary.

4. The Trial Court erred in granting attorney's fees under RCW 4.84.250-300 when there was evidence that Plaintiff had elected to pursue her case as a single claim seeking damages in excess of \$10,000, rather than as multiples claims for damages, each of which sought less than \$10,000.

5. Even if the attorney fee award were proper, the Trial Court erred in failing to apply any lodestar analysis, or any otherwise defined and reviewable analysis, in making the fee award.

Issues Pertaining to Assignments of Error

1. Was there evidence of substantial injury to Tricia Shoblom or her property as a result of the Pichler/Dyer Trespass?

2. Was Tricia Shoblom's Trespass Claim Mooted by Pichler and Dyer's Improved Behavior after Filing of the Lawsuit?

3. Did the Trial Court Taint the Record, and was there a Triable Case for Trespass Based on the Proper and Untainted Record?

4. Did Tricia Shoblom have Triable Claims in Addition to Trespass, including Harassment and Battery?

5. Is Tricia Shoblom Liable for Attorney's Fees Under RCW 4.84.250-300 when She Was Pursuing a Claim Valued at Well Over \$10,000?

6. If Tricia Shoblom is Liable for Fees, Did the Trial Court Conduct a Proper Lodestar Analysis or Otherwise Create a Reviewable Record Sufficient to Sustain a Fee Award?

III. STATEMENT OF THE CASE

Tricia Shoblom purchased her house in 2003. From the start of her time there, she was subjected to harassment by her neighbors Pichler and Dyer, who apparently didn't like her because they thought she was "weird." (CP 223; 228.) These acts of petty harassment continued and escalated over the years following 2003, finally culminating in Pichler and Dyer installing a water sprinkler aimed at Tricia Shoblom's driveway and controlled by a motion sensor pointed at her driveway, for the apparent purpose of spraying Ms. Shoblom with water whenever she drove onto or off of her property. (CP 227-228).

As part of Ms. Shoblom's attempt to regain basic privacy, she purchased a new, cedar fence to replace an inadequate chainlink fence. The chainlink fence was inadequate because it provided no privacy screen and because Pichler and Dyer also sprayed water into her backyard when Ms. Shoblom and her mother were there. (CP 223-224; 227.)

The fence selected and purchased by Ms. Shoblom was a clear-stained, plain wood fence. (CP 223-224.) She selected its appearance to fit the aesthetic of her house and yard and installed the fence on her side of the historic chainlink fence, in a location she understood to be her property. (CP 63-64; 67-68). Shortly after the fence was erected, Pichler and Dyer painted it, and painted it in a sloppy and haphazard manner, causing paint to seep through and streak down Ms. Shoblom's side of the fence, destroying the appearance of the fence. Following that, Pichler and Dyer further interfered with the fence by destroying the work Ms. Shoblom had done in an attempt to respond to and mitigate the damage Pichler and Dyer had done to the fence. (CP 223-228.)

In addition, as part of the pattern of harassment and trespass by Pichler and Dyer, Shoblom identified multiple incidents, most of which were minor in themselves, but all of which combined to create a situation where Ms. Shoblom felt like she was under siege in her own house. (CP 223-228). One of these incidents was Mr. Pichler's removing several survey stakes placed by a surveyor hired by Ms. Shoblom. (CP 67-68; 226.) These incidents were enumerated and identified as part of a pattern, early in discovery in the case. (CP 285-286.) Early discovery also indicated that Ms. Shoblom's total claim was "expected to exceed \$30,000." (CP 290.)

Finally unable to bear her continuing and escalating harassment by Pichler and Dyer, Ms. Shoblom filed a lawsuit for trespass, nuisance, harassment and other torts. (CP 6-8.) This complaint was pled in the alternative, invoking a right to attorney's fees under RCW 4.84.250-300 if Ms. Shoblom elected to parse out her claim of harassment among specific incidents, most of which were minor in themselves and would not entitle her to more than \$10,000 damages per incident. (CP 7, ll 23-24.) However, as seen above, early in the discovery process, Ms. Shoblom elected to pursue her case as a single unified claim for more than \$30,000, rather than divide up her claims in a hope of receiving an attorney's fee award. (CP 290; 379-388.)

Pichler and Dyer counterclaimed for adverse possession, but made no other affirmative claims and did not plead any specific basis for an attorney's fee claim (citing no statute, contract, or common law principle on which they could claim attorney's fees). (CP 9-14.) Thereafter, Pichler and Dyer moved for total summary judgment, seeking both dismissal of all of Plaintiff's claims and seeking quiet title to Plaintiff's deeded property on their adverse possession claim. (CP 48-62.) The Court granted the summary judgment on the adverse possession claim, quieting title in the parties based on the historic fenceline. Additionally, the Court ruled that this change in the location of the boundary mooted Ms. Shoblom's RCW

58.04.015 claim that Mr. Pichler had wrongfully removed a survey stake, ruling that because the survey stake did not mark what had later been determined to be the lawful boundary, the statute provided no protection. Finally, the Court denied summary judgment on Ms. Shoblom's other claims, specifically ruling that each party owned half the fence, apparently conceiving each party as owning the physical half of the fence located on their side of the new property line, which ran down the center of the fence. (CP 118-120; RP 10/17/08, p. 23, l. 22 - p. 25, l. 6; p. 29, l.14-23.)

Following additional litigation and discovery, Pichler and Dyer again moved for summary judgment, seeking dismissal of all claims. (CP 180-189.) This motion was heard at a time Ms. Shoblom had a pending motion to amend to clarify and add claims, including claims for equitable relief and to specifically allege a battery claim based on her being personally sprayed with water. (CP 276-279; 280-305.) Expressing a desire to "shoot this horse" and applying a personal, nonlegal standard based on social concepts of neighborliness, rather than on any legal standards, the Court granted summary judgment and dismissed all of Plaintiff's claims, effectively denying Plaintiff's motion to amend as well by leaving Plaintiff with nothing to amend. (CP 306-307; RP 11/7/06, p.39, ll. 15-16; p.39, l. 16 - p.41, l. 2.) While the Court may have limited patience with neighbor disputes, it cannot give them such short shrift.

Compounding this error in applying a nonlegal standard to this case, the Court also invited, received, and based its ruling, in part, on improper information in the form of unsworn statements by Mr. Pichler. These statements, lacking the characteristics of testimony, are not proper evidence. As the statements were received, at the Court's invitation, outside the usual course of process and without giving Ms. Shoblom an opportunity to cross-examine or rebut the statements, the Court's consideration of them also violates due process and the usual course of justice. Despite that, these statements appear to have caused the Court to change its mind on whether Ms. Shoblom stated a claim based on her having been sprayed by Pichler and Dyer's sprinkler in her driveway. (RP 11/7/09, p.42, ll. 6-15; RP 11/7/09, p.43, ll. 17-22; RP 11/7/09, p.44, l. 20 - p.46, l. 4).

Following this ruling, Pichler and Dyer moved for attorney's fees, asserting that they were entitled to fees because Ms. Shoblom had originally pled, as an alternative claim, a claim for fees under RCW 4.84.250-300 if she elected to litigate her claims on a "per occurrence" basis. (CP 7; 308-313.) As Defendants had not pled any specific entitlement to fees, they asserted no other basis for fees in their motion. Ms. Shoblom responded by noting that she had clearly elected to pursue her claim as a unified claim, rather than on a "per occurrence" basis – and

had therefore stated her damages as \$30,000 in discovery (CP 290, l. 10) and as "over \$50,000" in settlement negotiations (CP 268-278; 379-388). Additionally, Ms. Shoblom's counsel noted that Pichler and Dyer's counsel had presented their fee claim with raw data and had not analyzed the work for wasted time, duplication, difficulty, or otherwise performed any "lodestar analysis." Despite this, and without conducting its own lodestar analysis, the Court granted the motion and awarded Pichler and Dyer \$25,000 in fees. Pichler and Dyer received a judgment for \$25,000, a recovery of attorney's fees only, which is now on appeal.

IV. SUMMARY OF ARGUMENT

Acting out of misplaced "idealism" and general frustration with neighbor disputes (which this case is), the Trial Court applied an idiosyncratic and nonlegal standard and improperly received and considered information that was not in the form of reliable or testable evidence, and dismissed Tricia Shoblom's claims for harassment, trespass, nuisance, and battery. These claims had been based on years of humiliation and mistreatment of Ms. Shoblom by her neighbors, Pichler and Dyer, which included poisoning Ms. Shoblom's plants and landscaping and spraying Ms. Shoblom and her mother with water. In dismissing Ms. Shoblom's case, the Court failed to provide Ms. Shoblom's person and property with the basic protections offered by the law.

V. ARGUMENT

A. The Standard of Review is de Novo

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court. Failor's Pharmacy v. DSHS, 125 Wn.2d 488 at 493, 886 P.2d 147 (1994). The Court of Appeals will affirm the summary judgment only if there are no genuine issues of material fact between the parties and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. Id. All facts and all reasonable inferences from those facts are considered in the light most favorable to the party resisting summary judgment. Id. The burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact. Morris v. McNicol, 83 Wn.2d 491 at 494, 519 P.2d 7 (1974). Summary judgment is sustainable on review only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor. Failor's Pharmacy, Id.

"When a trial court rules as a matter of law, it must accept the [non-moving party's] evidence as true, and determine whether or not the [non-moving party] has a prima facie case." Spring v. Department of Labor and Industries, 96 Wn.2d 914, 918, 640 P.2d 1 (1982). The trial court should

not make factual determinations or evaluate the non-moving party's evidence, except as may be necessary to favorably resolve conflicts appearing therein. See Spring v. Dept. L&I, 96 Wn.2d at 918.

"If affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied." Tegland and Ende, *Washington Handbook on Civil Procedure*, § 69.16, p. 428 (2004 ed.).

"[T]he court should not grant summary judgment when there is some question on the credibility of a witness whose statements are critical to an important issue in the case." See Id., citing to Powell v. Viking Insurance Col, 44 Wn. App. 495, 722 P.2d 1343 (1986).

There is almost never a case in which the actions of a party are so unambiguous that reasonable persons could reach only one conclusion as to that party's knowledge, intent or motivations.

Where intent is the primary issue, summary judgment is generally inappropriate. Drawing inferences favorably to the nonmoving party, summary judgment will be granted only if all reasonable inferences defeat the plaintiff's claims. The moving party's burden is therefore a heavy one.

Admiralty Fund v. Tabor, 677 F.2d 1297 at 1298 (Ninth Cir. 1982).

Summary judgment is not appropriate "where a trial, with its opportunity for cross-examination and testing the credibility of witnesses,

might disclose a picture substantially different from that given by the affidavits." United States v. Perry, 431 F.2d 1020 at 1023 (Ninth Cir. 1970).

This principle has been thoroughly and articulately explained in a series of cases from the Second Circuit:

Summary judgment has been found to be notoriously inappropriate in cases such as this one in which judgment is sought "on the basis of 'the inferences which the parties seek to have drawn [as to] questions of motive, intent, and subjective feelings and reactions.

Litton Industries Credit v. Plaza Super of Malta, 503 F. Supp. 83 at 86 (N. D. NY 1980).

The rationale is that "[d]ealving into the internal workings of the parties' minds and making credibility assessments is within the special province of the trier of fact." Politano, [932 F. Supp. 631 (1996)] at 635. "[I]ntent can rarely be established by direct evidence, and must often be proven circumstantially and by inference. Intent is therefore peculiarly inappropriate to be decided on a motion for summary judgment." Zilg v. Prentice-Hall, 515 F. Supp. 716 at 719 (S. D. NY 1981). "Leaving issues of assessing credibility to juries or fact-finders is particularly important when conflicting inferences about a party's knowledge can be deduced from the evidence." Politano, Id. at 635.

It is obvious that this evidence must come largely from the defendants. This case illustrates the danger of founding a

judgment in favor of one party upon his own version of the facts within his sole knowledge as set forth in affidavits prepared *ex parte*. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture. This is not the kind of case that can be settled on summary judgment. It is peculiarly the kind of case where the triers of fact whose business is not only to hear what men say but to search for and find the roots from which the sayings spring, should be afforded full opportunity to determine the truth and integrity of the case.

Subin v. Goldsmith, 224 F.2d 753 (Second Cir. 1955) (citations omitted).

With regard to a party's knowledge or intent, it is usually the case that the nonmoving party need not even file counter affidavits disputing moving party's allegations. Subin, *Id.* at 759. The other facts of the case, even without restatement in affidavit form, almost always support a wide range of inferences regarding knowledge and intent. This Federal analysis has been specifically cited and adopted in Washington. Percival v. Bruun, 28 Wn. App. 291 at 293-94, 622 P.2d 413 (1991).

While there appears to be no similar case on the inappropriateness of dismissing, out of hand, a party's claim to have suffered emotional distress, such distress, like intent, is psychological in nature and therefore not readily accessible and testable through a summary judgment motion. In this case, the Trial Court accepted Pichler and Dyer's protestations of innocence, which was improper, and dismissed Ms. Shoblom's assertion that she had suffered significant humiliation and mental distress, which

was equally improper. A trial, not a pretrial summary proceeding, is the only proper way to resolve issues of this kind.

B. **There is a Triable Case on Tricia Shoblom's Trespass Claim.**

1. **General Law of Trespass**

“A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession.” 16 Wa. Prac. § 2.22. Trespass to land. A party is liable for trespass if he or she intentionally or negligently intrudes onto the property of another. Mielke v. Yellowstone Pipeline Co., 73 Wn. App. 621, 624, 870 P.2d 1005, review denied, 124 Wn.2d 1030, 883 P.2d 326 (1994) (citing Restatement (Second) of Torts §§ 158, 165, 166 (1965)).

“A trespasser to real property is defined as a person who enters or remains upon land of another without permission or invitation, expressed or implied. A person is liable for trespass, even though he causes no damage, if he intentionally (1) enters the land in possession of another, or causes a thing or third person to do so, (2) remains on the land, or (3) fails to remove from the land a thing which he has a duty to remove. Trespass can also occur by means of water.” 16 Wa. Prac. § 13.31. Trespass to land; citing to Brutsche v. City of Kent, 164 Wn.2d 664, 193 P.3d 110 (2008); Winter v. Mackner, 68 Wn.2d 943, 416 P.2d 453 (1966); Restatement (Second) of Torts § 329.

2. Intentional Trespass

“One who intentionally enters onto the land of another, or causes a tangible object to enter the land of another, is liable for damages caused thereby. Intentional entry may occur when the actor causes something to enter the land of another, even if the consequences are not desired, so long as there is substantial certainty that such entry will occur.” 16 Wa. Prac. § 2.22. Trespass to land.

In Washington, the tort of intentional trespass requires proof of four elements: “(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.” 16 Wa. Prac. § 13.31. Trespass to land; citing to Wallace v. Lewis County, 134 Wn. App. 1 at 15, 137 P.3d 101, 108 (2006); see also Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 691-92, 709 P.2d 782 (1985).

There is no dispute here that Ms. Shoblom has an interest in exclusive possession of (1) her half of the fence (which has been trespassed by Defendants’ paint); (2) her backyard (which has been trespassed by Defendants’ water and son); (3) her frontyard (which has been trespassed by Defendants’ water); (4) her driveway (which has been trespassed by Defendant Dyer, by Defendants’ herbicides, and by

Defendants' water); and (5) her person (which has been trespassed by Defendants' water), giving rise to battery and nuisance claims in addition to trespass claims.)

At summary judgment, Pichler and Dyer argued that the evidence of trespass by herbicide should be dismissed because that evidence is circumstantial, rather than being based on direct observation. The Court appears to have accepted this argument. However, in Washington, “[e]vidence may be either direct or circumstantial. ... The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.” WPI 1.03. Given the circumstances of the trespasses to the driveway, there are triable issues as to those trespasses.

Although trespass is called an intentional tort, it is not necessary that the actor intend to enter the land of another. Washington courts apply the Restatement definition of intent in determining if a person intentionally trespasses upon another's property. Intent exists where the actor desires to cause consequences of his act, or where he believes that the consequences of his act are substantially certain to result. Intent to commit a trespass is not limited, however, to consequences that are desired. If the actor knows that the consequences are certain, or substantially certain, from his act, and he still goes ahead, he is treated by the law as if he had in fact desired to produce the result. Intent to trespass can also include an act that the actor undertakes realizing that there is a high probability of a trespass occurring and yet the actor behaves with disregard of those likely consequences.

16 Wa. Prac. § 13.31; see also Garratt v. Dailey, 46 Wn.2d 197, 279 P.2d 1091 (1955).

3. Trespass to Personalty

Ms. Shoblom also stated a fully-fleshed claim of trespass to personalty (also called “trespass to chattels”) by Pichler and Dyer, which was dismissed out of hand by the Trial Court.

The gist of trespass to personalty is an injury to, or interference with, possession, unlawfully, with or without the exercise of physical force.

Personal property may be the subject of a trespass. Trespass to personal property is the intentional use of, or interference with, a chattel which is in the possession of another, without justification, by an unlawful act or by a lawful act done in an unlawful manner. Any act of unlawful dominion, however slight, is sufficient, if it proximately causes injury, even though no physical force is exercised.

87 C.J.S. Trespass § 9.

Washington recognizes trespass to chattels as an intentional tort.

One in possession of personal property is entitled to be free of illegal or improper interference in his enjoyment of the chattel. When one's personal property is intentionally interfered with, trespass to chattels and conversion are available causes of action. Conversion, more fully discussed in § 13.33, infra, is the exercise of dominion or ownership over the personal property of another. In contrast, trespass to chattels is something less than a conversion. It is the intentional interference with the possession or physical condition of personal property in the possession of another without justification.

Because trespass to chattels is an intentional tort, it is essential to prove that the actor intended to interfere with the chattels. Intent is present not only where the actor intends to bring about the desired result, but also where the results are substantially certain to happen. Intent does not necessarily include a wrongful motive. A person is liable for trespass though he innocently believes the property to be his own. Mere negligence is not a sufficient basis to impose liability under a trespass theory.

16 Wa. Prac. § 13.32 Trespass to personal property.

There is strong circumstantial evidence that Mr. Pichler twice placed limbs and debris from their yard into Plaintiff's truck, scratching and damaging the truck as a result.

a. There is Evidence of Substantial Injury from the Trespass.

Washington differs from other jurisdictions, and from the Restatement rules for trespass, in that Washington law requires “actual and substantial damages” as an element of a cause of action for a tort recovery in intentional trespass. That is, Washington law no longer authorizes award of nominal damages in trespass cases. However, injunctive relief remains available in “no injury” trespass cases. Bradley v. American Smelting and Refining Co., 104 Wn.2d 677 at 685, 709 P.2d 782 (1985).

Pichler and Dyer argued that Ms. Shoblom had suffered no substantial injury as a result of their trespasses. The Trial Court appears to have agreed with this argument in granting the motion for summary judgment.

While it is true that Washington no longer recognizes "no damage" trespass actions, for which nominal damages could be awarded, Washington has not abolished "small damage" trespass actions. In this case, there were clearly stated allegations of actual and real harm to Ms. Shoblom's property: Damage to the fence, requiring replacement; destruction of landscaping through placement of herbicide on Ms. Shoblom's property; and damage to her truck by the wood debris placed in it by Mr. Pichler. In the case of the fence, the damages are specifically stated as \$3,213.42 (replacement cost) (CP 228, l. 25.) These actual, physical damages may be small, but they are not "insubstantial" as that term is used in Washington trespass law.

Additionally, trespass, when done intentionally, is an intentional tort. Bradley v. American Smelting and Ref. Co., 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985); 75 AM.JUR.2D Trespass § 25, at 28 *116 (1991); PROSSER & KEETON, TORTS § 13, at 67-68 (5th ed. 1984). For intentional property torts, damages include both compensation for injury to the property (such as the cost to restore the property) and emotional distress damages suffered by the owner of the property as a result of the intentional tort. In Washington, the Courts "liberally construe[] damages for emotional distress as being available merely upon proof of 'an intentional tort'." Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 916, 726 P.2d 434 (1986) (permitting damages for emotional distress

in wrongful termination action). *See also* Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 485, 805 P.2d 800 (1991) (emotional distress damages available for shock, anger, and upset in action for concealment and deceit by business partner). Emotional distress damages may be recovered in circumstances involving intentional injury to property. *See, e.g.,* Miotke v. City of Spokane, 101 Wn.2d 307, 332, 678 P.2d 803 (1984) (mental suffering an element of damage in public nuisance action); Cherberg v. Peoples Nat'l Bank, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977) (emotional distress damages available for willful breach of lease); Nordgren v. Lawrence, 74 Wash. 305, 133 P. 436 (1913) (damages for mental suffering available in action for wrongful entry by landlord into tenant's premises); McClure v. Campbell, 42 Wash. 252, 84 P. 825 (1906) (damages for mental suffering available in action for wrongful eviction). Emotional distress damages are specifically authorized in cases of intentional trespass. Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 942 P.2d 968 (1997); Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997).

In this case, Ms. Shobom identified eight categories of trespass by the Pichler and Dyer, which form a cumulative pattern of trespass (along with other wrongful acts of Defendants, including verbal bullying, nuisance, and battery, a pattern of harassment): (1) Painting the fence; (2) Defendants'

child in Plaintiff's backyard; (3) Entry by Defendants to cut and destroy Plaintiff's landscaping; (4) Destruction of fence and survey stake by Defendants' landscaping; (5) Herbicide in Driveway; (6) Setting up backyard sprinkler to spray Plaintiff in her backyard; (7) Setting up frontyard sprinkler (and attaching it to motion detector) to spray Plaintiff while in her driveway, and frontyard; and (8) Defendant Dyer's spraying Plaintiff and Plaintiff's car with a garden hose.

All of these trespasses meet the four-part test required by Bradley Smelting, supra.

All of these incidents involved some intrusion by Pichler and Dyer (or persons, water, or things in their control) onto Ms. Shoblom's land, thus violating Ms. Shoblom's right to exclusive possession of her land. This satisfies element (1) – an invasion of property affecting an interest in exclusive possession

All of these incidents appear to be calculated intrusions by Pichler and Dyer – that is, they intended to enter, or cause some entry, onto Ms. Shoblom's land. In any case, the entries were foreseeable consequences of Defendants' actions (painting a knotty cedar fence will cause bleed-through; painting the top of a fence will cause spill-over; placing a sprinkler with a twenty-foot spray ten feet from a boundary and directing it toward the boundary will cause the water to cross the boundary-line). This satisfies

elements (2) and (3) -- intentional act and reasonable foreseeability that the act would disturb the plaintiff's possessory interest.

Finally, Ms. Shoblom has suffered real and substantial injury in addition to the physical injury that resulted from these trespasses. Each of these trespasses (and the cumulative effect of all of them) has caused Ms. Shoblom to suffer substantial emotional distress for which she can receive a real recovery in general damages.

The Trial Court simultaneously accepted Pichler and Dyer's protestation of innocence, despite proper inferences that could be drawn to the contrary, and rejected Ms. Shoblom's claim that she has suffered both physical property damage and mental distress injury, despite evidence of both. Only by disregarding evidence could the Trial Court conclude that Ms. Shoblom had not suffered substantial injury. This disregard was wrong, especially in a summary judgment context, in which inferences should have run in favor, rather than against, Ms. Shoblom, as the nonmoving party. This Court should reverse and remand.

b. The Trespass Claim is Not Mooted by Defendants' Improved Behavior after Filing of the Lawsuit.

While it is not clear from the ruling, the Court may have considered Mr. Pichler's statement that he had ceased any improper behavior as a mootness defense. That is, the Court may have based its

decision, in part, on a finding (contrary to the evidence, but based on Mr. Pichler's statements) that Pichler and Dyer had ceased to trespass on Ms. Shoblom's property and had ceased to otherwise harass her after the lawsuit was filed. Based on this, the Court appears to have decided that a cessation of harm was sufficient and that no further redress was necessary to remedy past harm.

If so, the Court's ruling would be improper. Past harm is not mooted by its cessation when it has caused damages. As seen above, Pichler and Dyer's actions caused Ms. Shoblom and her property to suffer substantial and lasting harm, which has not been remedied to this day. Ms. Shoblom is entitled to some remedy beyond mere cessation of Pichler and Dyer's harassment of her (which she disputes in any case).

c. The Court Tainted the Record, Injecting Its Own Defenses and Improperly Considering Information it Received Through an Improper Process.

The record of this shows a Trial Judge, acting from what he characterizes as "idealism", but which is actually a hostility to the idea of privacy and private property rights, including the right to exclude, making rulings from personal feelings and idiosyncratic standards, rather than from a basis in law. Starting with the expression that he was "all for shooting this horse" (RP 11/7/06, p.39, ll. 15-16.), the Court proceeded to

eviscerate Ms. Shoblom's righteous claims, leaving her unprotected from the systematic harassment and trespasses she had been subjected to for years by her neighbors. The Court applied a personal standard, which was a standard based on neighborly courtesy rather than on any legal principle or on our system of private property rights. (RP 11/7/06, p.39, l. 16 - p.41, l. 2). Even after noting special concern about a sprinkler being placed on a motion sensor such that it would regularly spray Ms. Shoblom (essentially recognizing that claim to involve disputed material facts) (RP 11/7/09, p.42, ll. 6-15), the Court invited Mr. Pichler to address the Court without being under oath, over the objection of Ms. Shoblom's counsel, and used the information as a rebuttal of the material facts raised in support of Ms. Shoblom's claims, granting summary judgment and dismissing the case. (RP 11/7/09, p.44, l. 20 - p.46, l. 4). Finally, the Trial Court, in dismissing Ms. Shoblom's claim that the damage to her fence was substantial, speculated that the paint could be powerwashed off with a \$60 rental from Home Depot (RP 11/7/09, p.27, ll 3-4), which was not in evidence and which Ms. Shoblom had no opportunity to rebut.

This is a record rife with Court-injected prejudice and error. This Court should reverse and remand for trial, when a jury can act as a fact-finder and resolve the disputed facts of this case, leaving the Court to apply the law without private filtering through factual prejudices.

C. **There is a Triable Case on Tricia Shoblom's Harassment and Battery Claims.**

In dismissing the trespass claims, the Trial Court ruled that it was dismissing all of Tricia Shoblom's claims. In doing so, it failed to address, or even recognize, Tricia Shoblom's claims for harassment and battery, which were in evidence at the time of the motion for summary judgment, which had been pled with sufficient detail, especially when coupled with Ms. Shoblom's interrogatory answers, to put Pichler and Dyer on notice of the claims, and which were presented on a pending motion to amend (which was not heard as the dismissal left no case to amend) at the time of the summary judgment motion. This Court should reverse and remand with instruction that Ms. Shoblom be allowed to amend her pleadings to specifically state these claims, which were pending and prematurely dismissed at the time of the 2009 summary judgment.

D. **There is a Triable Case on Tricia Shoblom's Claim for Wrongful Removal of Survey Stakes.**

“A person who intentionally disturbs a survey monument placed by a surveyor in the performance of the surveyor's duties is guilty of a gross misdemeanor and is liable for the cost of the reestablishment.” RCW 58.04.015. Ms. Shoblom's survey cost \$1,150, although the replacement cost of the stakes removed by Mr. Pichler may be only \$300. (CP 290, ll. 7-8.)

The Trial Court dismissed this claim on the basis that its subsequent ruling on adverse possession rendered it moot because the survey stake no longer marked a purported boundary line. However, this ruling was in error for several reasons. First, the Legislature specifically prohibited self-help removal of disputed survey stakes when it passed RCW 58.04.015. If the Legislature had wanted there to be a defense for vigilante removal of survey stakes in the adverse possession context, it could have set forth that as a statutory defense. It did not, and it had good reason for not doing so.

First, the harm caused by improper removal of survey stakes based on unsuccessful claims for adverse possession would outweigh any potential benefit of allowing removal of professionally placed markers by people claiming title by adverse possession. In such case, the evidence of the boundary would be erased without being replaced or redrawn. Further, allowing the rule applied by the Trial Court in this case to stand would incentivize vigilante stake removal by making such action evidence of adverse possession.

Second, it is incorrect to conclude that historic survey stakes have no value if the boundary line changes through adverse possession. The location of an historic boundary can continue to have significance. Further, the specific placement of the stakes can have evidentiary value in

a surveyor malpractice case where, as seems to be the case here, the stake was mislocated. (RP 11/6/09, p.6, ll. 1-22.) In this case, Mr. Pichler's removal of the stake worked a spoilation of evidence to the detriment of Ms. Shoblom in her interaction with her surveyor.

This case should be remanded to the Trial Court to determine whether, under these circumstances, Ms. Shoblom is entitled to the \$300 stake replacement cost or the full \$1,150 survey cost.

E. **The Court Erred in Award Fees.**

Defendants argue that they are entitled to reasonable attorneys fees as the prevailing party pursuant to RCW 4.84.250 and costs pursuant to CR 68. Attorneys fees under RCW 4.84.250 are to be awarded to the prevailing party if the pleading party sought damages, exclusive of costs, of \$10,000 or less. *See* RCW 4.84.250. The defendant is considered the “prevailing party” for purposes of RCW 4.84.250 if the plaintiff recovers either nothing or a sum not exceeding that offered by the defendant in settlement. *See* RCW 4.84.270. The intent of the statute is to enable a party to pursue a meritorious small claim of \$10,000 or less without seeing the award diminished in whole or in part by legal fees. *See Klein v. City of Seattle*, 41 Wn. App. 636, 640, 705 P.2d 806 (1985); *Northside Auto Serv., Inc. v. Consumers United Ins. Co.*, 25 Wn. App. 486, 492, 607 P.2d 890 (1980).

In this case the Plaintiffs did not seek an award of \$10,000 or less. No specific amount was pleaded in the complaint; rather, the amount was set to be proven at trial. Thus, the Plaintiffs did not limit their award and based on their claim for damages and relief could have received well above \$10,000 in damages. Consequently, Defendants are not entitled to reasonable attorneys fees pursuant to RCW 4.84.250.

Reynolds v. Hicks, 134 Wn.2d 491 at 502, 501-02, 951 P.2d 761 (1998).

Here, Plaintiff's prayer for relief seeks a "judgment against Defendants Kristina Dyer and E. E. Pichler, in an amount to be proven at trial, but known to be less than \$50,000.00." Further, in discovery, Ms. Shoblom stated her claim to be \$30,000 (CP 290, 1.10) and as "over \$50,000" in settlement negotiations (CP 268-278; 379-388). There is no entitlement to fees under RCW 4.84.250-.300 in this case as pled and prosecuted.

Pichler and Dyer have no basis for fees except on a flip argument from Ms. Shoblom's entitlement to fees. Because Ms. Shoblom elected remedies and claims that do not entitle her to fees, Pichler and Dyer are not entitled to fees. The Trial Court erred in awarding them.

1. Election of Remedies

"One is bound by an election of remedies when all of the three essential conditions are present: (1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them." Lange v. Town of Woodway, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). The "inconsistency" is where "the pursuit of one remedy necessarily involves or implies the negation of the others if one of them admits a set of facts and the other denies the same facts, or where one is founded upon affirmance and the other upon disaffirmance." Willis T. Batcheller, Inc. v. Welden Constr. Co., 9 Wn.2d 392, 403-04, 115 P.2d 696 (1941). The election of remedies is made by the Plaintiff, and Plaintiff's

election of one remedy forecloses pursuit of the other by any party in the case. *See Johnson v. Brado*, 56 Wn. App. 163, 167, 783 P.2d 92 (1989), *review denied*, 114 Wn.2d 1022, 792 P.2d 534 (1990).

In this case, Ms. Shoblom's claim arose from a pattern of harassment, which included incidents of trespass, by Pichler and Dyer. In such case, Ms Shoblom could pursue multiple claims for each incident of the Defendants' wrongful behavior, or could pursue a single claim based on the entirety of Defendants' wrongful behavior, but not both (because allowing a pursuit of both would allow for a double-recovery for each incident).

There were significant differences between the remedies provided by and the proofs required for these alternative claims. If Ms. Shoblom litigated the case by making multiple claims on an incident-by-incident basis, then it would be likely that many (or most) of her claims would be less than \$10,000, opening the door to a fee award under RCW 4.84.250-.300. However, such a piecemeal approach to claims would undermine Ms. Shoblom's ability to seek and receive equitable relief (as no isolated claim, divorced from Defendants' pattern of misconduct, provided a strong basis for injunctive relief) and would weaken her claim for emotional distress damages (her largest potential recovery), which are a reaction to the whole pattern, but which are difficult to allocate on an incident-by-incident basis. In other words, Plaintiff had one theory that provided a basis for attorney's

fees at a loss of substantial damages; and another that provided stronger substantive case, but no basis for an attorney's fee award. (CP 379-388.)

Plaintiff was obligated to elect one of these alternatives before trial. However, Plaintiff was not obligated to make a premature election, and neither the Court nor the Defendants can impose such an election on her. Hill v. Cox, 110 Wn. App. 394, 401-402, 41 P.3d 495 (2002).

Ms. Shoblom's Amended Complaint was specifically drafted to leave this election of claims open for later resolution, depending on the developments of the case. The Amended Complaint specifies that fees under RCW 4.84.250-.300 are available only if the damages are sought on an "incident-by-incident" basis (as opposed to being sought in a single claim based on Defendants' pattern of conduct). (CP 7, ll. 23-24.) By making this distinction, Plaintiff's Complaint specifically asserts that Ms. Shoblom is seeking damages in excess of \$10,000, but that she initially reserved the right to allocate those damages among multiple claims such that each could less than \$10,000. However, this was not the election she made. (CP 368-378; 379-388.)

2. Lack of Proper Lodestar Analysis

Washington's Supreme Court set forth the process by which trial judges may set reasonable attorneys' fees. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983). This process, the "lodestar

method,” incorporates the twelve factors that are based on guidelines for private fee arrangements set forth in the Model Rules of Professional Conduct (1982). 100 Wn.2d at 595-96. These factors are:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the fixed or contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 596.

The lodestar method incorporates these twelve factors into an analytical framework that “can be easily applied by trial judges and that will make possible meaningful appellate review.” *Id.*

The application of the lodestar method necessarily begins with a lodestar figure – the number of hours reasonably expended in the litigation. 100 Wn.2d at 597. “The Court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.” *Id.* Next, the Court multiplies this lodestar figure by a reasonable hourly rate of compensation. In calculating the reasonably hourly rate, the Court may consider, in addition to the attorney’s usual billing rate, relevant

factors enumerated above. *See id.* at 596, 597. Finally, after multiplying a reasonable number of hours by a reasonable hourly rate, the court may consider adjusting the dollar amount to reflect either or both of two broad categories: the contingent nature of success and the quality of work performed. *Id.* at 597. (Here, the attorneys have not indicted in their declarations that they had entered into contingent fee agreements with their clients. “The contingent nature of success” is therefore likely inapplicable.)

This analysis should be done by the party seeking fees, and should be accepted, rejected, or modified by the Court after argument.

In this case, neither Pichler nor Dyer in their moving papers, nor the Trial Court, in its ruling and subsequent order, used a lodestar analysis, or any other reviewable analysis. This was error. Even if Pichler and Dyer were entitled to an award of fees, which they are not, they are not entitled to an award of fees unless there is a reviewable analysis supporting the amount of fees awarded.

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VI. CONCLUSION

This is a neighbor dispute. Such disputes are messy and may seem unimportant to outside observers. However, they involve real financial and emotional stakes, and should be treated with judicial respect and understanding that involves, at a minimum, a fair and unprejudiced application of law. That did not happen here.

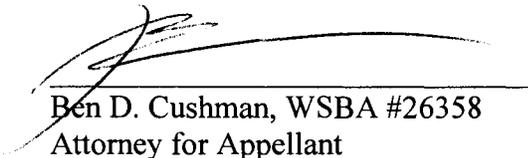
Even though the record reflects that Appellant Tricia Shoblom was the victim of a pattern of harassment, including repeated acts of trespass, by her neighbors, Kristina Dyer and E. E. Pichler, which included setting up a sprinkler on a motion sensor to spray her when she was on her driveway (CP 64-77, 223-229.), the Trial Court dismissed her case out of misguided "idealism." Rather than applying binding legal authority, the Trial Court ruled from personal feelings and idiosyncratic standards. The Court stated that it was "all for shooting this horse" and then did. (RP 11/7/06, p.39, ll. 15-16.)

Following this erroneous ruling, based on an extra-legal process, the Court compounded its error by imposing \$25,000 in fees on Ms. Shoblom under RCW 4.84.250-300 even though Ms. Shoblom's case, at the time it was decided, was on a unified claim seeking damages between \$30,000 and \$50,000.

Ms. Shoblom's case was prematurely dismissed based on extra-legal considerations by the Trial Court, followed up with an unsound award of attorney's fees against Ms. Shoblom. This Court should reverse and remand this matter to allow Ms. Shoblom to seek and receive the relief she is entitled to at trial.

SUBMITTED this 14th day of July, 2010.

CUSHMAN LAW OFFICES, P.S.



Ben D. Cushman, WSBA #26358
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury according to the laws of the State of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel indentified below:

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FILED
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10 JUL 14 PM 3:01
STATE OF WASHINGTON
BY *sm*

DATED this 14 day of July 2010.

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