

FILED
Court of Appeals
Division II
State of Washington
12/19/2019 3:01 PM

NO. 53127-5-II

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

GERALDINE A. MANIATIS LIVING TRUST et al.,

Respondents/Cross-Appellants,

v.

MALKIT SINGH et al.,

Appellants/Cross-Respondents.

Appeal from the Superior Court for Pierce County Cause No. 16-211518-2

RESPONDENT/CROSS-APPELLANT GERALDINE A. MANIATIS
LIVING TRUST'S REPLY BRIEF

C. TYLER SHILLITO
SMITH ALLING, P.S.
1501 DOCK STREET
TACOMA, WA 98402
(253) 627-1091

TABLE OF CONTENTS

I. ANALYSIS	1
A. Defendants moved for reconsideration pursuant to CR 59 yet even a separate motion under CR 52 was likewise untimely.....	1
1. Defendants filed a “Motion for Reconsideration” and the Court treated the Motion for Reconsideration pursuant to CR 59 and accompanying local rule, PCLR 7(c)(3).	1
2. The Trust and the Court properly provided proposed Findings of Fact and Conclusions of Law on the first day of trial and again on August 31, 2018 – more than three months before the trial court entered the same.	2
3. Alternatively, the Findings of Fact and Conclusions of Law entered December 19, 2018 adjudicated and finally determined the rights of the parties and triggered Defendants’ obligation to seek relief within ten days and the Defendants’ failed to timely act.	3
B. Nothing in RCW 4.24.630 requires the Defendant to intend the exact harm caused by a statutory trespass but even if this standard applied, the Trust offered sufficient proof to satisfy this element. ..	5
1. RCW 4.24.630 only requires proof of intent to commit the offending act but not also specific intent to cause the specific harm that occurs.....	6
2. Defendants’ cited case law at best misreads the operative language of the referenced cases and does not defeat the plain language of RCW 4.24.630.	7
3. Defendants’ requirement that a human body commits a trespassing act only illustrates Defendants’ selective application (and abandonment) of common law principals argued elsewhere.	14
4. In addition to cited case law, legislative history demonstrates liability will attach without physical human entry.	15

5.	If the Defendants disagreed with the Findings of Fact and Conclusions of Law as entered by the trial court that retained findings of wrongfulness, they should have challenged the language like they challenged the other minutia of the language used.	17
C.	The trial court by applying a different standards to Mr. Fielder while excluding testimony by Mr. McCarthy seemingly without proper analysis.	19
II.	CONCLUSION	21

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>224 Westlake, LLC v. Engstrom Properties, LLC</i> , 169 Wn. App. 700, 281 P.3d 693 (2012)	2
<i>Borden v. City of Olympia</i> , 113 Wn. App. 359, 53 P.3d 1020 (2002)	9
<i>Bradley v. Am. Smelting & Ref. Co.</i> , 104 Wn.2d 677, 709 P.2d 782 (1985)	10, 11, 15
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997)	19
<i>Clipse v. Michels Pipeline Const., Inc.</i> , 154 Wn. App. 573, 225 P.3d 492 (2010)	7, 8, 9
<i>Grundy v. Brack Family Trust</i> , 151 Wn. App. 557, 213 P.3d 619 (2009)	9, 10, 15
<i>Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Inv'rs L.P.</i> , 176 Wn. App. 244, 310 P.3d 814 (2013)	4
<i>Phillips v. King Cty.</i> , 136 Wn.2d 946, 968 P.2d 871 (1998)	15, 16
<i>Porter v. Kirkendoll</i> , 5 Wn. App. 2d 421 P.3d 1036 (2018)	11
<i>Professionals 100 v. Prestige Realty, Inc.</i> , 80 Wn. App. 833, 911 P.2d 1358 (1996)	14
<i>Wlasiuk v. Whirlpool Corp.</i> , 76 Wn. App. 250, 884 P.2d 13 (1994)	3, 4, 5

Statutes

RCW 4.24.630	Passim
--------------------	--------

Other Authorities

House Bill Report, SB 6080 (1994).....	15, 16
--	--------

I. ANALYSIS¹

This Court should affirm the Trial Court’s original Findings of Fact and Conclusions of Law entered December 19, 2018 and the award of fees and costs to the Trust. The Defendants failed to timely move for reconsideration or, alternatively, amendment of the Findings of Fact and Conclusions of Law. Regardless, the plain language of the operative statute, RCW 4.24.630, imposes liability here. The Defendants intended to commit the offending act – diversion of the water through unpermitted construction – with knowledge they lacked authorization to so act.

A. Defendants moved for reconsideration pursuant to CR 59 yet even a separate motion under CR 52 was likewise untimely.

- 1. Defendants filed a “Motion for Reconsideration” and the Court treated the Motion for Reconsideration pursuant to CR 59 and accompanying local rule, PCLR 7(c)(3).*

Defendants first try to save their procedural error and allege they never sought reconsideration pursuant to CR 59. However, the record clearly reflects the Defendants filed a “Motion for Reconsideration” pursuant to CR 59. CP 587-610. The trial court considered the request a

¹ Preliminarily, the Trust takes umbrage with the flagrant accusation of racism levied in the Defendants’ Reply Brief. D. Resp. Br.at 2 (accusing the Trust of “perpetuat[ing] prejudice that the Singh family has experienced since moving into this neighborhood”); D. Resp. Br. at 2-3 (“The Plaintiffs seem too distracted by the color of Malkit Singh’s skin...”). Nothing in the record evidences any racist motive. These unfounded, inflammatory, accusations are not supported by any evidence, were never mentioned in trial, are false and are offensive to the Plaintiff.

Motion for Reconsideration pursuant to CR 59. To this end, the trial court ordered briefing pursuant to PCLR 7(c)(3). CP 611; *see also* PCLR 7(c)(3) (discussing briefing schedule on a “motion for reconsideration”). The Defendants cannot successfully re-characterize the “Motion for Reconsideration” now on appeal.

2. *The Trust and the Court properly provided proposed Findings of Fact and Conclusions of Law on the first day of trial and again on August 31, 2018 – more than three months before the trial court entered the same.*

The Defendants next erroneously claim the trial court signed the findings without notice in violation of CR 52. The Trust, however, provided proposed versions of the Findings of Fact and Conclusions of Law the first day of trial on August 6, 2018. CP 1049-60. Then, after conclusion of trial, the Trust provided, again, proposed Findings of Fact and Conclusions of Law on August 31, 2018 at the request of the Trial Court. CP 1049-50; 1061-78. The Defendants received notice of both, and certainly, the later proposed Findings of Fact and Conclusions of Law. CP 1063; *see also* CR 52(c) (requiring service “of the proposed findings and conclusions”) (emphasis added). By providing proposed Findings of Fact and Conclusions of Law both before trial then as amended following trial, the Trust clearly complied with CR 52(c). *See also* 224 *Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 728, 281 P.3d 693 (2012)

(CR 52 satisfied when parties submitted proposed findings and conclusion before trial began). Defendants' attempt to blame the trial court for their delay fails.

3. *Alternatively, the Findings of Fact and Conclusions of Law entered December 19, 2018 adjudicated and finally determined the rights of the parties and triggered Defendants' obligation to seek relief within ten days and the Defendants' failed to timely act.*

Finally, the Defendants argue the Findings of Fact and Conclusions of Law entered December 19, 2018, CP 949-65 (the "First Findings") never triggered the ten (10) day requirement in CR 52. Comparison of this form-over-substance argument to established case law defeats this argument.

CR 52(b) requires a party seek amendment of findings "not later than 10 days after entry of judgment." A court may not enlarge the time in which a party must seek to amend a trial court's findings. CR 6(b).

By rule, a "judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." CR 54(a)(1). To determine whether a document constitutes a judgment, courts look "to the content of the instrument, not its title, and substance controls over form." *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255, 884 P.2d 13 (1994). Moreover,

a final judgment is recognizable as final for purposes of appeal if it finally determines the rights of the parties in the action and is not subject to de novo review at a later hearing

in the same cause. This is true even if it directs performance of certain subsidiary acts in carrying out the judgment, the right to the benefit of which is adjudicated in that judgment, and even if it is followed by subsequent orders with regard to those subsidiary acts.

Wlasiuk, 76 Wn. App. at 255.

In 2013, Division I of this Court addressed the propriety of findings of fact and allegations of an untimely motion to amend the same. *Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Inv'rs L.P.*, 176 Wn. App. 244, 263, 310 P.3d 814 (2013). In *Mukilteo Retirement Apartments*, the trial court entered findings of fact “to save the parties further disagreement and ongoing attorneys fees.” *Mukilteo Ret. Apartments, L.L.C.*, 176 Wn. App. at 263. The trial court also expressly invited the parties back if they felt additional findings or conclusions necessary. *Mukilteo Ret. Apartments, L.L.C.*, 176 Wn. App. at 263. Moreover, the findings provided by the trial court omitted “any operational language requiring the parties to take action.” *Mukilteo Ret. Apartments, L.L.C.*, 176 Wn. App. at 263.

In this case, the First Findings satisfied the requirements of a “judgment” despite Defendants form-over-substance complaints.² Compared to *Mukilteo Retirement Apartments, supra*, the First Findings

² The Trust acknowledges the Defendants’ filed a Notice of Appeal and this Court declared the appeal premature. To the extent not dispositive, the Trust argues the issue on the merits now.

satisfied the requirements of a judgment and, therefore, triggered the obligation to timely seek relief pursuant to CR 52. The First Findings awarded the Trust damages in the specific sum of \$500.00. CP 964. The First Findings awarded the Trust fees and costs (presumably upon timely motion filed pursuant to CR 54(d)).³ CP 964. The First Findings further awarded the Trust the sought injunctive relief. CP 964. The First Findings further declared the “Defendants... must abate the flow of water from the Singh Properties onto the Plaintiff [Trust] Property.” CP 964. Therefore, even if Defendants complain CR 52 controls, Defendants still delayed in seeking amendment within the time required by rule.

B. Nothing in RCW 4.24.630 requires the Defendant to intend the exact harm caused by a statutory trespass but even if this standard applied, the Trust offered sufficient proof to satisfy this element.

Defendants unconvincingly try to explain away RCW 4.24.630’s application here. The Defendants’ entire attempt to avoid liability here relies on two primary premises. First, the Defendants allege RCW 4.24.630 requires a showing of intent to cause the specific waste or injury. Second,

³ CR 54(d)(1) requires parties to file a cost bill and fee affidavit “within 10 days after entry of the *judgment*.” (Emphasis added). Thus, the Trust’s request for fees filed within ten (10) days comports with CR 52 and CR 54. Moreover, because the First Findings granted the injunctive relief, dickering regarding the language of the injunction at best constitutes a “subsequent order” to effect the trial court’s ruling in the First Findings. *Wlasiuk*, 76 Wn. App. at 255.

the Defendants allege RCW 4.24.630 requires physical intrusion by a human body. Both arguments fail.

1. RCW 4.24.630 only requires proof of intent to commit the offending act but not also specific intent to cause the specific harm that occurs.

The Defendants' first argue RCW 4.24.630 requires a plaintiff prove that the defendant "wrongfully (i.e., intentionally) cause[d] the injury." D. Resp. Br. at 10. Thus, Defendants argue RCW 4.24.630 requires a showing of intent to cause the specific harm, not merely intent to commit the offending act. This argument attempts to rewrite RCW 4.24.630 by parsing and reading the statutory language separately.

RCW 4.24.630(1) imposes liability upon a person that "wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land." (Emphasis added). RCW 4.24.630(1) continues and defines "wrongfully":

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.

RCW 4.24.630(1) (emphasis added).

The plain language of RCW 4.24.630(1)'s intent requirement therefore only attaches to an intent to "commit[] the act or acts." Nothing in RCW 4.24.630(1) requires the Plaintiff to show an intent to cause the

specific injury. Liability, therefore, attaches here because the record plainly shows Singh intended to install the offending trench and divert water from his property.⁴ See, e.g., CP 683 (finding Singh regraded “the wetland and buffer areas... initially... without approval by the City of Tacoma”); CP 684 (finding regrading “destroyed the pond and drain system... and buffer area was altered by the regrading, causing the flow of any water on the Singh Properties to change from a northerly direction to a northeasterly direction onto the [Trust] Property”); CP 684 (“Singh objectively and constructively knew of the requirements and limitations imposed by and through the permits... in particular... that water could not be directed onto the [Trust] Property”).

2. *Defendants’ cited case law at best misreads the operative language of the referenced cases and does not defeat the plain language of RCW 4.24.630.*

To circumvent RCW 4.24.630(1)’s plain language, the Defendants misplace reliance on a series of cases cited in Response. In large part, the Defendants rely upon cases that analyzed common law intentional trespass claims and later, cursorily, held no statutory violation occurred.

The Defendants first argue this Court rejected an argument similar to the Trust’s in *Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573,

⁴ Discussed below, the record supports the findings also shows Singh diverted the water “unreasonably.”

576, 225 P.3d 492 (2010). The unsuccessful property owner in *Clipse* argued “‘wrongfully’ applies only to the act of coming onto another’s property and can be proved merely by showing the person lacked authorization.” *Clipse*, 154 Wn. App. at 577. The court rejected this argument, holding a plaintiff must also show the defendant “had reason to know that he or she lacked authorization” to perform the offending act. *Clipse*, 154 Wn. App. at 580. The court emphasized, “RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts *and* knew or had reason to know that he or she lacked authorization.” *Clipse*, 154 Wn. App. at 580 (italic in original).

Read faithfully, the Trust’s argument comports with the express holding of *Clipse, supra* omitted in the Defendants’ discussion. Consistent with *Clipse*, the Trust need only show the Defendants “intentionally and unreasonably committed one or more acts” not a specific harm. *Clipse*, 154 Wn. App. at 580 (emphasis added). Regarding the Defendant’s mental state, *Clipse, supra*, counsels the defendant only needs to understand “he or she lack authorization” to perform the act. *Clipse*, 154 Wn. App. at 580. Thus, liability attaches here because: (1) of an act - Singh intentionally regraded his wetland and buffer and diverted water onto the Trust Property and (2) mental state - because Singh knew he lacked authorization to perform this work.

Likewise, the Defendants cannot rely on *Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002). Noted by the *Borden* Court, the plaintiffs in *Borden* never alleged a trespassing act. *Borden*, 113 Wn. App. at 363 (“The Bordens do not claim that water from the 1995 drainage project actually invaded their property on the surface.”). Instead, the Plaintiff’s there complained because “private developers built a new stormwater drainage project” that the City approved. *Borden*, 113 Wn. App. at 363 (emphasis added).

Nothing in *Borden*, decided before *Clipse, supra*, alters the wrongfulness discussion. Unlike the City that merely approved of construction in *Borden*, the Defendants here actually performed work and altered the topography. *Compare*, Ex. 111 to Ex. 40. Further, the Trust here complains with demonstrated evidence that water from the Defendants’ property directly flows onto the Trust property. CP 685 (finding “water flowing onto Plaintiff [Trust] Property comes from the Singh Properties”).

The Defendants next argue *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 571, 213 P.3d 619 (2009) precludes liability. However, the *Grundy* Court addressed a common law claim for intentional trespass, not a

statutory claim predicate on RCW 4.24.630.⁵ *Grundy*, 151 Wn. App. at 567-68. Regardless, the *Grundy* Court reversed because the plaintiff failed to show (1) intentional entry through mere construction of a seawall and (2) substantial injury. *Grundy*, 151 Wn. App. at 570. Discussing intent for the common law claim, the *Grundy* Court applied the “substantial certainty” test set forth in *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 682, 709 P.2d 782, 785 (1985). *Grundy*, 151 Wn. App. at 569 (quoting *Bradley*, 104 Wn.2d at 682).

Applied here, *Grundy* offers little protection for the Defendants. The *Grundy* Court never addressed the elements or standard of proof applicable to the statutory cause of action in RCW 4.24.630. Moreover, even if this Court found *Grundy* applied, the *Grundy* decision applied the

⁵ The *Grundy* Court, however, addressed RCW 4.24.630’s attorneys fees provision and reversed an award seemingly predicate on the common law trespass claim. *Grundy*, 151 Wn. App. at 571.

“substantial certainty” or “had to know” standard in *Bradley*, 104 Wn.2d at

682.⁶ The evidence here satisfies this standard:⁷

1. Singh testified he lacked knowledge of the drainage system’s design, and instead, deferred to his engineer, Mr. Biggerstaff.⁸ VRP 28:15-19, 30:20-31:3.
2. The Minklers never bothered to investigate the flow of water despite actual knowledge of the claims in the litigation. VRP 69:22-24, 68:18-23, 71:18-72:14.
3. The City conditioned Singh’s development of the Singh Properties upon not diverting water onto neighboring (i.e., the Trust)

⁶ In the application of the intent requirement for common law trespass, the *Bradley* Court reasoned:

The defendant has known for decades that sulfur dioxide and particulates of arsenic, cadmium and other metals were being emitted from the tall smokestack. *It had to know* that the solids propelled into the air by the warm gases would settle back to earth somewhere. *It had to know* that a purpose of the tall stack was to disperse the gas, smoke and minute solids over as large an area as possible and as far away as possible, but that while any resulting contamination would be diminished as to any one area or landowner, that nonetheless contamination, though slight, would follow.

Bradley, 104 Wn.2d at 682 (emphasis added).

⁷ The Defendants suggest the Trust hopes this Court fails to review the transcripts in full. To the contrary, the Trust hopes this Court reviews the transcripts in full and reaches the same conclusion initially reached by the trial court following more than one week of trial testimony. Nevertheless, in addition to the volume of other citations to the record, the Trust cites the record here.

⁸ Singh cannot avoid liability by sacrificing his agent, Mr. Biggerstaff. *Porter v. Kirkendoll*, 5 Wn. App. 2d 702, 421 P.3d 1036 (2018), *as amended* (Oct. 23, 2018), *aff'd in part, rev'd in part*, 194 Wn.2d 194, 449 P.3d 627 (2019) (“One who authorizes or directs a trespass is jointly and severally liable with the actual trespassers”).

properties. Ex. 15, pg. 2 (prohibiting “uncontrolled water affecting neighboring properties” and requiring “call for inspection to occur before wetland area planting”); Ex. 26, pg. 4 (“the applicant is reminded... these flows must not affect neighboring property owners”);⁹ VRP 541:23-542:17; 552:13-19; *see also* Ex. 19.

4. The Trust complained to Singh and his agents about the water runoff. VRP 131:13-132:17; 128:2-20.
5. The City and disinterested witnesses testified they never saw water on the Trust Property until after Singh performed the work. VRP 456:6-11 (Ms. Kluge testimony); 7:3-5.
6. Singh’s engineer, Mr. Biggerstaff, constructively knew of the water runoff. As a result, Mr. Biggerstaff proposed to Singh two methods to avoid the runoff onto the Trust Property including a sump pump to the street. Inexplicably, Singh never proposed this plan to the City. Biggerstaff Dep. at 49:17-50:4.¹⁰

⁹ Page 3 of Exhibit 26 also shows, among other things, Ms. Kluge telling Mr. Singh in writing:

[Your] Report indicated there would be “*no draining, excavation, filing or grading, other than for construction of the house and removal of the concrete pads.*” Despite this assurance, the applicant proceeded to conduct work without permits including clearing, excavation, filling and grading. Soil from the wetland and buffer area was generally leveled throughout the mitigation area, in a manner that was inconsistent with the original plan.

(Italics in original).

¹⁰ The Defendants cite the preservation testimony of Mr. Biggerstaff, their own expert, yet elected not to put the material into the record now on appeal. D. Rep. Br. at 26, n. 13. The Trust cites to Mr. Biggerstaff’s preservation testimony similarly in the event the Court actually considers Mr. Biggerstaff’s testimony.

7. Mr. Biggerstaff testified “the majority” of the water diverted from the Trust Property came from an area other than downspouts on the Singh Properties.¹¹ Biggerstaff Dep. at 50:5-23.
8. Singh’s contractor knew of the potential for water flowing onto the Trust Property and tried “to eliminate any potential water from... flowing towards [the Trust’s] direction.” Biggerstaff Dep. at 53:5-11.
9. Singh, aware of the water flowing on the Trust property, tried to place wheelbarrows of dirt to stop the flow of water to no avail. VRP 43:12-44:16.
10. Singh never engineered this berm to stop the flow of water and the makeshift berm “was built out of the wrong type of material” or mere topsoil. Biggerstaff Dep. at 87:18-25, 88:12-17.
11. The City issued correction notices based on a multitude of deficiencies with the troubled project. At trial, Ms. Kluge testified:

[T]here were violations regarding the groundwater. There were violations with work orders. There were violations with the home, different violations, and not all related to the wetland permit.

And our site development folks, they're the ones that issue those correction notices, so this is a correction notice saying these are the elements that I see you have a problem with.

VRP 462:16-24.

12. Singh failed to stop the flow of water and water continues to flow onto the Trust Property. VRP 173:9-174:12; 189:19-190:7.

¹¹ The Defendants in briefing continue to state the water diverted on the Trust Property comes from rain water seemingly collected and diverted from the downspouts. The Defendants’ own expert disagrees with this assertion.

The evidence clearly establishes, and remains unrebutted¹² that the Defendants knew of the trespassing flow of water yet failed restrain the same. Instead, the evidence shows clear culpable intent – namely that Defendants knew of the flow, took virtually no action address it, eventually giving up after failing to stop the flow. On these facts, even under the common law approach urged by the Defendants, the trial court correctly imposed liability.

3. Defendants’ requirement that a human body commits a trespassing act only illustrates Defendants’ selective application (and abandonment) of common law principals argued elsewhere.

The Defendants’ requirement for human entry asserts a bold double standard. The Defendants’ briefing ask this Court to apply the same “intent”

¹² The burden falls upon the Defendants to rebut the presumption of correctness afforded to the trial court’s Findings of Fact. *Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App. 833, 842, 911 P.2d 1358 (1996) (“On appeal, findings of fact are presumed correct”). The Findings of Fact as entered clearly support liability under RCW 4.24.630. *See, e.g.*, CP 683 (finding Singh regraded wetland area “without approval by the City”), CP 684 (finding regrade diverted water from Singh Properties to the Trust Property), CP 684 (City conditioned permit to Singh on condition water flow “to the north, to the Tosch property... that had been established over the years”), CP 684 (permit required compliance with all laws “and specifically precluded allowing uncontrolled water to affect neighboring properties”), CP 684 (Defendant Singh objectively and constructively knew of the requirements and limitations” and “[i]n particular... knew that water could not be directed onto the [Trust] Property”), CP 685 (finding Sing “installed a variation of the approved drainage” plan but “water flowing onto [Trust] Property comes from the Singh Properties”).

standard found in common law trespass claims to violations of RCW 4.24.630, a statutory claim.

This argument only shows a flagrant selective application of common law principals when it suits them. The Defendants argue liability cannot attach because RCW 4.24.630 requires a human body to enter the land of another. But this position clearly conflicts with the common law cases that the Defendants' argue apply now. The cases cited by Defendants themselves clearly hold a trespass may occur by diversion of water or material. *See, Bradley*, 104 Wn.2d at 682 (intentional trespass occurred by particulates not human intrusion); *Grundy*, 151 Wn. App. at 566 (“The concept of trespass includes trespass by water.”); *Phillips v. King Cty.*, 136 Wn.2d 946, 957, 968 P.2d 871, 876 (1998) (addressing trespass by water).

The Defendants cannot have it both ways. Either RCW 4.24.630 sets forth a unique statutory claim, like the Trust contends, or RCW 4.24.630 merely provides treble damages and fees for common law intentional trespass, as Defendants' argue.

4. *In addition to cited case law, legislative history demonstrates liability will attach without physical human entry.*

Regardless, a review of the statute's legislative history reflects the error in Defendants' "human body" argument. The legislature intended to impose liability for the intentional and wrongful act caused by another, not

specifically damage caused by bodily entry. *See, e.g.*, House Bill Report, SB 6080 (1994). Summarizing Senate Bill 6080, the Bill Report states:

A person *whose wrongful act* causes injury to the land of another, or injury to personal property or improvements on that land, is liable to the injured party for treble the amount of injury caused.

Id. at 1 (emphasis added).

The legislative history further shows testimony surrounding RCW 4.24.630 intended the statute to curb “vandalism and dumping” on the land of another. *Id.* at 2. An odd result occurs if: (1) the legislature intended to curb “dumping” but (2) a court may not impose liability on one who dumps garbage on the land of another because the defendant’s body (opposed to his trash) never entered the land of another.

Presumably, Defendants will concede a person that drives onto his neighbors’ property and throws his trash on his neighbor’s land falls subject to RCW 4.24.630. However, under Defendants’ contorted logic, a person escapes RCW 4.24.630 by merely throwing his trash on his neighbor’s land from a public road.¹³ The Defendants’ proffered interpretation makes no

¹³ Continuing the bulldozer example, under Defendants’ reading, a defendant evades liability by pushing his trash or rocks onto his neighbor’s property provided his body, but not necessarily the blade of his tractor, remains on the defendant’s own property. Or further yet, presumably if a defendant intentionally pushes a boulder down the hill (contrary to a building permit) and it rolls through his neighbors’ house liability would attach pursuant to RCW 4.24.630.

sense in light of the legislative history and therefore fails for this additional reason.

5. *If the Defendants disagreed with the Findings of Fact and Conclusions of Law as entered by the trial court that retained findings of wrongfulness, they should have challenged the language like they challenged the other minutia of the language used.*

The Defendants also try and blame the Trust for the trial court's retention of the wrongfulness findings in the ultimate Findings of Fact and Conclusions of Law. However, the trial court's letter ruling clearly states the scope of trial court's decision. The trial court intended to strike only "Conclusions of Law 23 and 24 from its Findings of Fact and Conclusions of Law dated December 19, 2018." CP 1095. The Letter Ruling makes no reference to amending the other Conclusions of Law.

Moreover, the Letter Ruling itself specifically references, and therefore seems to expressly retain, Conclusion of Law 8. CP 1095. At the time, Conclusion of Law 8 read, in part:

Defendants Singh *intentionally and unreasonably* have committed acts while knowing they did not have authority to do so.

CP 962 (emphasis added).

Despite specifically citing (and apparently affirming) Conclusion of Law 8, the trial court only removed Conclusions of Law 23 and 24. This juxtaposition seemingly shows the trial court specifically intended to retain

the conclusion that Singh acted “intentionally and unreasonably.” *See* CP 962; CP 691 (retaining “intentionally and unreasonably” language in Conclusion of Law 8 in final Findings of Fact and Conclusions of Law); *see also* RCW 4.24.630(1) (defining “wrongfully” to mean a 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”).^{14, 15}

Moreover, if the Defendants believed the trial court intended to further amend the Findings of Fact and Conclusions of Law, they bore the burden to raise the issue with the language used. The record below reflects the Defendants argued extensively regarding the language used in the Findings of Fact and Conclusions of Law. *See generally*, 2/8/19 VRP, 1/25/19 VRP. Yet, oddly, the Defendants never raised the issue of the retained “intentionally and unreasonably,” i.e., “wrongful” applied in the

¹⁴ Regarding the second element, lack of authorization, the trial court also found

Singh objectively and constructively knew of the requirements and limitations imposed by and through the permits and applicable code and law. In particular, Defendants Singh knew that water could not be directed on to the [Trust] Property.

CP 684 (Finding of Fact 32).

¹⁵ In addition, the Trust never invited any error by filing a brief with internal notations among counsel not intended for filing. To the contrary, the annotation decried by Defendants only illustrates arguments made about the trial court’s Findings of Fact and Conclusions of Law.

Findings of Fact. The Defendants cannot now complain on appeal. RAP 2.5(a) (limiting adjudication of issues raised for the first time on appeal).

C. The trial court by applying a different standards to Mr. Fielder while excluding testimony by Mr. McCarthy seemingly without proper analysis.

The Defendants fail to offer any argument grounded in law or fact to save the trial court's exclusion of portions of Mr. McCarthy's testimony despite permitting Mr. Fiedler to testify.

First, the Defendants offer no discussion or even defense of the trial court's exclusion of Mr. McCarthy's testimony. The Defendants fail to offer any analysis under, relevant here, *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) concerning Mr. McCarthy's exclusion. By failing to address the issue, the Defendants seemingly concede this point and acknowledge the error.

Moreover, the exclusion directly relates, to among other things, the wrongfulness component of RCW 4.24.630 that the Defendants continue to argue. For example, the Defendants objected to, and excluded testimony by Mr. McCarthy concerning applicable permits issued to Singh. VRP 291:18-294:2. Certainly, Mr. Singh's permits directly relate to whether Singh acted intentionally and unreasonably in light of the permit restrictions.

Moreover, the trial court also excluded, upon objection, Mr. McCarthy's testimony of ongoing saturation and "drainage." VRP 295:2-

12. The exclusion also carried over to a limitation on rebutting the analysis of Defendants' expert, Mr. Biggerstaff that Defendants offered through deposition designation only. VRP 305:2-15. In short, the Defendants cannot simultaneously argue the Trust failed to show wrongfulness and culpable intent and also argue Mr. McCarthy's exclusion non-prejudicial. If this Court agrees that the Trust failed to show wrongfulness and intent, the Court should remand for the entirety of Mr. McCarthy's testimony.¹⁶

If on the other hand, the Court finds the exclusion proper, the trial court abused its discretion by allowing Mr. Fielder to testify under the same circumstances. Over objection, the Defendants entered into evidence for the trial court's consideration, Exhibits 141 through 144. Further, the Defendants turned these Fielder's documents over on January 28, 2018, days before the then February 2, 2018 discovery cutoff. *See, e.g.*, VRP 1127:12-21. The Trust tried to conduct discovery on these late disclosures and the Defendants refused citing the discovery cutoff and trial court's order. *See, e.g.*, VRP 1127:12-21. To remedy the prejudice, the Court

¹⁶ The Defendants then parlay into a strawman fallacy and argue the exclusion irrelevant because this appeal presents a legal interpretation of RCW 4.24.630. D. Resp. Br. at 24. The trial court heard Mr. Fielder's testimony and relied on it when issuing its findings and conclusions. Presumably, therefore, Mr. Fielder's testimony affected trial court's determination of wrongfulness and whether RCW 4.24.630 applies, the primary issue on appeal.

should therefore exclude consideration of Mr. Fielder's testimony on appeal if not remand with clear direction.¹⁷

II. CONCLUSION

This Court should hold RCW 4.24.630 applies, award the Trust fees on appeal, and remand for entry of an award of fees before the trial court.

DATED this 19th day of December, 2019.

/s/ C. Tyler Shillito

C. Tyler Shillito, WSBA #36774

tyler@smithalling.com

Matthew C. Niemela, WSBA #49610

mattn@smithalling.com

Smith Alling, P.S.

1501 Dock Street

Tacoma, WA 98402

Telephone: (253) 627-1091

Attorneys for The Geraldine Maniatis
Living Trust

¹⁷ In light of the record, the Trust contends this Court may impose liability under RCW 4.24.630. However, if the Court finds the burden of proof unmet, the Trust asks for a remand to consider all evidence, including Mr. McCarthy's entire testimony.

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on the below date she caused to be delivered to the Court and to the persons below, the attached document via the Washington State Appellate Court's Portal:

Colleen A. Lovejoy, WSBA #44386
James G. Fick, WSBA #27873
Schlemlein Fick & Scruggs, PLLC
66 S. Hanford Street, Suite 300
Seattle, WA 98134
Attorneys for Appellants/Cross Respondents
Singh and Ranjit
c.lovejoy@soslaw.com
jgf@soslaw.com

Stephen A. Burnham, WSBA #13270
3175 Meridian Avenue
Puyallup, WA 98371
Attorney for Appellants/Cross Respondents
Mincklers
steveb@cdb-law.com

Elizabeth R. Powell, WSBA #30152
Elizabeth Powell, PS, Inc.
535 Dock Street, Suite 108
Tacoma, WA 98402
Attorney for Respondents/CrossAppellants
Tosch and Kerger
powelllaw@comcast.net

Amy R. Pivetta Hoffman, WSBA #35494
APH Law PLLC
PO Box 73040
Puyallup, WA 98373

Attorney for Respondents/CrossAppellants
Tosch and Kerger
amy@aphoffman.com

DATED this 19th day of December, 2019.

/s/ Lisa Lefebvre
Lisa Lefebvre, Legal Assistant

SMITH ALLING, P.S.

December 19, 2019 - 3:01 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53127-5
Appellate Court Case Title: Geraldine A Maniatis Living Trust, et al, Resp/Cross-App v. Malkit Singh, et al,
App/Cross-Resp
Superior Court Case Number: 16-2-11515-8

The following documents have been uploaded:

- 531275_Briefs_20191219150056D2618652_2396.pdf
This File Contains:
Briefs - Respondents/Cross Appellants
The Original File Name was maniatitis reply brief FINAL 12.19.19.pdf

A copy of the uploaded files will be sent to:

- C.Lovejoy@soslaw.com
- jgf@soslaw.com
- mattn@smithalling.com
- maura@smithalling.com
- powelllaw@comcast.net
- steveb@campbellbarnettlaw.com

Comments:

Sender Name: Julie Perez - Email: julie@smithalling.com

Filing on Behalf of: Charles Tyler Shillito - Email: tyler@smithalling.com (Alternate Email:)

Address:
1501 Dock Street
TACOMA, WA, 98402
Phone: (253) 627-1091

Note: The Filing Id is 20191219150056D2618652