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COURT OF APPEALS  
DIVISION II

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NO. 46966-9-II

STATE OF WASHINGTON

BY Cm  
DEPUTY

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

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2101 MILDRED, LLC and CONTAC 38, LLC,

Appellants,

v.

1921 MILDRED, LLC,

Respondent.

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BRIEF OF APPELLANTS

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## **ASSIGNMENTS OF ERROR**

1. The trial court erred in entering judgment against Appellant Contac 38, LLC for fees and costs under RCW 4.24.630(1) following the acceptance by Respondent of Appellants' offer of judgment to move a wall encroaching into Respondent's non-exclusive easement area.
2. The trial court erred in entering judgment against Appellant 2101 Mildred, LLC for fees and costs under RCW 4.24.630(1) following the acceptance by Respondent of Appellants' offer of judgment to move a wall encroaching into Respondent's non-exclusive easement area.
3. The trial court erred in making a conclusion of law (misabeled a finding of fact) that Appellant 2101 Mildred LLC "entered onto plaintiff's property and intentionally, unreasonably, and without authority, constructed a concrete retaining wall on the plaintiff's property and easement in violation of RCW 4.24.630(1).
4. The trial court erred in making a finding of fact that "the defendants' trespass onto the plaintiff's property was intentional."
5. The trial court erred in making a conclusion of law (misabeled a finding of fact) that "the construction of the concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property."

6. The trial court erred in making a finding of fact that "Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon."

7. The trial court erred in making a conclusion of law (misabeled a finding of fact) that "Plaintiff is entitled to a judgment under RCW 4.24.630(1) for its costs, and investigative costs, reasonable attorney fees and litigation expenses incurred in bringing this action."

8. The trial court erred in making its conclusion of law "that attorney fees, costs and litigation expenses should be awarded to the plaintiff in the following amounts, which amounts are found to be reasonable: . . . \$53,999.98."

### **ISSUES**

1. Did the trial court err in entering judgment against Appellant Contac 38, LLC for fees and costs under RCW 4.24.630(1) for construction of an encroaching wall, when the unchallenged evidence is that 2101 Mildred, LLC constructed the encroaching wall, not Contact 38, LLC?

2. Did the trial court err in entering judgment against Appellants for fees and costs under RCW 4.24.630(1) following Appellants' offer of judgment to move a wall encroaching into Respondent's non-exclusive easement area when Respondent did not make the required showing of actual and substantial damages, Respondent did not have exclusive right to

possession of the easement area into which 2101 Mildred LLC's wall partially encroached, there was no intentional act of trespass since the wall was constructed with the acquiescence of Respondent's predecessor-in-title, there was no proof Appellant 2101 Mildred, LLC acted wrongfully when the wall was constructed, and the wall was constructed seven years before Respondent bought the property?

3. Did the trial court err in making a conclusion of law (misabeled a finding of fact) that Appellant "2101 Mildred LLC entered onto plaintiff's property and intentionally, unreasonably, and without authority, constructed a concrete retaining wall on the plaintiff's property and easement in violation of RCW 4.24.630(1)"?

4. Did the trial court err in making a finding of fact that "the defendants' trespass onto the plaintiff's property was intentional?"

5. Did the trial court err in making a conclusion of law (misabeled a finding of fact) that "the construction of the concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property?"

6. Did the trial court err in making a finding of fact that "Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon?"

7. Did the trial court err in making a conclusion of law (misabeled a finding of fact) that "Plaintiff is entitled to a judgment under RCW 4.24.630(1) for its costs, and investigative costs, reasonable attorney fees and litigation expenses incurred in bringing this action?"

8. Did the trial court err in making its conclusion of law "that attorney fees, costs and litigation expenses should be awarded to the plaintiff in the following amounts, which amounts are found to be reasonable: . . . \$53,999.98?"

#### **STATEMENT OF THE CASE**

The Respondent sued 2101 Mildred, LLC and Contac 38, LLC, praying for the issuance of an injunction to require the removal of a concrete retaining wall constructed in 2004 or 2005 by 2101 Mildred, LLC, which was located partially within a non-exclusive easement. CP 001-005. The Respondent bought its property at a tax sale in 2011, seven years after the wall was erected. CP 112, 162-163. Appellants tendered an offer of judgment under CR 68, in which they offered to move the wall. CP 036-038. An offer of judgment is required by CR 68 to include "taxable costs incurred to the date of this offer," which this offer included. The Appellants' offer of judgment was accepted by Respondent. CP 040-041, 046.

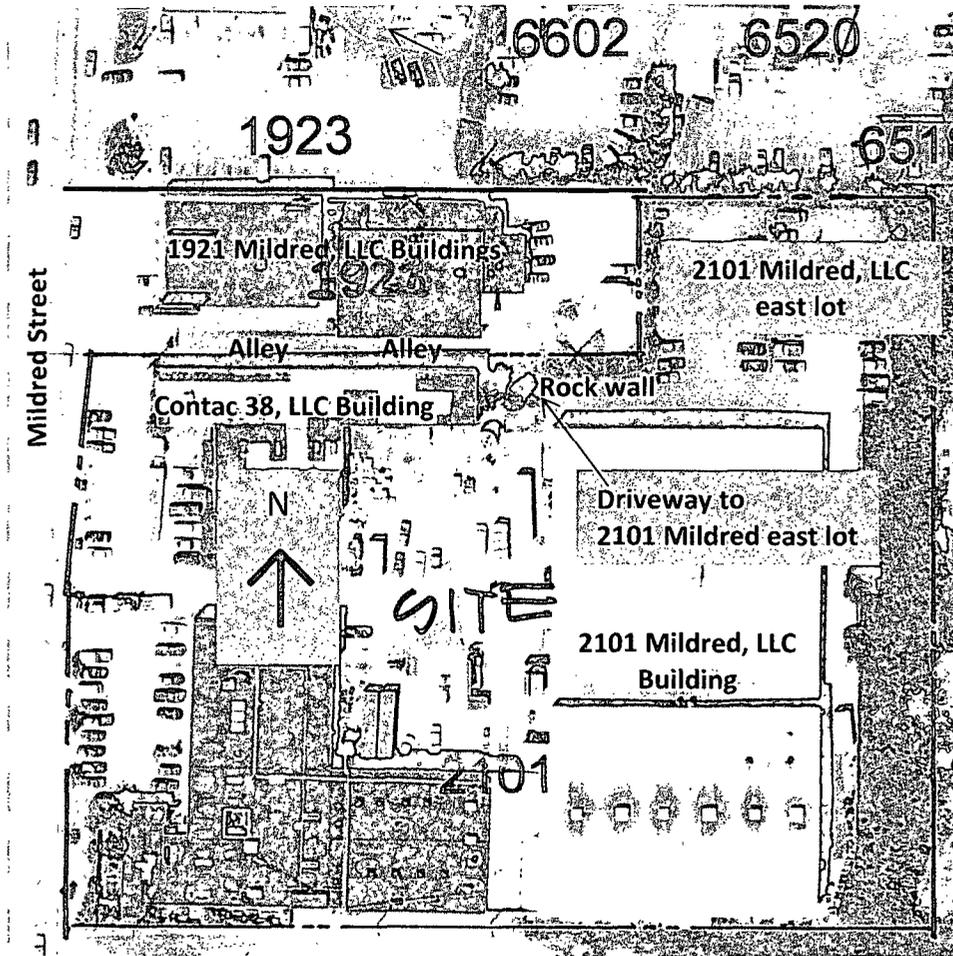
Respondent moved for presentation of the judgment offered by Appellants. In support of recovery of taxable costs incurred to the date of the Appellants' offer, it cited RCW 4.24.630(1), which includes attorney fees as recoverable costs. Its motion was granted. CP 210-214.

Respondent 1921 Mildred, LLC and Appellants 2101 Mildred, LLC and Contac 38, LLC own adjacent commercial properties located in Fircrest, Washington. CP 003, 018, 108-109, 119. The Respondent's property is to the north, and the properties of the Appellants are contiguous to the south. In 1969, non-exclusive easements were created over the properties. CP 108, 119-120, 126-128. The former owner of the Appellants' properties reserved "a non-exclusive easement over the Southerly 8 feet of the [Respondent's property] for ingress to and egress from [the Appellants' properties]." CP 108, 120, 126-128. That owner conveyed to the owner of Respondent's property, "a non-exclusive easement . . . over and upon the Northerly 8 feet of [the Appellants' properties] for ingress to and egress from the [Respondent's property]." CP 108, 120, 126-128. Importantly, the easements do not expressly benefit any specific part of either property. CP 109. In 1969, the Respondent's property was unimproved. CP 164. Rather, they are for ingress to and egress from each, generally. CP 109.

In 2003, 2101 Mildred, LLC bought the properties now owned by it and Contac 38, LLC. CP 109, 120. It sold the two western lots to Contac 38, LLC after a boundary line adjustment in 2006. CP 003, 217. In 2003, Respondent 1921 Mildred, LLC's property was owned by Mr. Jung Lee, who operated a dry cleaning business there. CP 109, 120, 133-134. As previously noted, Respondent bought its property at a tax sale in 2011. CP 112, 162-163.

The two easements form an alley between the buildings. Together, both easements will be referred to as the "Alley." CP 018, 108. The Alley runs from Mildred Street on the west, to Respondent's east property line. CP 108, 109.

Most of 2101 Mildred, LLC's property borders Respondent's property to the south. One parcel, however, is due east. CP 109. In 2003, there was no physical way to access the east parcel through Appellants' property. All traffic came and went via the same, narrow Alley. CP 109, 120. An aerial photo shows the configuration:



The grade of Respondent's property decreases moving east from Mildred Street. CP 110, 121. Toward the east property line, the grade is substantially lower than the adjacent 2101 Mildred, LLC property to the south. CP 110, 121, 165. In 2003, a rock retaining wall separated the two properties in this area, holding back the higher 2101 Mildred, LLC lot. CP 110, 121, 165. A driveway was cut into the west end of the rock wall, allowing access from the Alley to 2101 Mildred, LLC's east parcel via a gate. CP 110, 121, 165.

The old rock retaining wall was located within the easement on the north eight feet of 2101 Mildred, LLC's property. CP 110, 121, 165. It extended about fifty feet from Respondent's east property line. CP 110, 121, 165. North of the rock wall, between it and the property line, grew several mature trees and shrubs. CP 110, 121, 165. This area was not paved. CP 110, 121. A power pole was also located north of the rock wall, between it and the property line, as were several water pipes servicing the buildings on 2101 Mildred, LLC's property. CP 110, 121, 165. In short, due to these obstructions, the approximate fifty western feet of the easement on the 2101 Mildred, LLC property was completely unusable, and unused, by Respondent's predecessors in title. CP 110, 121, 165 - 166.

2101 Mildred, LLC's development permit required the grade to be raised by bringing in substantial amounts of fill dirt. CP 110, 122. The raising of the grade required the construction of an engineered concrete and steel-reinforced retaining wall. CP 111, 122. The city of Fircrest approved plans calling for the new retaining wall to be constructed on the property line, and then to be angled southwest, to the northeast corner of the building on the lot 2101 Mildred, LLC sold more than two years later to Contac 38, LLC. CP 110, 122. By angling the wall, Mr. Bodine was careful to preserve access to the back of the Respondent's property (owned

then by Mr. Lee) via the Alley. CP 111, 122. By placing the wall on the property line over that distance and angling it south, Mr. Bodine was careful to place the wall in part of the easement area neither used or useable by Respondent's predecessors in title for egress and ingress. CP 111, 122.

The wall was constructed by 2101 Mildred, LLC in 2004 or 2005. CP 003, 018, 100, 111. Prior to beginning construction, Mr. Bodine spoke with Mr. Lee and requested his permission to use his property to construct the wall on the property line, as the location of the new wall would not affect any use that Mr. Lee was making of his property. CP 111, 123. The property line was clearly marked by survey stakes. CP 111, 123. Mr. Lee granted permission and witnessed the construction of the retaining wall without objection. CP 111, 123.

The east parcel was accessible for the first time through the 2101 Mildred, LLC property. CP 110, 122. Access to the eastern 90 feet of the easement area on the 2101 Mildred, LLC property is cut off by the wall. CP 111, However, the remaining 215 feet of the easement from Mildred Street to the beginning of the wall enabled Mr. Lee, and now Respondent, full enjoyment of the easement for its intended purpose, e.g., ingress to and egress from the 1921 Mildred, LLC property. CP 111, 123.

## ARGUMENT

### 1. Standard of Review.

A trial court's conclusions of law are reviewed de novo. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wash. App. 333, 340, 24 P.3d 424, 429 (Div. 3, 2001). The interpretation of a statute is a question of law that is reviewed de novo. *Medcalf v. Dep't of Licensing*, 133 Wash.2d 290, 297, 944 P.2d 1014 (1997). The trial court's conclusions of law pertaining to contract interpretation are reviewed de novo. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wash.App. 803, 814, 225 P.3d 280, 284 (Div. 2, 2009).

“If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact. . .” *State v. Niedergang*, 43 Wash. App. 656, 658, 719 P.2d 576, 577 (Div. 2, 1986). However, “if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.” *Id.* at 658–59, 719 P.2d 576; *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wash. App. 333, 340, 24 P.3d 424, 429 (Div. 3, 2001); *Casterline v. Roberts*, 168 Wash. App. 376, 382-83, 284 P.3d 743, 746 (Div. 2, 2012). A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law and reviewed de novo. *Willener v. Sweeting*, 107 Wash.

2d 388, 394, 730 P.2d 45, 49 (1986); *Casterline v. Roberts*, 168 Wash. App. 376, 381, 284 P.3d 743, 745-46 (Div. 2, 2012).

Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Willener v. Sweeting*, 107 Wash.2d 388, 393, 730 P.2d 45, 49 (1986). Where the record consists only of affidavits, memoranda of law, other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses' credibility or competency, this Court is not bound by the trial court's factual findings and it reviews the record de novo. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398, 407, 259 P.3d 190, 194 (2011).

Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 712, 732 P.2d 974, 985 (1987); *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wash. 2d 217, 222, 797 P.2d 477, 481 (1990). The application of the law to the facts is a question of law reviewed de novo. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash.2d 432, 441, 191 P.3d 879, 886 (2008).

A trial court's "decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wash.2d 39, 47, 940 P.2d 1362, 1366 (1997). The trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *First-Citizens Bank & Trust Co. v. Reikow*, 177 Wash.App. 787, 797, 313 P.2d 1208, 1214 (Div. 2, 2013). A court acts on untenable grounds if the record does not support its factual findings, and it acts for untenable reasons if it uses "an incorrect standard, or the facts do not meet the requirements of the correct standard." *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922, 925 (Div. 2, 1995). An error of law necessarily constitutes an abuse of discretion. *Sales v. Weyerhaeuser Co.*, 163 Wash.2d 14, 19, 177 P.3d 1122, 1124 (2008). A trial "court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 458–59, 229 P.3d 735, 743 (2010).

2. The trial court erred in entering judgment against Appellant Contac 38, LLC for fees and costs under RCW 4.24.630(1) for construction of an encroaching wall. Contac 38, LLC played no role in the construction of the wall.

The trial court entered judgment against Contac 38, LLC for fees and costs for violation of RCW 4.24.630(1):

(1) Every person who goes onto the land of another and who . . . **wrongfully causes waste or injury to the land** . . . is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. 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. . . In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs. (*Emphasis added*).

The statute requires the alleged trespasser to “wrongfully” cause waste or injury to land. A defendant acts “wrongfully” only if he or she “intentionally,” as opposed to negligently, causes waste or injury to another’s land. *Borden v. City of Olympia*, 113 Wn. App. 359, 374, 53 P.3d 1020, 1028 (Div. 2, 2002).

Contac 38, LLC did not act wrongfully at all. It did not build the wall. In its complaint, 1921 Mildred, LLC correctly pleaded that 2101 Mildred, LLC had built the wall. CP 003. In its motion for entry of judgment, 1921 Mildred, LLC alleged that "in 2005 the defendant 2101 Mildred, LLC . . . constructed a 12 foot high concrete retaining wall on the

East 95 feet of the plaintiff's property and easement." CP 018. Mr. Bodine, the Managing Member of 2101 Mildred, LLC, admitted that he caused the construction of the wall. CP 018, 058 – 059, 122 – 123, 194 - 203. Contac 38, LLC did not even own the property when the wall was constructed, having only purchased a revised parcel following a boundary line adjustment in 2006. CP 003, 217. Throughout its motion for entry of judgment, 1921 Mildred, LLC referred solely to acts of 2101 Mildred, LLC in constructing the wall. CP 018 – 025.

The findings of the trial court do not support the judgment against Contac 38, LLC. Finding No. 7 states: "Defendant 2101 Mildred, LLC entered onto plaintiff's property and intentionally, unreasonably, and without authority, constructed a concrete retaining wall on the plaintiff's property and easement in violation of RCW 4.24.630(1)." CP 212. Finding No. 8<sup>1</sup> states: "Bruce Bodine of 2101 Mildred knew the location of the plaintiff's boundary line and easement at the time he purchased his property, and he chose to construct the concrete retaining wall on the plaintiff's property and easement in order to gain better access to parking at the rear of his property and to facilitate obtaining a building permit." CP 212. Finding No. 10 states: "Mr. Bodine knew he did not have the

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<sup>1</sup> The Findings of Fact are actually mis-numbered. There are two Findings of Fact numbered as 8, and two numbered as 9. This reference is to the second Finding No. 8.

authority to enter the plaintiff's property or to construct a retaining wall thereon." CP 212.

The trial court made no explicit finding that Contac 38, LLC entered onto Respondent's property at all. Nor could it have. Yet, the trial court made the following Finding of Fact No. 9<sup>2</sup>: "The *defendants*' trespass onto the plaintiff's property was intentional (*emphasis added*)."  
The record is devoid of any evidence that Contac 38, LLC trespassed on 1921 Mildred, LLC's property at all, much less substantial evidence to support the entry of Finding No. 9 as applied to Contac 38, LLC. The trial court erred in entering judgment against Appellant Contac 38, LLC for fees and costs under RCW 4.24.630(1) for construction of an encroaching wall. Finding No. 9, as applied to Contac 38, LLC, adopts a view that no reasonable person would take. It is untenable. Taken together with the trial court's other findings, the conclusion of law that Contac 38, LLC violated RCW 4.24.630(1) by "wrongfully caus[ing] waste or injury to the land" of 1921 Mildred, LLC is manifestly unreasonable. This Court should reverse that judgment.

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<sup>2</sup> This reference is to the first Finding No. 9.

3. The trial court erred in entering judgment against Appellants for fees and costs under RCW 4.24.630(1) because the trial court failed to make, and the record does not establish, the statutorily-required finding of actual and substantial damages as a condition to recovery under the statute.<sup>3</sup>

The trial court made no finding of “actual and substantial damages,” as required by RCW 4.24.630(1). That finding, a condition to recovery under the statute, requires the establishment of “some dollar amount of damages.” *Colwell v. Ezzell*, 119 Wash. App. 432, 442, 81 P.3d 895, 900 (Div. 3, 2003) (“In other words, without a showing of damages the claim has no value.”); *Standing Rock Homeowners Ass’n. v. Misich*, 106 Wash. App. 231, 244-45, 23 P.3d 520, 528 (Div. 3, 2001).

The trial court entered no finding of fact establishing any dollar amount of damages. It could not have done so, as 1921 Mildred, LLC submitted absolutely no evidence of damages. The closest it came was the self-serving, conclusory statement by its managing member, Mr. Hauge, in his reply declaration in support of Respondent’s motion for entry of judgment, that “[p]rospective tenants have expressed disinterest in the property due to the encroaching retaining wall. The easement provides a substantial benefit to the property. The construction of the retaining wall

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<sup>3</sup> The previous Argument applied only to Contac 38, LLC because it did not participate in the construction of the wall. All other Arguments apply equally to both Appellants; although the facts, the findings, and the application of the findings to the trial court’s conclusions of law discuss acts of 2101 Mildred, LLC only. To the extent that this Court reverses the judgment against 2101 Mildred, LLC on the basis of any of the errors raised hereafter, the judgment against Contac 38, LLC must be reversed as well.

on my property and easement substantially reduces the development potential and value of my property.” CP 207.

The closest the trial court came to entering a finding of “some dollar amount of damages” was Finding No. 9<sup>4</sup>: “The construction of the concrete retaining wall on the plaintiff’s property and easement caused an unreasonable waste of plaintiff’s property.” Finding No. 9 is mislabeled a finding of fact. The determination of economic waste is a legal conclusion, not a matter subject to a finding of fact. *Eastlake Const. Co. v. Hess*, 33 Wash. App. 378, 384, 655 P.2d 1160, 1164 (Div. 1, 1982). Indeed, it is the ultimate legal conclusion of RCW 4.24.630(1): “Every person who goes onto the land of another and who . . . wrongfully causes waste or injury to the land, . . . is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.”

Finding No. 9, a legal conclusion, does not establish “some dollar amount of damages” amounting to “actual and substantial damages,” as required by RCW 4.24.630(1). Even assuming *arguendo* that the trial court properly entered the ultimate legal conclusion, improperly labelled Finding No. 9, that waste was established by the record, the statute requires a finding of damages *in addition to* establishing waste.

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<sup>4</sup> This reference is to the second Finding No. 9.

The trial court's judgment against the Appellants for fees and costs under RCW 4.24.630(1) was manifestly unreasonable. It was outside the range of acceptable choices, given the lack of any facts to establish some dollar amount of damages, and the applicable legal standard of actual and substantial damages. It was based on untenable grounds because the record does not support the court's finding, which was erroneously described as a finding of fact. It was based on untenable reasons because it was based on an incorrect standard and the facts do not meet the requirements of the correct standard. For these reasons, this Court should reverse the judgment against both Appellants.

4. The trial court erred in entering judgment against Appellants for fees and costs under RCW 4.24.630(1) because Respondent did not have exclusive right to possession of the easement area into which 2101 Mildred LLC's wall partially encroached.

RCW 4.24.630 is premised upon a wrongful invasion or physical trespass upon *another's property*, a commission of intentional and unreasonable acts upon *another's property*, and subsequent destruction of physical or personal property by the invader to *another's property*. *Colwell v. Etzell*, 119 Wash. App. 432, 439-40, 81 P.3d 895, 898-99 (Div. 3, 2003).

Here, like the easement in *Colwell v. Etzell*, both easements are non-exclusive. Where an easement is non-exclusive in nature, both the

holder of the easement and the owner of the land burdened by the easement have rights to use the property. *Colwell v. Etzell*, supra.

The wall is almost entirely within the north eight feet of the property owned by 2101 Mildred, LLC and Contac 38, LLC across which 1921 Mildred, LLC has an easement. A small portion of the wall, where it turns north at its eastern end, extends north of the property line into 2101 Mildred, LLC's easement. CP 059. The encroachment in this area is de minimus; the 14 inch width of the wall for 7 feet, 9 inches adjacent to 1921 Mildred, LLC's east boundary with 2101 Mildred, LLC's east lot. CP 059. The area had been unused and unusable before the wall's construction. CP 165 – 166. The wall allows 2101 Mildred, LLC to access its east lot through its property, which its predecessors-in-title had been unable to do before the wall was built. CP 120 – 123. It is a reasonable use made by 2101 Mildred, LLC of its easement area, advancing the purpose of ingress and egress. *Littlefair v. Schulze*, 169 Wash. App. 659, 665, 278 P.3d 218, 221 (Div. 2, 2012), *as amended on denial of reconsideration* (Sept. 25, 2012).

A portion of the toe of the wall extends 1.3 feet under the surface of the ground on 1921 Mildred, LLC's property north of the boundary, and within the eight foot easement in favor of 2101 Mildred, LLC. CP 059. It, also, is a reasonable use of made by 2101 Mildred, LLC of its easement

area, advancing its purpose of ingress and egress. *Littlefair v. Schulze*, supra.

Because RCW 4.24.630 is premised upon a wrongful invasion or physical trespass upon *another's* property, a commission of intentional and unreasonable acts upon *another's* property, and subsequent destruction of physical or personal property by the invader to *another's* property, the statute does not support a claim by 1921 Mildred, LLC of damages for waste or injury to its interest as holder in the easement across Appellants' property. *Colwell v. Ezzell*, 119 Wash. App. 432, 441-442, 81 P.3d 895, 899-900. Similarly, RCW 4.24.630 does not support a claim by 1921 Mildred, LLC of damages for waste or injury to the area of its property subject to an easement in favor of Appellants. *Littlefair v. Schulze*, supra.

The trial court committed an error of law in applying RCW 4.24.630 to this case and awarding fees and costs to Respondent under it. This Court should reverse the trial court's judgment on that basis.

5. The trial court erred in entering judgment against Appellants for fees and costs under RCW 4.24.630(1) because 2101 Mildred, LLC did not commit an intentional and unreasonable trespass and commission of waste.

The trial court erred in making a finding of fact that "the defendants' trespass onto the plaintiff's property was intentional." CP 212. RCW 4.24.630(1) requires the alleged trespasser to "wrongfully" cause

waste or injury to land, and a defendant acts “wrongfully” only if he or she “intentionally,” as opposed to negligently, causes waste or injury to another’s land. *Borden v. City of Olympia*, 113 Wash. App. 359, 374, 53 P.3d 1020, 1028 (Div. 2, 2002).

1921 Mildred, LLC had the burden to prove an intentional trespass and wrongfulness by 2101 Mildred, LLC before the trial court could award attorney fees under RCW 4.24.630. *Grundy v. Brack Family Trust*, 151 Wash.App. 557, 571, 213 P.3d 619, 626 (Div. 2, 2009); *Borden v. City of Olympia*, supra. Merely entering the land of another<sup>5</sup> does not make the action “wrongful.” *Clype v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 577, 225 P.3d 492, 494 (Div. 1, 2010) (“There is no way to read “wrongfully” as describing the mere act of coming onto the land”).

To find liability for an intentional tort, the court must find that there was a volitional act undertaken with the knowledge and substantial certainty that reasonably to be expected consequences would follow. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash. 2d 677, 683, 709 P.2d 782, 786 (1985)(citing *Garratt v. Dailey*, 46 Wash.2d 197, 279 P.2d 1091 (1955)). (See also *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 772, 332 P.3d 469, 479 (Div. 1, 2014) (“Appellants argue that they

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<sup>5</sup> Assuming, *arguendo*, that the easement area constitutes “land of another,” discussed *infra*.

satisfied the requirements for intentional trespass based on Respondents' intentional act of cutting down trees. We disagree. The “intent element of trespass can be shown where the actor ‘knows that the consequences are certain, or substantially certain, to result from his act.’ (citation omitted). Even viewed in the light most favorable to Appellants, the nonmoving party, there is no evidence in the record that Respondents knew or were substantially certain that their logging activities would result in a landslide.)”

To establish intentional trespass, a 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 damages. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 692-93, 709 P.2d 782 (1985).

In 2004 - 2005 when the wall was constructed, 1921 Mildred, LLC did not own the property. It bought the property in 2011 – some 6 to 7 years later. There is no evidence 2101 Mildred, LLC had knowledge or substantial certainty that “reasonably to be expected consequences” would follow the erection of the wall on the easternmost part of the easement. The burden was on 1921 Mildred, LLC to make this showing.

The trial court entered a conclusion of law, mislabeled a finding of fact, that "the construction of the concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property." CP 212. There are no findings that support this conclusion, and insubstantial evidence to make such a finding.

The easements were created for the purpose of providing ingress to and egress from each property. CP 108, 120, 126-128. At the time of their creation in 1969, there were no buildings on the 1921 Mildred property. CP 164. After the two buildings were erected on the 1921 Mildred property between 1972 and 1974, the easements were used by the predecessor-in-title to 1921 Mildred, LLC to enable the owner's fuel company to fuel trucks to fill up from heating oil tanks at the back of the 2101 Mildred property. CP 165. The fuel trucks drove down the Alley, parked on the 1921 Mildred side of the old rock retaining wall at the east end of the property, that was later torn down by 2101 Mildred, LLC. CP 165. The eastern 50 feet of the easement area – the area now in dispute – was never used by the owner of the 1921 Mildred property for egress and ingress. It was "unusable and unnecessary. . ." CP 165. "It was unusable because the area consisted of the then existing rock retaining wall, mature trees, and exposed water pipes on the 1921 Mildred side of the rock retaining wall. That area was unnecessary to use, because Silver

Investments and its tenants had the full use of the rest of the easement area to gain access to and from Mildred Street.” CP 165 – 166.

There is insufficient evidence in the record to demonstrate that the actions of 2101 Mildred, LLC were intentional, unreasonable, and therefore wrongful. There is no evidence that 2101 Mildred, LLC constructed the wall with the knowledge and substantial certainty that reasonably to be expected consequences would follow. Respondent had no possessory interest in 2004 – 2005. It bought the property in 2011. There is no evidence that it was reasonably foreseeable that building the new wall would disturb the possessory interest of the Respondent’s predecessors-in-title, either. Both sides have a right to possession to a non-exclusive easement. The east 50 feet of the Alley was never used or useable since the time it was created in 1969. The rest of the Alley has always been more than sufficient to allow Respondent’s predecessors-in-title to achieve the purpose of the easements; e.g., ingress to and egress from the property. Whether the new wall is there or not, the purpose of the easement is unaffected. The easement was not intended to gain access behind the buildings on the 1921 Mildred property, because those buildings did not exist when the easements were created.

This Court should reverse the trial court's judgment against Appellants. There is insubstantial evidence to establish intentional and unreasonable trespass and waste on Respondent's property.

6. The trial court erred in entering judgment against Appellants for fees and costs under RCW 4.24.630(1) because 2101 Mildred, LLC had authorization from the adjoining landowner to construct the wall.

Liability under RCW 4.24.630(1) requires proof by 1921 Mildred, LLC that 2101 Mildred, LLC acted wrongfully. Wrongfulness requires substantial evidence not only that 2101 Mildred, LLC intentionally and unreasonably trespassed and committed waste on 1921 Mildred, LLC's property, but also that it did so "while knowing, or having reason to know, that [it] lacks authorization to so act." The trial court made Finding No. 10 that "Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon."

There is no evidence to support this finding, much less substantial evidence. The previous owner of the 1921 Mildred property permitted the construction. The area in question was previously unused and unusable for ingress and egress to the 1921 Mildred property.

In 2004 - 2005 when the wall was constructed, 1921 Mildred, LLC did not own the property. Respondent relied entirely upon the deposition testimony of Mr. Bodine, managing member of 2101 Mildred, LLC. At that time, the 1921 Mildred property was owned by Mr. Jung Lee. CP

120. Mr. Bodine testified in his deposition that he had the permission of Mr. Lee to use Mr. Lee's property to construct the wall. CP 156 – 159. The property lines had previously been surveyed and were marked at that time. CP 123. Mr. Lee granted permission to use his property to construct the wall. CP 123. The retaining wall was built with the agreement and acquiescence of the owner of the 1921 Mildred property.

The record in the trial court is based entirely on affidavits, memoranda of law, and other documentary evidence. The trial court's factual findings do not bind this Court. *Bainbridge Island Police Guild v. City of Puyallup*, supra. There is no evidence in support of Finding No. 10 that "Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon." This Court should reverse the judgment of the trial court against the Appellants because there was no evidence, let alone substantial evidence, that he knew, or had reason to know, that he lacked authorization to construct the wall.

7. The prevailing party is not entitled to attorney fees on appeal because CR 68 limits recovery to costs that accrue through the Offer of Judgment.

The Appellants' delivered to Respondent an offer of judgment on August 29, 2014. CP 030, 042 – 044. The Respondent accepted the offer of judgment on September 3, 2014. CP 031, 040, 046 – 047, 049 – 051. The trial court issued its judgment against Appellants following their offer

of judgment under CR 68. CP 017, 020 – 022, 030 – 031, 036 – 038, 040 – 051. CR 68 requires that the offer of judgment include “costs then accrued.” The offer of judgment included this language. It did not expressly offer attorney fees. If a CR 68 offer of judgment is silent on the issue of attorney fees, then the court must look to the underlying statute or contract provision. If the statute or contract provision defines “attorney fees” as “costs,” then the court reads the offer of judgment as including attorney fees even though the offer of judgment does not expressly mention them. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wash. App. 571, 581-82, 271 P.3d 899, 905 (Div. 2, 2012). RCW 4.24.630(1) defines costs as: “reasonable costs, including but not limited to . . . reasonable attorneys' fees and other litigation-related costs.”

1921 Mildred, LLC requested a judgment against Appellants for recovery of its attorney fees incurred through August 25, 2014, the last date Respondent incurred fees prior to the date Appellants made their offer of judgment. CP 026, 031, 087 – 088.

CR 68 only allows recovery of costs, including attorney fees, incurred through the date the offer of judgment is made, if the offer of judgment is accepted. The offer of judgment was accepted. The prevailing party is not entitled to recover, under RCW 4.24.630(1), attorney fees as statutory costs incurred thereafter, including on appeal.

If, but only if, this Court holds that CR 68 does not apply on appeal, each of the Appellants should be entitled to recover their attorney fees and costs on appeal.

### CONCLUSION

For the reasons set forth, Appellants respectfully ask this Court to reverse the judgment against each of them for Respondent's attorney fees and costs under RCW 4.24.630(1).

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of February, 2015.

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### CERTIFICATE OF SERVICE

I certify that on the 19<sup>th</sup> day of February, 2015, I caused a true and correct copy of the Brief of Appellants to be served on the following by hand delivery:

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Dated this 19<sup>th</sup> day of February, 2015.

  
Kara K. Hanson