

NO. 48701-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
Division II

ROBERT GUNN, a single man,

Respondent,

v.

TERRY L. RIELY and PETRA E. RIELY, ET UX ET AL
husband and wife,

Appellants

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COURT OF APPEALS
DIVISION II
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AMENDED
BRIEF OF APPELLANTS

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1:

The Rielys challenge the remand conclusions of law No. 6. The remand trial court erred when it awarded attorney's fees to the Plaintiff on equitable grounds since the trial court record does not support the conclusion that the Defendant had the intent to wrongfully trespass and injure property or engage in willful misconduct and any findings of fact to support such legal conclusions are completely absent. (CP-119-120; CP-125; CP-135; CP-136-139).

Assignment of Error No. 2:

The remand trial court erred in awarding *treble damages* under RCW 64.12.030 by adopting the trial court's conclusions of law based on RCW 4.24.630(1) that the Defendant engaged in willful misconduct when the finding of wrongful conduct lacked substantial evidence and the use of RCW 4.24.630(1) was subsequently reversed on appeal and the evidence supports single damages under RCW 64.12.040. (CP-119-120; CP-122-125; CP-135; CP-136-139)

Assignment of Error No. 3:

The remand court erred in its determination that equitable relief in the form of attorneys' fees to the Plaintiff was appropriate under a timber trespass claim based on RCW 64.12.030. (CP-249; CP-165; CP 115-116).

Assignment of Error No. 4:

The remand court abused its discretion in awarding the Plaintiff \$17,500 as attorney fees where the remand court failed to exclude attorneys' hours spent on the non-prevailing claim of the damage to land statute (RCW 4.24.630) and where Plaintiff's counsel failed to segregate attorney's fees from the non-prevailing causes of action, and did not submit proper Findings of Fact and Conclusions of Law to

justify the amount of the fees awarded following the remand hearing.
(CP-119; CP-125; CP-137-141)

Assignment of Error No. 5:

The remand court erred as a matter of law in ruling that *all* outstanding trial issues of the Plaintiff involving mixed legal and equitable claims were required to be settled by the Defendant in order to determine the prevailing party thereby disregarding the application of small claims statutes and CR 68. (CP 20-21)

Assignment of Error No. 6:

The remand court erred as a matter of law in denying the Defendants an award of attorneys' fees as the statutorily prevailing party under RCW 4.84.250 and RCW 4.84.280 when the Plaintiff's judgment for damages was less favorable than Defendant' Offer of Settlement. (CP-20; CP-95; CP-88-94; CP-120)

Assignment of Error No. 7:

The remand court erred as a matter of law in denying the Defendants the re-taxation of costs since the Plaintiff's judgment finally obtained was less favorable than the amount of the Defendant's Offer of Judgment submitted under CR 68. (CP-20; CP-91-92; CP-95)

Assignment of Error No. 8:

The remand court erred as a matter of law when the equitable basis for attorney fees to Gunn was not an issue at trial, was not pleaded or argued, and was not cited with authority in the respondent's brief during the first appeal between the parties. (CP-125; CP-115)¹

¹At page 2, lines 14-17 of the remand court's "Memorandum Opinion on Motion for Reconsideration", Judge Melly stated "Inasmuch as an award of attorney fees on equitable grounds was not before the Court of Appeals since the trial court awarded them under the waste statute, this court may exercise its discretion and address this issue." (CP-115).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) As a question of law, does RCW 64.12.030 allow for an award of attorneys' fees to a party recovering a judgment for damages as a form of equitable relief in a timber trespass claim? **Assignments of Error No. 1; No 2. and No. 3.**

(2) Whether the remand court abused its discretion in finding that the Plaintiff was entitled to attorney fees in the sum of \$17,500, where the remand court failed to exclude or segregate Plaintiff's attorney hours on non-prevailing claims under RCW 4.24.630 and no Findings of Fact nor Conclusions of Law were entered to support or justify the amount of fees awarded? **Assignment of Error No. 4.**

(3) Whether the remand court erred as a matter of law in denying the Defendants attorney fees as the statutorily prevailing party under RCW 4.84.250 and RCW 4.84.280 (for claims under \$10,000) when the Plaintiff's judgment for damages was less favorable than the amount identified in the Offer of Settlement? **Assignment of Error No. 6.**

(4) Whether the remand court erred as a matter of law in denying Defendants the re-taxation of costs when the Plaintiff's judgment finally obtained was less favorable than the amount identified in the CR 68 Offer of Judgment? **Assignment of Error No. 7.**

(5) Whether the remand court erred as a matter of law in holding that all outstanding legal and equitable claims of the Plaintiff were required to be settled in order to determine the statutorily prevailing party thereby disregarding the use of the RCW 4.84.250 (Offer of Settlement) and CR 68 (Offer of Judgement) to resolve damage claims in advance of trial? **Assignment of Error No. 5.**

(6) Where a damage judgment finally obtained by a Plaintiff under RCW 64.12.030 is less than the settlement amount offered by the Defendants under both RCW 4.84.250 and CR 68, do the Defendants become the statutorily prevailing party to be entitled to an award of attorney's fees and a retaxation of costs? **Assignment of Error No. 6 & 7.**

(7). May a court grant attorneys' fees on the basis of equity if the Defendants' actions did not arise to the level of bad faith, willful misconduct or wantonness where the trial record supports a reasonable belief that the Defendants had *probable cause* to believe they possessed a common law right to use and maintain an implied easement from the parties common grantor? **Assignment of Error No. 1 and No. 2.**

10. Does the holder of an implied easement have *lawful authority* under RCW 64.12.030 to enter, use and remove foliage encroaching in the easement area such that said actions would not be

wrongful and therefore not subject to *treble* damages? **Assignment of Error No. 2.**

III. STATEMENT OF THE CASE

A. Substantive Factual History.

This case involved a longstanding dispute between Gunn and Riely in their rural Clallam County property over the right to use an old logging road previously owned and used by the parties common grantor. The dispute subsequently evolved into a timber trespass action between them. (CP 325, CP 314). The Rielys hired a well driller to construct a well on their property adjoining that of Mr. Gunn. The well driller moved his equipment down the old logging road (referred to at trial as the “grassy path”) across the ten acre neighboring parcel of land owned by Gunn to access the well site on the Riely property just below the terminus of the grassy path. The well driller cut down small saplings encroaching in or along grassy path that obstructed movement of his equipment. Gunn claimed damages for timber trespass on the basis of RCW 4.24.630 and RCW 64.12.030. (CP 314; CP-325) Gunn’s expert witness determined the value of the loss of the foliage and alder saplings to be \$153.00. (RP p. 107, ln. 7-24). Prior to trial of the action, the Rielys had submitted

an Offer of Judgment under RCW 4.84.250 and an Offer of Settlement under CR 68 to settle Gunn's damage claims for his tree loss. (CP-267; CP-269). Both offers were rejected by Gunn and the case went to trial. (CP-42-See Exhibit "D" attached thereto). Following the trial, under RCW 4.24.630(1), Gunn was awarded treble damages, restoration costs, attorney fees and other costs based on RCW 4.24.630(1). The use of that statute led to the first appeal of this case.

In *Gunn v. Riely*, at 185 Wn. App. 517, 344 P.3d 1225 (2015), the Division II Court reversed Gunn's judgment and held that under the evidence presented, RCW 64.12.030 controlled the measure of damages. In its opinion, the appellate court also stated:

"Here, the trial court awarded attorney fees under the waste statute (RCW 4.24.630). Because we are reversing the trial court's judgment, Gunn is not entitled to attorney's fees unless the trial court determines that such fees are appropriate under the timber trespass statute (RCW 64.12.030)."

On October 14, 2015, at the conclusion of the remand hearing, Judge Melly found damages for timber trespass in the sum of \$153, trebled the amount to \$459.00 based on RCW 64.12.030, and awarded Gunn attorney's fees in the sum of \$17,500 as a matter of equitable relief ruling that equity allowed the attorneys' fee award

since the Rielys' engaged in "willful misconduct" as previously found by the trial judge (Judge Taylor).² (CP-119; CP 122-126).

Following the denial of their motion for reconsideration, the Rileys appealed the remand judgment. (CP-155; CP-147; CP-09; CP-119, CP-122). The Rielys also appealed the denial of their right to attorneys' fees and retaxation of costs as the "*statutory prevailing party*" under both RCW 4.84.250 (the small claims statute) and CR 68. (CP-267; CP-269)

B. Procedural History.

On April 26, 2013, Gunn filed an Amended Complaint which governed the pleadings of the case at trial. (CP-314). Thereafter, the Riely defendants filed their Amended Answer and Affirmative Defenses. (CP-309). In his amended complaint, Gunn specified that his damages were for less than \$10,000. (CP 314-317; CP-320).³

² To support Gunn's attorneys' fee award, Judge Melly stated at paragraphs 4, 6, and 8 in the remand conclusions of law that:

"However, attorney's fees are recoverable in equity when the losing party's actions arise to bad faith, willful misconduct or wantonness (citation omitted)...The trial court concluded that the defendants engaged in willful misconduct. Plaintiff is awarded \$17,500 in attorney's fees against Defendants." (CP-125).

³ In the amended complaint filed April 26, 2015, at page 6 appearing at paragraph 7.10 Gunn's stated, "The award of damages for all claims will not exceed ten thousand dollars (\$10,000.00). (CP-319)

More than ten days in advance of the trial (on April 22, 2013) the Rielys had delivered to Gunn's attorney an Offer of Settlement as authorized by RCW 4.84.250; and an Offer of Judgment pursuant to CR 68 to resolve the damage claims asserted by Mr. Gunn. (CP-267; CP-269). Shortly before the trial, the parties entered into a stipulated order dismissing Gunn's claim for injunctive relief against the Rielys' well. (CP-139). Following the conclusion of the trial, Judge Taylor found damages of \$153 to Gunn and trebled them under authority of RCW 4.24.630(1) and also awarded Gunn \$17,500 in attorney fees as equitable relief along with other costs. (CP-271; CP-275).

Following entry of the trial court judgment, on July 2, 2013, the Defendant's Offer of Judgment and Offer of Settlement were filed with the Clallam County Superior Court Clerk as authorized by statute and court rule. (CP-267; CP-269).

Subsequently, the trial court's judgment was appealed and the award of damages under RCW 4.24.630 was reversed in *Gunn v. Riely*⁴. The Division II of the Court of Appeals remanded the action back to the superior court to determine damages under the timber trespass statute (RCW 64.12.030). However, by that time the trial judge had retired and

⁴ *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015)

the case was re-assigned to the Honorable Judge Christopher Melly for the remand hearing. (CP-228-231)

Following the remand hearing to determine damages, on October 14, 2015, Judge Melly entered judgment for Gunn . (CP- 119-121). Thereafter, Judge Melly denied Defendant's Motion for Reconsideration concerning the award of the Plaintiff's attorneys' fees as a matter of equity and to apportion or set-off attorneys' fees between successful and non-successful claims. (CP-20; CP-113-118; CP-88).

After the entry of the remand judgment, the Rielys moved for an award of attorney's fees under RCW 4.84.250 (offer of settlement) and a retaxation of costs under CR 68 (offer of judgment). (CP-95; CP-88). The damages awarded to Gunn following remand were approximately 50% less than the amount offered in settlement by the Defendants. (CP-269) That motion was also denied by Judge Melly reasoning that *all* trial claims of the Plaintiff were not resolved by the two settlement offers.⁵ (CP-20-21) The remand court also ruled that there was an equitable basis to award Gunn \$17,500 in attorney fees based on the finding of facts that the trial Judge Taylor had previously entered. (CP-124-125). In reaching this

⁵ In the order denying the motion, Judge Melly stated that the court "...finds that Defendants are not the prevailing party and are not entitled to an award of attorney's fees because neither their settlement offer (RCW 4.84.250) nor offer of judgment (CR 68) addressed Plaintiff's quiet title equitable claim which compelled Plaintiff to proceed to trial." (CP-21).

conclusion, Judge Melly quoted Judge Taylor's findings that Rielys' use of the grassy path was "wrongful" under his interpretation of RCW 4.24.630 and as entered in the Remand Findings of Fact and Conclusions of Law on October 14, 2015. (CP-122-126; CP-284, at 2.6, lns. 3-5; and 2.13 and 2.14, lns 23-27; CP-286, at 2.19, lns. 10-15).

IV. ARGUMENT

A. Summary of Argument.

The remand court (Judge Melly) erred in awarding attorney's fees to the Plaintiff based on equitable grounds which were not raised at the trial or argued at the first appeal as an alternative ground to support an award of attorney's fees. RCW 64.12.030 does not authorize attorney fees but does control the determination of damages and the ability to treble those damages. The trial record does not support the finding that the Rielys' actions were "without law authority" or were "wrongful" and therefore treble damages were not supported by substantial evidence and only single damages under RCW 64.12.040 should be considered. The judgment finally obtained by Gunn following remand was less the amount of the Defendant's offer of settlement (RCW 4.84.250) and offer of judgment (CR 68) given pre-trial, thus, the remand court's award of attorney's fees and litigation costs to Gunn were in error.

The Rielys should be declared to be the prevailing party on the damage claim and be entitled to an award of attorneys' fees and re-taxation of costs and attorneys' fees on appeal.⁶

B. Standard of Review.

The Standard of Review is De Novo Because the Issues Involve a Determination Concerning Whether There is a Legal Basis Upon Which to Grant or Deny Attorney Fees.

As an initial matter, a court's decision whether to award costs and attorney's fees "is a legal issue reviewed *de novo*." *Sanders v. State*, 169 Wn. 2d 827, 866, 240 P. 3d 120 (2010); accord *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). The appellate court reviews an award of attorney fees under two different standards of review. The court first reviews *de novo* whether fees are authorized by statute, contract, or a recognized ground in equity, then reviews any award of fees for an abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P. 3d 1100 (2012).

A trial court abuses its discretion when its decision is outside the range of acceptable choices, unsupported by the record, or reached using an incorrect legal standard. *In re Marriage of Horner*, 151 Wn. 2d 884, 894, 93 P. 3d 124 (2004) (quoting *In re Marriage of Littlefield*, 133 Wn. 2d 39, 47, 940 P. 2d 1362 (1997)); *Estate of Johan Kvande v. Olsen*, 74

⁶ RCW 4.84.290.

Wn. App. 64, 71, 871 P. 2d 669 (1994). An abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 427, 54 P. 3d 687 (2002). All questions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. V. Dickie*, 149 Wn. 2d 873, 879-880, 73 P. 3d 369 (2003); *King County v. Seawest Inv. Associates, LLC*, 141 Wn. 2d 304, 170 P. 3d 53 (2007).

C. The Remand Court Erred As A Matter of Law in Using an Equitable Basis to Award Plaintiff's Attorneys Fees Not Allowed Under RCW 64.12.030 Nor In Accordance with the Mandate of the Court of Appeals And Therefore Was Also An Abuse of Discretion.

Washington follows the American rule "that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity." *Panorama Village Condominium Owners Assn'n Bd of Directors v. Allstate Ins. Co.*, 144 Wn. 2d 130, 143, 26 P. 3d 910 (2001); *Labriola v. Pollard Grp. Inc.*, 152 Wn. 2d 828, 839, 100 P.3d 791 (2000).

One of the issues in this appeal concerns the question of whether the trebling of timber trespass damages under RCW 64.12.030 also allows attorneys' fees to be awarded as a generalized equitable basis. The

standard of review is de novo. Under RCW 64.12.030, a trial court can award treble damages “Whenever any person shall cut down...or otherwise injure....any tree, or shrub on the land of another person....*without lawful authority*....”⁷

In this case, on remand, Judge Melly in relying on the findings of fact by Judge Taylor determined that the Rielys’ actions were “wrongful” justifying the trebling of damages for the cutting down of the alder saplings. (CP-122-126; CP-284, at 2.6, Ins. 3-5; and 2.13 and 2.14, Ins 23-27; CP-286, at 2.19, Ins. 10-15).

From that determination of “wrongful”, Judge Melly justified the equitable award of attorneys’ fees against the Rielys since he concluded their actions constituted a wrongful trespass amounting to willful misconduct. (CP-124-125; CP-119; CP-165, CP-278-280). However, historically, from research into the case law, no court discussion has ever occurred whether the defendant’s actions supported an equitable award of attorneys’ fees as additional costs or damages under and award of treble damages in a timber trespass action under RCW 64.12.030,. For instance,

⁷ RCW 64.12.030 states in material part, “Whenever any person shall *cut down*, girdle or otherwise *injure*, or carry off any tree, timber or shrub on the land of another person.... thereof, *without lawful authority*, in an action by such person....against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for *treble* the amount of damages claimed or assessed therefore, as the case may be.”

in *Broughton Lumber Co v. BNSF Railway Co.* 174 Wn. 2d 619, 636-37, 278 P. 3rd 173 (2012) the Washington Supreme Court summarized a litany of cases specifically construing the factual application of timber trespass statute (RCW 64.12.030) resulting from the entry of land of another:

“And in each of our cases construing the statute over the last 142 years, the defendant entered the plaintiff's property and committed a direct trespass against the plaintiff's timber, trees, or shrubs, causing immediate, not collateral, injury. Examples include: *Birchler*, 133 Wash.2d at 106, 942 P.2d 968 (1997), where the defendant encroached on plaintiff's properties and removed trees and shrubbery; *Guay*, 62 Wash.2d at 473, 383 P.2d 296 (1963), where the defendants cut a swath on plaintiff's property, destroyed trees, brush, and shrubs, and denuded the strip; *Mullally v. Parks*, 29 Wash.2d 899, 190 P.2d 107 (1948), where the defendants entered a disputed area and destroyed trees; *Luedinghaus v. Pederson*, 100 Wash. 580, 171 P. 530 (1918), where the defendant trespassed upon plaintiff's land and removed standing timber; *Gardner*, 27 Wash. 356, 67 P. 615, where the defendants entered plaintiff's land, cut down and converted into shingle bolts and removed plaintiff's cedar trees; and *Maier v. Giske*, 154 Wash.App. 6, 21, 223 P.3d 1265 (2010), where the defendant entered a disputed area and destroyed trees and plants.... Our cases demonstrate that the statute applies only when a defendant commits a direct trespass causing immediate injury to a plaintiff's trees, timber, or shrubs....Further, our canons and case law strongly suggest that the legislature intended the timber trespass statute (RCW 64.12.030) to apply only when a defendant commits a direct trespass that immediately injures a plaintiff's trees. See *Broughton Lumber Co.* supra, at 640.

RCW 64.12.030 is completely silent concerning an award of attorney fees. The damage restrictions in the statute constitute an important part of the case law history defining and applying statutory liability for timber trespass cases. A reasonable inference from the cases summarized above lack any discussion of equitable relief and none of

those actions resulted in any equitable award of attorneys' fees where treble damages were awarded under RCW 64.12.030. In *Tatum v. R & R Cable, Inc.*, 30 Wn. App. 580, 585, 636 P.2d 508 (1981), the landowners sought damages for injuries to trees outside of a utility easement. The trial court had awarded treble damages and attorney fees. However, the attorneys' fee award on appeal was reversed. The Division III court held that "RCW 64.12.030, relating to treble damages, does not include attorney's fees".

Washington courts, as appropriate to a penal statute such as RCW 64.12.030, have narrowly interpreted the punitive damages/costs provision. *Birchler v. Costello Land Company, Inc.*, 133 Wn.2d 106, 110-11, 942 P. 2d 968 (1997); *Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879, 886, 289 P.2d 975 (1955).

Therefore, the conclusion should follow that there is no statutory basis to award attorneys' fees as a matter of equitable relief by mere application of the timber trespass statute.

Among the recognized equitable grounds sufficient to support an award of attorneys' fees as costs or damages, are the bad faith or misconduct of a party, "action by a third person subjecting a party to litigation," and the dissolution of a wrongfully issued temporary injunction. *Gander v. Yeager*, 167 Wn. App. 638, 282 P. 3d 1100 (2012);

Ino Ino, Inc. v. City of Bellevue, 132 Wn. 2d 143, 937 P. 2d 154 (1997) (citing *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn. 2d 230, 247, 635 P. 2d 108 (1981); *Cecil v. Dominy*, 69 Wn. 2d 289, 291-92, 418 P. 2d 233 (1966)). A temporary restraining order is “wrongful” if dissolved by the court at the conclusion of a full hearing. *Id.* (citing *Cecil*, 69 Wn. 2d at 293-94). The rationale supporting this “equitable rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking relief prior to trial on the merits.” Id.

The Rielys actions did not precipitate or involve a wrongfully issued temporary injunction or restraining order against the Plaintiff. In this case, there was no preliminary injunction or restraining order sought by the Rielys against their neighbor, Mr. Gunn and none ever issued. Therefore, this court should conclude that there is no recognized equitable basis for Gunn to be awarded attorney’s fees.

Furthermore, Gunn never requested an award of attorney’s fees as a matter of equity in his pleadings before the trial court—or in his memorandum of law---and did not argue for equitable attorney fees during the first appeal before the Division II-Court of Appeals. RAP 18.1(a) provides that “If applicable law grants to a party the right to recover reasonable attorney fees the party should devote a section of the brief for

fees or expenses.” No such argument appeared in Gunn’s appellate brief as the respondent in that matter.

At trial and on appeal, Gunn only proposed attorneys’ fees under the discredited use of RCW 4.24.630---but never argued equitable theory as an alternative basis. Gunn’s equitable argument was first raised to the remand court as a tactical matter after the Rielys had filed a motion to be declared the statutorily prevailing party on the issue of timber trespass damages under RCW 4.84.250 and CR 68.⁸ (CR-95; CR-73; CP-67; CP-20; CP-142-146; CP-226; RRP-p. 8, lns 3-14; RRP- p. 12, lns 12-17).

The trial record is silent as to the use of any equitable theory as a basis to support an award of attorney’s fees. Gunn’s trial attorney never raised equitable considerations to claim an award of attorneys’ fees. His right to attorneys’ fees was clearly based on RCW 4.24.630(1). (CP-141).

Fairness requires a meaningful opportunity for each party and the trial court to consider and resolve the issues before it. Generally, a party must inform the court of the legal theories it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn. 2d. 26, 37; 666 P. 2d 351 (1983). However, there was no equitable basis given or argued by Gunn at the trial before Judge

⁸ In Plaintiff’s Response to Motion to Determine Damages Following Remand, at page 4, lines 9-10; and line 24, Plaintiff at the remand hearing for the first time stated, “The Court should award attorney’s fees based upon equitable considerations....This is the type of action in equity a court should award attorney’s fees.” (CP-226).

Taylor to support an equitable award of attorney fees to the Plaintiff. Whether a finding or conclusion of “wrongful” actions to support equitable relief by way of attorneys’ fees was supported by substantial evidence will be discussed in further depth later in this brief.

A clear distinction between actions at law and an actions in equity normally exist. An equitable action usually awards some right or duty that monetary damages cannot resolve concerning a dispute between the parties. See *State v. Sizemore*, 48 Wn. App 835, 839, 741 P.2nd 572 (1987).

Since Gunn never argued equity theory to recover attorney’s fees at trial, he should be precluded from raising this theory for the first time at the remand hearing and during this appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

D. NO EQUITABLE FINDINGS WERE MADE TO SUPPORT PLAINTIFF’S ATTORNEY FEES AWARD FOLLOWING THE REMAND HEARING.

It is well established that Findings of Fact and Conclusions of Law are required to establish an adequate record on review to support an attorneys’ fee award. *Mahler v. Szucs*, 135 Wn. 2d 398, 435, 957 P. 2d 632 (1998). At the conclusion of the trial, Judge Taylor made no findings of fact or conclusions of law that equity was an alternative basis to support

any award of attorney's fees to the Plaintiff. (CP-275). The attorneys' fee award was solely predicated on the use of RCW 4.24.630 (subsequently reversed). Furthermore, an award of attorney fees is usually considered a cost claim and not a damage claim. *State Ex Rel Macri v. Bremerton*, 8 Wn. 2d 93, 113, 111 P. 2d 612 (1941). (The term 'costs' or 'expenses' as used in a statute is not understood ordinarily to include attorneys' fees...A court has no power to award costs unless such power is derived from statute.")

The Findings of Fact and Conclusions of Law entered following remand do not include any findings or legal conclusions that the Rielys acted *without lawful authority*, but nevertheless the remand court granted treble damages finding "wrongful" conduct and then awarding fees on the basis of equity pursuant to said conclusion. (CP-122-125, CP-119).

The remand court (Judge Melly) went sideways in reliance on the findings of fact and conclusions of law previously issued by the trial court (Judge Taylor), whose attorney fee award was derived upon the use of RCW 4.24.630(1) as the authorizing statute. (CP-275). RCW 4.24.630 defines 'wrongful' as acting intentionally and unreasonably while knowing the acts to be unauthorized. It is premised on the wrongful and unreasonable invasion of the land. See *Clipse v. Michels Pipeline Construction Inc.* 154 Wn. App. 573, 225 P. 3d 492 (2010). The

language of RCW 4.24.630 requires a trespass (“every person who goes on the land of another”). It does not apply, however, if the court awards damages under RCW 64.12.030, the timber trespass statute. The trial between Gunn and the Rielys devolved into action at law for the cutting of the alder saplings and was not grounded in equity. Judge Taylor acknowledged that circumstance at paragraph 2.1 in his conclusions of law concerning Rielys’ liability for their actions, “Their liability is controlled by one of two statutes. (RCW 4.24.630 or RCW 64.12.030)” (CP-282 at 2.1, lns. 22-26; CP-283 at lns. 1-24).

Gunn’s current position at remand is contrary to the position he took in his trial brief. In that document, Gunn’s trial attorney wrote that his client was seeking “Legal fees in connection with the timber trespass matter.”⁹ In his opening statement to Judge Taylor, Gunn’s trial attorney stated, “This case does involve requesting attorney fees....I had amended our complaint to specify the damages in our case would be not more than \$10,000¹⁰.....this case is about whether or not they (Rielys) committed trespass nor whether or not they had an easement.”¹¹ Gunn’s attorney further went on to state, “...this is a timber trespass case basically.”¹²

⁹ See Plaintiff’s Trial Memorandum, at page 6, item 4, appearing at line 13, attached hereto as Appendix “A”.

¹⁰ VRP p. 5, ln 12; p. 5, ln. 26; p. 6, ln. 1-2 (Attorney Mullins Opening Statement))

¹¹ VRP p. 7, lns. 6-9.

¹² VRP p. 22, lns. 23-25.

Later, Gunn's attorney at remand attempted to finesse a completely different case theory to support attorneys' fees claiming that the lawsuit was essentially a quiet title action.¹³

These actions are impermissible and the lack of adequate findings of fact warrant a reversal of the attorneys' fee award made on remand to Gunn.

E. The Amount of the Attorneys' Fee Awarded to Plaintiff by the Remand Court Was an Abuse of the Court's Discretion. The Proportionality Doctrine Allows an Offset Against the Attorneys' Fee Award.

An appellate court reviews the reasonableness of an award for attorney fees under the standard for an abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 645 & 647, 282 P. 3d 1100 (2012). The Rielys contend that the remand court (Judge Melly) abused his discretion in awarding the sum of \$17,500 as attorneys' fees for the Plaintiff, Robert Gunn. That sum is unreasonable; is not supported by the *Findings of Fact and Conclusions of Law on Remand* entered by Judge Melly and therefore constitutes an abuse of discretion. In *State v. Sizemore*, 48 Wn. App. 835, 839, 741 P. 2d 572 (1987) it was stated that "Equity cannot be a

¹³ "Gunn's suit was a quiet title action to stop Riely's claim to an easement to use the grassy path through his property; the trial testimony was dominated by Riely's claim to an easement through Gunn's land over the grassy path." (CP-225, lines 15-17).

basis for awarding attorney's fees unless the cause of action was cognizable in equity."

Following the conclusion of the first trial, the only claims that Gunn could be considered as prevailing upon were (1) the determination that there was *no easement of record* allowing the Rielys to use the grassy path and (2) a small damage claim for timber trespass. All other claims by Gunn were either not supported by the evidence or no further relief was granted by Judge Taylor.¹⁴ However, it is here contended that the Rielys have prevailed on the damage claim under RCW 4.84.250 through RCW 4.84.280.

However, assuming for the sake of argument that Gunn was entitled to equitable relief in the form of attorneys' fees as a recognized ground in equity, then, examination was required to determine whether both Gunn and the Rielys prevailed on offsetting claims where attorney fee awards were proper under the American rule. In that circumstance, the Judge Melly remand court failed to apply the "doctrine of proportionality" as an offset of attorneys' fees against the claims that the party opponents had each prevailed provided that there was a statute, contract or recognized ground in equity to support the award of attorneys' fees in the

¹⁴ "Since the court has concluded that the defendants had no easement over the grassy path," since this was the defense raised to trespass...the concern for ongoing protection of plaintiff's security is adequately addressed, and there is no need for an injunction at this time." (CP-291 at para.. 2.36, lines 19-24).

first instance. *Labriola v. Pollard Grp. Inc.*, 152 Wn. 2d 828, 839, 100 P.3d 791 (2000).

The *proportionality doctrine* is the judicial approach to fairly consider offsetting attorney fees on multiple issue cases where each side prevails on independent claims. If each party at trial prevails on an issue, it is said that proportionality is the only method that provides a fair determination of the attorney fee award. For instance, in *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P. 2d 605 (1993), a case involving contractual issues, the court stated that the proportionality approach awards plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant on the claims it has prevailed upon. The fee awards are then offset.

The bottom line is that attorneys' fees are only awarded on successful claims. This issue at hand calls into question of how Judge Melly arrived at \$17,500 to support an award to Gunn for his attorneys' fees following the remand hearing. Ultimately, when RCW 4.84.250 is considered, the only claim Gunn prevailed upon was that his property was "cleared of any claim of an *easement of record*."¹⁵ (CP 19-21; CP 22-26).

Case law has held that attorney fees should be awarded only for those services related to the causes of action which allow fees. *Boeing Co.*

¹⁵ See Judgment on Remand for Relief and Damages, page 3, Sec. 5, lines 2-6 (CP-21)

v. Sierracin Corp., 108 Wn. 2d 38, 66, 738 P. 2d 665 (1987). A corollary rule is that the court must exclude the requested hours spent on *unsuccessful* theories or claims multiplied by the attorney's reasonable hourly rate. *Mahler v. Szucs*, 135 Wn. 2d. 398, 434, 957 P. 2d 632 (1998). *Cornish Coll. v. 1000 VA. Ltd. P'Ship*, 158 Wn. App. 203, 234, 242 P. 3d 1 (2010).

There was an absence of proper remand findings of fact that justified the sum of \$17,500 to Gunn as a reasonable attorney's fees again assuming equitable relief is proper in the record before this court. In his Memorandum Opinion on Motion for Reconsideration, Judge Melly stated that he did not know how Judge Taylor arrived at the attorney award to Gunn.¹⁶ There was no attempt to make any separation or segregation of attorney's fees by the remand court or by Gunn's remand attorney in allocation between the no *easement of record* versus the unsuccessful claim related to damage to land (RCW 4.24.630(1)). Judge Melly just awarded the same amount that Judge Taylor had awarded at trial. (CP-125, CP-119).

Gunn's trial attorney's supporting affidavit to the Judge Taylor demonstrated that the entire \$17,500 attorneys' fee award was derived

¹⁶ "It is not known by this court how Judge Taylor arrived at the attorney fee figure that he did. But the court assumes that Judge Taylor's award for fees based upon the claims presented for trial and upon which the plaintiff prevailed. (CP-117 at lns 21; CP-118 at lns 1-3).

solely from the damages to land claim under RCW 4.24.630(1). Gunn's attorney's "Affidavit Regarding Attorney Fees" submitted on May 28, 2013, to support an award of attorneys' fees clearly stated that the "100 hours" of attorneys' time was based on the use of RCW 4.24.630(1) as statutory authority authorizing the Plaintiff to recover an award of attorney fees.¹⁷ In his affidavit narrative, Gunn's trial attorney stated in part as follows:

"1. Attached hereto is a true and accurate summary of dates, times and services rendered on behalf of Robert Gunn in the above case with the ratio of fees related to the claim under RCW 4.24.630 shown in the column entitled "Tmber/Trspss Ratio" and the legal fees for the items under the column entitled "Timber/Trespass Legal Fees.....

3. The attached invoicing shows about 250 hours on this case, including all issues among which were the trespass and removal of timber. Of the total time, about 140 hours were spent on the trespass and removal of timber aspect of the case. Of this nearly 100 hours of the time is billed at \$175 per hour, for fees of \$17,380.48 for the trespass and timber removal portions of this case..."

In reliance on Gunn's trial attorney's affidavit submitted at the post-trial hearing to consider an award of attorney fees, Judge Taylor calculated \$175 dollars per hour x 100 hours of attorney's time and awarded \$17,500. (CP-291 at para. 2.34, lns 13-14 and lns. 25-27).

However, Judge Taylor's adoption of RCW 4.24.630(1) as the controlling statute for attorneys' fees and other damages at trial was

¹⁷ See "Affidavit Regarding Attorneys' Fees" appended hereto as Attachment "B"

reversed and therefore, this was ultimately a non-prevailing claim for the Plaintiff.¹⁸ “Attorney fees are not allowed on unsuccessful claims. Findings of Fact and Conclusions of Law are required to support a fee award.” *Mahler v. Szucs*, 135 Wn. 2d 398, 435, 957 P. 2d 632 (1998).

If attorney’s fees are to be awarded as recognized ground in equity, then a breakdown of the fee award must be gleaned from the Affidavit Regarding Fees of Mark Mullins (Gunn’s trial attorney). There is no reference in his affidavit as to the amount of hours necessarily incurred regarding any equitable action in his fee affidavit. Therefore, in the absence any supporting documentation, the remand court’s Amended Findings/Conclusions on Remand is based on speculation and conjecture. Any meaningful information is clearly absent and insufficient for the appellate court to justify whether the amount was reasonable. (CP 122-126).

A party claiming fees has the burden of making segregation and the trial court must include segregation on the record. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 690-691, 82 P. 3d 1199 (2004); *Kastanis v. Educ. Employees Credit Union*, 122 Wn. 2d 483, 501-502; 859 P. 2d 26 (1993).

¹⁸ *Gunn v. Riley*, 185 Wn. App. 517, 344 P. 3d 1225 (2015)

A plaintiff's standing in equity is governed by whether the facts warranting equitable relief are apparent from the allegations of his or her pleadings. Pleadings are determinative of equitable jurisdiction. In *Hanson v. Estell*, 100 Wn. App. 281, 289-90, 997 P.2d 426 (2000), the Division III Court of Appeals held that a claim for damages can be joined with a claim for other relief, i.e., injunction and RCW 4.84.250 is still applicable. In *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001) it was held that a quiet title action is a claim for equitable relief, thus, damages are ordinarily not allowed. See also *King County v. Squire Inv. Co.*, 59 Wash. App. 888, 896, 801 P. 2d 1022 (1990), which held that in a typical quiet title action, there is no statutory basis for awarding attorney fees to the prevailing party.

On these grounds, the court should find that the amount of \$17,500 awarded to Gunn as attorneys' fees by the remand court (Judge Melly) was an abuse of discretion and reverse that award.

F. The Evidence in the Trial Record Does Not Support a Finding Of Wrongful Conduct by Defendants to Support A Trebling of Damages under RCW 64.12.030 By The Remand Court.

The Rielys contend that the facts raised in the trial testimony do not justify a finding that their actions were willful or wrongful such that *single* damages under RCW 64.12.040 rather than *treble* damages under

RCW 64.12.030 for Gunn's tree loss are appropriate. This issue is not raised to re-hash the issue of a quasi-easement, but to examine whether by the preponderance of evidence, the Rielys had *probable cause* to believe that that they possessed an implied easement such that single damages under RCW 64.12.040 should have applied. This is purely a legal issue, recognizing that the amount of damages awarded on remand (\$153) even when trebled was nevertheless modest. However, the fact of the trebling the damages appears to be the basis for Judge Melly following the remand hearing to conclude "...that the defendant's engaged in willful misconduct" such that Gunn was awarded equitable attorneys' fees.¹⁹ (CP-165).

Gunn had argued at trial and on remand that the Rielys had no reasonable claim to enter the grassy path on his property and cut down the alder saplings. (CP-42).²⁰

At trial, the Rielys were permitted to present evidence that they believed there was an easement right and that they were therefore acting

¹⁹ Memorandum Opinion on Remand. "The Court finds that the conclusion of law specifically, and many of the findings and conclusions generally, support a finding that the Defendant's conduct rose to the level of bad faith, willful and wanton misconduct." Consequently, attorney fees in the amount of \$17,500 are awarded to the Plaintiff." (CP-168, lns 16-20) citing *Baird v. Carson*, 59 Wn. App. 715, 719; 801 P. 2d 247 (1990).

²⁰ Declaration of Mark Mullins. "This lawsuit substantially involved Riely's claim to an easement route through...Gunn's property. Substantial evidence was presented to demonstrate that the Rielys had no reasonable claim to enter the property and theirs was unreasonable and unauthorized entry and destruction of Rob's property, particularly in contrast to their claim of easement rights." (CP-42, lns. 19-24).

reasonably in the use and actions on the basis of an implied easement from the parties common grantors (Joel Sisson and Donald Goralski). (CP-309).

The companion statute, RCW 64.12.040, provides an exception to the strict treble damage provisions of RCW 64.12.030:

64.12.040 Mitigating circumstances ---Damages.

“If upon trial of such action it shall appear that the trespass was casual or involuntary, *or that the defendant had probable cause to believe that the land on which such trespass was committed was his own*, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from unenclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for *single damages*.”

The trial evidence was that the Rielys were told by Joel Sisson, the subdivision developer and common grantor, that the Rielys had a right to use the logging road (grassy path) to access their property. (VRP Vol. 1 page 154-154, Ins. 6-25; VRP Vol. 1 page 157 Ins. 16-25; VRP Vol. 1 page 1-7; VRP Vol. 1 page 168, Ins 21-25, page 169, Ins. 1-2). Parcels 1, 2, and 3 of the Storm King Ranch Large Lot Subdivision adjoin each other and have one common corner that was near the center where the activity that lead to this lawsuit occurred. (VRP Vol. 2, p. 33, ll. 1-25). Running down from Sponberg Lane through Gunn property was an old logging road that the witnesses at trial referred to as the “grassy path”. (VRP Vol. 2 p. 30, Ins. 1-19; Trial-Ex.12). The Treerise’s owned Parcel 3 of the

Storm King development and have never been parties to this litigation. However, the Treerise's had a written easement that covered the right to use the area referred to in trial as the "grassy path" that cut through Gunn land. Shortly before trial, they had released their easement to Gunn by a quit-claim deed. (VRP Vol. 1, p. 73, lns. 6-16;).

The Rielys defended against Gunn's damage claims in part on the basis that they held an implied easement to use the "grassy path" and set forth their affirmative defenses to the amended complaint as thus:

"In the event that the Plaintiff establishes trespass on the part of the Defendants, such trespass was casual or involuntary and not willful or reckless, and/or was done with probable cause to believe that defendant's had an interest in the area of the disputed property as envisioned pursuant to RCW 64.12.040 based upon covenants and easements affecting the burdened property...(CP-309; CP-322)

Following a subsequent motion in limine, the trial court (Judge Taylor) allowed testimony to be considered regarding the Rielys' good faith as to the issue of damages. (VRP Vol. 1, p. 11, ln. 7-17).

Prior to the Rielys' purchase of Parcel No. 2, Joel Sisson (the parties common grantor) walked the property with Terry Riley and showed him the lines and corners. (VRP Vol. 1, p. 149, ln. 6-17). Furthermore, Sisson told him about being able to use that logging road (grassy path) to eventually construct the Rielys' home up on the top of the

hill of Parcel No. 2, stating that the Rileys would have both a mountain and water view. (VRP Vol. 1, p. 166, ln. 14-25; VRP p. 167 ln., 1-4).

The old road (the “grassy path”) was in existence prior to Sisson and Goralski (partner in the subdivision development) purchased the Storm King Ranch property. (VRP Vol. 1, p. 151, ln. 11-21). Sisson testified that the format of the Storm King subdivision was to give each property owner a good view. (VRP Vol. 1, p. 152, ln. 17-19). The grassy path led to the area upon which to access the best view for the Riely property to build a house. (VRP Vol. 1 p. 152, ln. 3-22; VRP p. 153, ln. 21-25; VRP p. 154, ln. 1-7).

In the spring of 2007, Gunn first met Mr. Riely after he had noticed Riely’s blue Volvo pickup truck parked on the grassy path. (RP p. 63, ln. 8-20); RP p. 68, ln. 8-16). Gunn testified that he informed Riely that he did not want him to drive on the grassy path any more. (RP p. 71, ln. 1-13). Gunn then testified as to their conversation regarding the right to use the grassy path:

A:....At that point I looked at him and again I said, you don’t have a right to this easement or roadway and he(Riely) said ‘well, Joel Sisson says we do’ and I went on to tell him Joel Sisson is wrong.

Testimony from Gunn established that the grassy path was gradually being obscured by the natural growth of the foliage (VRP Vol 1, p. 84, ln. 1-13; CP-12). Gunn hired a full boundary survey of his property

from James Wengler, a licensed surveyor. (VRP p. 27, ll. 9-18). In preparing the Gunn survey, Wengler mapped the logging road (grassy path) and the extent of the alder tree clearing along the grassy path. (RP p.28, ln. 7-11; p. 29, ln 5-9). Wengler testified that the cutting of the trees took place near the approximate boundary between Parcel 2 and Parcel 3. Wengler testified that to his observation the grassy path had been a road at one time. (RP p. 31, ln. 6-16).

Sisson further stated that it was always the developers' intention of the Storm King Subdivision that the purchasers of Parcels 2 and 3 would have access to their property from the grassy path. (RP p. 153, ln. 21-25; RP p. 154, ln. 1-7). He testified that use of the grassy path was supposed to be written up that the parcel owners shared that road. (RP p. 154, ln. 13-20) Sisson further testified that he later discovered that his attorney who had drafted the easements and maintenance agreements had written the use up for Parcel No. 3 (purchased by the Treerises) but had inadvertently omitted it for Parcel No. 2 (purchased by the Rielys). Sisson characterized the omission stating that "someone had dropped the ball" implying that his attorney accidentally forgot to put the easement language in Gunn's real property deed. Sisson never caught the omission before to the sale of Parcel 1 to Gunn. (VRP p. 154, ln. 6-21; RP p. 157, ln. 16-21; VRP p. 158, ln. 3-8). Sisson stated that was not aware of the omission until

approximately four years earlier (from the trial date) when Gunn and Riely were having confrontations over the use of the grassy path. (VRP p. 154, ll. 21-25). However, in discussing the issue, Sisson testified that he believed he communicated with Gunn about the right of the Rielys to use the grassy path. (VRP Vol. 1, p. 156, ll. 3-16).

Under an implied easement, authorization is provided under the common law to enter and to maintain the easement.

“It is not only the right, but the duty, of the owner of an easement to keep it in repair. The owner of the servient tenement ordinarily is under no duty to maintain or repair it, in the absence of an agreement imposing such a duty....See “Maintenance and Repairs” (25 Am. Jur. 2d Easements and Licenses, Section 82. p. 580-581).

“In order that the owner of an easement may perform the duty of keeping it in repair, he or she has the *right to enter the servient estate at all reasonable times to effect the necessary repairs and maintenance*. In addition, the owner of an easement may have the right to construct improvements necessary for enjoyment of the easement....” See 25 Am. Jur. 2d Easements and Licenses, Section 83 Right of Access To make Repairs or Improvements; Secondary Easements pp. 581-582

An implied easement is not an express easement that would be written in the deed, nevertheless, the holder of an implied easement has the right to cut overgrowth on the grassy path to preserve it as a way of ingress and egress. For instance, *Hughes v. Boyer*, 5 Wn. 2d 81, 90, 104 P.2d 760 (1940) held that the owners of the dominant tenement had the right to regrade an easement across the land of the owners of a servient

tenement without any express grant from the owners of the servient tenement. In *Dreger v. Sullivan*, 46 Wn. 2d 36, 278 P. 2d 647 (1955), the court held that the owner of an easement by implied grant has the burden of making any necessary improvements to the way. In that action the court also stated:

“An implied easement (either by grant or reservation) may arise (1) where there has been unity of title and subsequent separation; (2) when there has been apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity that the quasi easement exist after severance.”
Id. 46 Wn. 2d at 38.

The case of *Longmire v. Yelm Irr. Dist.*, 114 Wash. 619, 195 P. 1014 (1921) held ditch owners had a right and duty to enter lands to conduct maintenance and effect repairs.

Therefore, even in the absence of a specific grant of easement, the Rileys’ believed that they possessed a common law right travel on the “grassy path” through Gunn property to reach their land as obtained from the right of use by the common-grantors, Joel Sisson. (VRP Vol 1, p. 123, ln. 20-25; VRP p. 124, ln. 1-13). See also CP-5; CP-6; CP-10, CP-11 which are references to Clerk’s Papers use in first appeal.

An easement by implication may be deemed to arise from a former use only where the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, the use has been so long continued and so obvious as to show that it was meant to be permanent,

and the easement is necessary for the proper and reasonable enjoyment of the dominant tract. 25 Am. Jur. 2d "Easements and Licenses" page 521.

Evich v. Kovacevich, 33 Wn. 2d 151, 156-158, 204 P. 2d 839

(1949) stated:

"Easements by implication arise where property has been held in a unified title, and during the such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, has been in use and is reasonable necessary for the fair enjoyment of the portion benefited by such use. The rule, then, is, that upon such severance, there arises, by implication of law, a grant of the right to continue such use....

The essentials to the creation of an easement by implication are, as variously stated by this court, the following: (1) a former unity of title, during which time the right of permanent user was, by obvious and manifest use, impressed upon one part of the estate in favor of another part; (2) a separation by a grant of the dominant tenement; and (3) a reasonable necessity for the easement in order to secure and maintain the quiet enjoyment of the dominant estate."

Prior to buying Parcel 1, Gunn admitted that he had walked or drove through the property with Joel Sisson. They came to the grassy path but did not drive down it. (VRP p. 121, ln. 8-18). At trial, Gunn admitted that he observed the grassy path and saw that it lead down from Parcel 1 to Parcels 2 and 3. He stated that he did not ask Joel Sisson how long the grassy path had been in existence before his purchase of Parcel 1. Gunn testified that he was not interested to what use the grassy path had been made. (VRP p. 122, ln. 1-22, VRP p. 123, ln. 3-4).

On the basis of the trial record and testimony of the witnesses, there is a lack of substantial evidence in the both trial court findings of fact and Judge Melly's remand court findings and conclusions of law to support the conclusion of law of bad faith, willful misconduct or wantonness by the Rielys. A reasonable person in the Rielys' position would believe they had *probable cause* and a reasonable belief to rely on the statements of Joel Sisson (common grantor) to use the old logging road to access their ownership of Parcel 2. If so, under common law they would also have a right to cut down the alder saplings to provide for clearer access on the grassy path.

The term "*probable cause to believe*" is not defined in RCW 64.12.040 which provides mitigating circumstances and single limit damages. The use of "probable cause" in civil actions has an absence of case law to assist in its definition. However, resort to the customary and usual definition in the criminal law arena is well documented.

For instance, probable cause to arrest exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing an offense. *State v. Ward*, 24

Wn. App. 761, 603 P. 2d 857 (1979); *State v. Rodriguez*, 53 Wn. App. 571, 769 P. 2d 309 (1989).

The fundamental objective in reading a statute is to ascertain and carry out the Legislature's intent. *King County v. Seawest Inv. Associates, LLC*, 141 Wn.2d 304, 309, 170 P.3d 53 (2007); *Cockle v. Dep't. of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). Statutes relating to the same subject such as RCW 64.12.030 and RCW 64.12.040 "are to read together as constituting a unified whole, to the end that harmonious total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974); *see also Waste Mgmt. of Seattle*, 104 Wn.2d at 630; *State v. Fairbanks*, 25 Wn.2d 686, 690, 171 P.2d 845 (1946).

Under RCW 64.12.040, a reasonable conclusion is that the requirement of *probable cause* was a legislative reflection of the balance sought for reasonable people to make mistakes when acting as reasonable persons.

In his oral opinion, Judge Taylor stated (in regards to the damage to land statute (RCW 4.24.630(1)):

“For purpose of this section, a person acts, quote “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....(VRP p. 44, lns 10-14).

Judge Taylor ruled that “wrongfulness cannot refer to the mere act of entry on to the land”. (VRP Vol. 2, p. 47, lns 5-6).

The Rielys use along the grassy path was done in reliance to the statements made by Joel Sisson. This was absolutely acknowledged by Judge Taylor at the conclusion of the trial court proceedings:

“So, at this point the question arises how Mr. and Mrs. Riely were to know this when it had been represented to them by Mr. Sisson that they had an access easement? Mr. Sisson was a little bit unclear as to what he had told them. I am satisfied from the testimony that he made that representation. I think that had that not been the case, they would not have had any other reason to think they had the right to use the grassy lane.” (VRP Vol. 2, p. 39, lns 9-17).

Defendant’s Reily never had an opportunity to address either the trial court (or in the first appeal of this action) as to whether equitable considerations applied to allow Plaintiff’s attorneys’ fees as a basis of wrongful conduct under RCW 64.12.030. The focus of the earlier appeal was whether RCW 4.24.630(1) controlled the outcome of the trial, though the use of RCW 64.12.040 was previously addressed in the Rielys’ legal memorandums to the trial court, the remand court and the court of appeals.

The current issue arises because of the dove-tailing of earlier findings of “wrongful” under RCW 4.24.630(1) to support an equitable basis for attorneys’ fees when damages should have been considered under RCW 64.12.030 or RCW 64.12.040.

RAP 2.5(c) restricts the law of the case doctrine. That rule states,

“The following provisions apply if the same case is again before the appellate court following a remand:

- (1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.
- (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would be best served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.

The Rielys seek the review by the appellate court of whether their actions were wrongful under both RAP 2.5(c) (1) and (2).

Under consideration of the totality of the evidence and pursuant to RCW 64.12.040, the standard of *probable cause* was clearly supported by the testimonial evidence in favor of Rielys’ reasonable belief of their right to use the grassy road as an implied easement. Judgment should have been for single damages of the value of the alder saplings at \$153, rather than trebled.

The finding of “wrongful” or “willful misconduct” should be reversed as error at law or an abuse of discretion to bootstrap an award attorneys’ fees in equity.

G. The Public Policy of RCW 4.84.250 Through RCW 4.84.290, is to Encourage Pre-Trial Settlements of Small Claims By Placing Parties at Risk for Paying Opposing Party Attorney’s Fees.

RCW 4.84.250 states:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there *shall* be taxed and allowed to the prevailing party as part of the costs of the action a reasonable amount to be fixed by the court as attorneys’ fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.250 authorizes a trial court to award attorney fees, under certain circumstances, in disputes of \$10,000 or less. Under RCW 4.84.250, a trial court *shall* award the prevailing party attorney fees if the statutory requirements are satisfied. *Davy v. Moss*, 19 Wn. App. 32, 33-34, 574 P. 2d 826 (1978). The term “*prevailing party*” is not used in the usual sense. The companion statute of RCW 4.84.270 states that the defendant is the prevailing party if the recovery is as much as or less than the amount offered in settlement by the defendant.

RCW 4.84.280 outlines the procedure for a settlement offer and requires that the offer be made at least 10 days prior to trial. *Beckmann v. Spokane Transit Auth.*, 107 Wn. 2d 785, 787, 733 P. 2d 960 (1987).

The meaning and statutory interpretation of RCW 4.84.250 is a question of law and is reviewed de novo. *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). The fundamental objective in reading a statute is to ascertain and carry out the Legislature's intent. *King County v. Seawest Inv. Associates, LLC*, 141 Wn.2d 304, 309, 170 P.3d 53 (2007); *Cockle v. Dep't. of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. *Keithy v. Sanders*, 170 Wn. App. 683, 687, 285 P. 3d 225 (2012). *Raum v. City of Bellevue*, 171 Wn. App. 124, 286 P. 3d 695 (2012). Statutes relating to the same subject "are to read together as constituting a unified whole, to the end that harmonious total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974); see also *Waste Mgmt. of Seattle*, 104 Wn.2d at 630; *State v. Fairbanks*, 25 Wn.2d 686, 690, 171 P.2d 845 (1946).

The Washington Supreme Court re-affirmed the public policy fostered by the statutory scheme for small claims related in RCW 4.84.250, which is to encourage pre-trial settlements in cases where the

amount in controversy is \$10,000 or less. *Williams v. Tilaye*, 174 Wn. 2d 57, 58, 272 P. 3d 235 (2012). The offer of settlement is required to place the other party on notice that it would seek attorney's fees if the offer were not accepted. *Toyota of Puyallup, Inc. v. Tracy*, 63 Wn. App. 346, 353-4, 818 P. 2d 1122 (1991). See also *In Re the Matter of the 1992 Honda Accord*, 117 Wn. App. 510, 524, 71 P. 3d 226 (2003).

Court policy is also holds that the size of the controversy must not be considered when attorneys' fees are awarded under the statute on attorneys' fees as costs in small claims actions. The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims and to avoid the expense of trial. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 173 321 P. 3d 1215 (2015); *Kalich v. Clark*, 152 Wn. App. 544, 215 P. 3d 1049 (2009); *AllianceOne Receivables Management, Inc., v. Lewis*, 180 Wn. 2d 389, 325 P. 3d 904 (2014); *Hanson v. Estell*, 100 Wn. App. 281, 997 P. 2d 426 (2000).

In the matter at hand, Gunn sought damages less than \$10,000, as stated in the order to amend the complaint and in the amended complaint. (CP-314; CP-320). The remand judgment entered on October 14, 2015, Judge Melly awarded Gunn monetary damages of \$459.00 for the timber trespass under RCW 64.12.030. (CP-119). That amount was less than the

\$1,000 settlement offered to Gunn by the Rielys over ten days in advance of trial. (CP-269; CP-95)

Therefore, under application of both RCW 4.84.250 and RCW 4.84.270, Rielys should be declared the prevailing party and the remand order denying Rielys' motion to be declared the prevailing party reversed. (CP-20). Gunn's damage recovery was approximately 50% less than the amount offered in settlement before trial. (CP-269; CP-122; CP-119).

If the Rielys are determined by the appellate court to be the *statutorily prevailing party* on issue of small claim damages, the Rielys should be awarded their reasonable attorneys' fees incurred at trial, on remand and at the appeal(s) concerning this case.

H. The Judgment Finally Obtained by the Plaintiff was Less than the Offer of Judgment Submitted Under CR 68 and therefore Costs Should Be Re-taxed Against Him.

CR 68 provides in material part:

“At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer....”.

More than 10 days in advance of trial, the Rielys had submitted to Gunn through his trial attorney an Offer of Judgment meeting the requirements of CR 68 to resolve the damage claims asserted by Mr. Gunn. (CP-267). Gunn declined the judgment offer and the case proceeded to trial for the determination of damages.

According to *Trotzer v. Vig*, 149 Wash. App. 594, 203 P. 3d 1056, review denied 166 Wn. 2d 1023, 312 P. 3d 336 (2009), the purpose of the offer of judgment rule requiring payment of costs in certain circumstances is to encourage settlement before trial and to avoid lengthy litigation. See also *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 271 P. 3d 899 (2012). When a plaintiff rejects an offer of judgment and later obtains a judgment for an amount less than the defendant's offer, the defendant is entitled to an award of costs pursuant to CR 68 and the plaintiff does not qualify as a "prevailing party" for purposes of RCW 4.84.030, which provides for an award of costs to a prevailing party. See *Tippie v. Delisle*, 55 Wn. App. 417, 777 P. 2d 1080, review denied 114 Wn. 2d 1003, 788 P. 2d 1078 (1989).

The award of costs should be reduced and retaxed against the Plaintiff since his recovery was less than Offer of Judgment submitted to him pursuant to CR 68. (CP-267).

I. Rielys' Request An Award Of Attorney Fees And Costs Following this Appeal Under the Authority of RCW 4.84.250; RCW 4.84.270; and RCW 4.84.290 Should the Defendants Be Deemed the Prevailing Party.

The Rielys request an award of reasonable attorney's fees and costs incurred at the trial, the post-trial remand hearing and the ensuing appeal under the authority of RCW 4.84.250; RCW 4.84.270; and RCW 4.84.290.

Awarding of attorney's fees on appeal of a judgment from a trial court is governed by RAP 18.1. That rule reads in pertinent part as follows:

(b) Argument in Brief. The party must devote a section of its opening brief to the request for fees or expenses....

Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs. *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P. 2d 404, *review denied*, 124 Wn. 2d 1015, 880 P. 2d 1005 (1994); *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P. 3d 9 (2012);

The Rielys seek attorney fees pursuant to RAP 18.1 and RCW 4.84.250 and RCW 4.84.290. RAP 18.1 allows this court to award reasonable attorney fees on appeal where authorized by "applicable law". In his amended complaint, Gunn asserted that his damages were less than

\$10,000. (CP-314). The Riely's submitted an offer of judgment to Gunn's attorney over ten days in advance of trial (CP-269). Gunn's damage recovery was less than the amount offered in settlement of the timber trespass damage claims. (CP-119; CP-122).

When the Defendant is the "prevailing party" is defined in RCW 4.84.270 as follows:

The defendant, or party resisting relief, shall be deemed to be the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

RCW 4.84.290 allows an award of reasonable attorneys' fees to the statutorily prevailing party on appeal:

"If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: Provided, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any for the purpose of applying the provisions of RCW 4.84.250.

In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal."

Should the remand judgment entered by Judge Melly and the Order Denying Defendant Rielys' Motion to be Declared to be the Prevailing

Party be reversed, then the Rielys should be deemed the prevailing party under RCW 4.84.250 and under RCW 4.84.290. (CP-119; CP-20; CP-269). It is requested that the appellate court grant the Rielys an award of reasonable attorney fees incurred at the trial court, the remand hearing level and also at the appellate court level.

The Rielys further request the appellate court to consider whether attorney fees would be appropriate following the conclusion of the first *Gunn* appeal. At that time the Rielys could not claim to being the prevailing party since offer of settlement and offer of judgment under CR 68 would not be determined until after the entry of the remand judgment. (CP-119).

RAP 12.7(c) expressly provides that the appellate court retains jurisdiction on the issue of costs, attorney fees and expenses. That rule states:

“The appellate court retains the power after the issuance of the mandate to act on questions of costs as provided in Title 14 and on questions of attorney fees and expenses as provided in RAP 18.1.”

RAP 18.1(i) provides that the appellate court “may direct the amount of fees and expenses be determined by the trial court after remand.” See *Thompson v. Lennox*, 151 Wn. App. 479, 486, 212 P. 3d 598 (2009). The issuance of a mandate does not divest the Court of Appeals of jurisdiction regarding cost and fee issues. See RAP 12.7(c).

In the first *Gunn* appeal, the Rielys had requested that the court reserve the issue of attorney fees following remand on the issue of damages however, no determination of the amount of damages had yet been made and therefore RCW 4.84.270 had not yet come into play and the requirement for further discussion was premature and the policy under RAP 12.7(c) could not be claimed. According to RCW 4.84.280, offers of settlement are not to be communicated to the trier of fact until after judgment at which time the settlement offer is to be communicated for the purpose of considering the merits of attorney's fees under RCW 4.84.250. The Rielys had followed the required statutory procedures. The inability of Riely to comply at the time of the first appeal was a procedural impossibility since at that point no one could have been determined to be the prevailing party since damages under RCW 64.12.030 were not yet determined.

RAP 1.2 states "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." This court had earlier denied the Rielys consideration of any award of attorney fees in *Gunn* without reserving the issue since the remand court had not yet concluded the issue of damages under timber trespass statute.

VI. CONCLUSION

It is requested that the court find that Gunn's attorneys' fees are not awardable under the timber trespass statute (RCW 64.12.030) or on the basis of equity. Furthermore, an award in equity was not argued at the trial or during the first appeal of this case. Finally, the Rileys request that they be deemed the prevailing party and entitled to an award of attorneys' fees and costs at trial and on appeal pursuant to the authority of RCW 4.84.250, CR 68, RAP 18.1 and RCW 4.84.290 and such other relief as they may be entitled.

Respectfully submitted this 25th day of July, 2016.

Law Office of Curtis G. Johnson, P.S.



Curtis G. Johnson, WSBA #8675
Attorney for Appellants Riley

APPENDIX "A"

advising defendants that they were trespassing, has suffered trespass and damage to his property at the hands of the defendants. The greatest injury has been the substantial investigative and legal expenses he has had to undertake in view of the defendants' intransigence.

He seeks to be made whole.

He is seeking:

- 1) Payment of the value of the lost timber, trebled as appropriate.
- 2) Costs for cleanup of the wasted alders that were dumped in the ditch to rot or for Rob to clean up (\$192);
- 3) Investigative surveyor expense in connection with establishing the area of timber trespass;
- 4) Legal fees in connection with the timber trespass matter;
- 5) Statutory fees and costs (\$230, \$50 process service);
- 6) Relief that will provide reasonable assurance that the Rielys will refrain from further trespasses, such as an injunction or declaratory judgment or that the Rielys have not established an easement right in the disputed area;
- 7) He is no longer seeking to enjoin the defendants from use of their well or damages for private nuisance created by their well in preventing him from locating his own septic system components within 100' of the well;
- 8) Other appropriate relief based on the evidence presented at trial.

Mr. Gunn perceived a persistence in the defendants' actions in contravention of his clearly stated demands that they cease their trespasses on his property. Even as late as the late fall or early winter in 2009, the Rielys seemed to remain unwilling to defer to his rights as owner of the property. His only effective remedy for that is an injunction, which he could not obtain in small claims court, requiring him to proceed in superior court.

APPENDIX "B"

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR CLALLAM COUNTY

9 Robert Gunn, a single man,

No. 10-2-00230-1

10 Plaintiff,

AFFIDAVIT REGARDING
ATTORNEY FEES

11 and/vs.

12 Terry L. Riely and Petra E. Riely, husband and wife, etal.

13 Defendant(s).

14 1. Attached hereto is a true and accurate summary of dates, times and services
15 rendered on behalf of Robert Gunn in the above case with the ratio of fees related to the
16 claim under ~~RCW 4.24.630~~ shown in the column entitled "Tmbr/Trspss Ratio" and the
legal fees for the items under the column entitled "Timber/Trespass Legal Fees."

17 2. The usual and customary hourly fee charged by the undersigned to the majority
18 of hourly clients is \$200.00, but this case commenced when my rate was \$175 per hour,
19 as it had been since 2007, and I did not increase my rate for this client during the
pendency of his litigation.

20 3. The attached invoicing shows about 250 hours on this case, including all issues,
21 among which were the trespass and removal of timber. Of the total time, about 140
22 hours were spent on the trespass and removal of timber aspect of the case. Of this,
nearly 100 hours of the time is billed at \$175 per hour, for fees of \$17,380.48 for the
23 trespass and timber removal portions of this case. I rely on Judge Taylor's discretion as
to the reasonable assessment of attorney's fees.

24 I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and
correct:

25 Date: May 28, 2013

Place: Port Angeles, Washington

26 

27 Mark D. Mullins, WSBA #19777

28 Attorney for Plaintiffs

AFFIDAVIT REGARDING ATTORNEY FEES

Law Office of
MARK D. MULLINS
408 East Fifth Street
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Telephone(360)457-7223

COURT OF APPEALS DIVISION II, STATE OF WASHINGTON

ROBERT GUNN, a single man,

NO. 48701-2-II

Respondent,

PROOF OF SERVICE

v.

TERRY L. RIELY and PETRA E. RIELY,
husband and wife,

Appellants.

FILED
COURT OF APPEALS
DIVISION II
2016 JUL 26 AM 10:29
STATE OF WASHINGTON
BY DEPUTY

I hereby certify that on the 26th day of July, 2016, I served the foregoing *Amended Brief* Appellants (*Terry and Petra Riely*) and *Proof of Service* on the following persons/entities, at the following addresses, by the following means:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of July, 2016, at Port Angeles, Washington

Law Office of Curtis G. Johnson, P.S.



Sharon R. Rhoads-Warren---Secretary