

NO. 688189-I

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

CAREY WILLIAM MEIRE, an individual,

Plaintiff-Appellant,

v.

BRADLEY AND MONICA GALVIN, a married couple,

Defendants-Appellees.

ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT
(Hon. Ira Uhrig)

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by awarding the Galvins damages not recoverable under RCW 4.24.630. CP 0022.

2. The trial court erred by awarding the Galvins all of their “costs of suit, investigative costs, and attorney fees, pursuant to RCW 4.24.630 and CR 11.” CP 0022.

II. ISSUES PRESENTED

1. Did the trial court commit reversible error when it awarded the Galvins \$72,795 in damages that are not recoverable under RCW 4.24.630? Assignment of Error 1.

2. Did the trial commit reversible error when, under RCW 4.24.630 and CR 11, it awarded the Galvins all of their costs and attorneys’ fees? Assignment of Error 2.

III. STATEMENT OF THE CASE

A. Meire and the Galvins Are Neighbors Engaged in a Property Dispute.

This case involves a property dispute between Plaintiff, Carey William Meire (“Meire”), and Defendants, Bradley and Monica Galvin (the “Galvins”). CP 0018. In March 2004, Meire purchased his home at 1882 Cliff Road, Point Roberts, Washington. CP 0763. Shortly thereafter, in November 2004, the Galvins purchased the adjoining vacant lot for \$26,000. CP 0764; RP (March 20, 2011) at 848. Approximately

four years later, the Galvins began efforts to construct a dwelling on their lot. CP 0764. To this end, in mid-2008, the Galvins hired an excavator, Brian Calder, to construct a driveway and parking area. CP 0764.

Shortly after Mr. Calder completed his excavation work, investigators working for the Whatcom County Planning and Development Services (“PDS”) inspected the Galvins’ lot. CP 0764. During their inspection, PDS found various debris, including dirt, broken concrete, electrical conduit, railroad ties, lumber, and barbed wire, on the Galvins’ lot. CP 0764. Additionally, inspectors found a makeshift camp, consisting of a tent with a wooden foundation and smokestack, and a toilet. CP 0764. PDS issued a stop-work order because the excavation work had been unpermitted and the camp was a nonpermitted residential structure. CP 0764. In response to the order, the Galvins explained that the debris had come from a demolition site in the area. CP 0764. Subsequently, PDS issued a Notice of Violation, which the Galvins admitted. CP 0764.

After receiving the Notice of Violation, the Galvins again hired Mr. Calder to excavate an area for the foundation of what was to be the Galvins’ home. CP 0764. In September 2009, while Meire was out of town, Mr. Calder used heavy machinery to dig a trench approximately twenty feet deep, thirty feet wide, and fifty-five feet long. CP 0764. The

trench generally runs along the property line between the parties' properties, but also extends well onto Meire's property, including running under Meire's stairs, which do encroach on the county's right-of-way. CP 0929-0930. Over time, the walls of the trench have eroded, causing further damage to Meire's property. CP 0765. The excavation also resulted in the removal of trees from Meire's property, including a maple tree, as well as other damage. CP 0764. Meire never authorized the work, including the trenching on his property, or the removal of his trees. CP 0764.

Additionally, the Galvins' excavation resulted in the dumping of excess soil and other materials onto Meire's property. CP 0764. Finally, without Meire's authorization, the Galvins, in an effort to improve their view, entered Meire's property and admittedly improperly pruned a cedar tree located wholly on Meire's property. RP (March 14, 2012) at 192.

B. The Galvins' Allegations of Trespass and Frivolous Pleadings.

After Meire filed suit against the Galvins for their trespass and damages to Meire's property, the Galvins asserted a counterclaim against Meire for trespass. CP 1152-1153. The Galvins' counterclaim first alleged that Meire committed trespass by constructing a brick area/driveway on the southeast corner of the Galvins' property. CP 1152-1153. The undisputed evidence produced at trial demonstrates, however,

that the pavers were not on the Galvins' property. RP (March 20, 2012) at 901-902. Rather, the Galvins testified that the pavers were placed on the county's right-of-way, and that the county took no action to remove them, or have them removed. RP (March 20, 2012) at 902-904. The Galvins also claimed that Meire trespassed by parking on the same area in which the pavers were placed. RP (March 20, 2012) at 901. But again, the undisputed evidence produced at trial shows that Meire parked on county land. RP (March 20, 2012) at 901.

The Galvins also alleged that Meire, or his agent, trespassed on their property by dumping various construction materials on the Galvins' property. CP 1152-1153. Additionally, the Galvins alleged that Meire's lawsuit is "frivolous without a basis in fact or law." CP 1153. The Galvins sought recovery of all their attorneys' fees and costs, and prayed for such fees and costs under RCW 4.84.250 and CR 11. CP 1154.

C. Trial Court Proceedings.

The trial court conducted a six-day bench trial. RP (March 13, 14, 15, 19, 20, & 21) at 1-1006. At the conclusion of the trial, the court sent the parties an email containing its preliminary decision, and inviting the Galvins' counsel to file proposed findings of fact and conclusions of law. RP (March 21, 2012) at 1005. Subsequently, the Galvins filed their proposed findings of fact and conclusions of law, which Meire timely

objected to. CP 0057-0066; CP 0105-0118. The trial court largely overruled all of Meire's objections and on May 11, 2012, issued its Findings of Fact, Conclusions of Law, Judgment and Order ("Order"), which serves as the basis for this appeal. CP 0016-0024.

In the Order, the trial court awarded Meire \$150 for damages related to the Galvins' improper pruning of the cedar tree located on Meire's property, but concluded that the Galvins' pruning was authorized. CP 0021. Additionally, the trial court awarded the Galvins the following damages:

- Costs to haul and dispose of plaintiff's construction waste: \$9,000.00 for excavation and hauling; \$5,265.00 for toxic waste disposal: TOTAL \$14,265.00. TREBLED \$42,795.00.
- Costs incurred to relocate and redesign defendants' building: \$10,000.00. TREBLED \$30,000.00.
- Total attorney fees and costs, including costs of investigation. Attorney fees \$61,302.50; Engineering fees \$5,700; Arborist fees \$2,200.00[.]

CP 0021. The trial court's award of the Galvins' costs and fees was limited solely to RCW 4.24.630 and CR 11. CP 0022. The trial court did not award the Galvins any costs and fees under RCW 4.84.250. *See* CP 0022.

Additionally, the trial court granted the Galvins' request for injunctive relief, thereby ordering Meire not to interfere in any way with the Galvins' use of, and access to, their property, and directing Meire to

remove the pavers within fourteen days as well as storm drain pipes within sixty days. CP 0023.

IV. SUMMARY OF ARGUMENT

The trial court committed reversible error when it awarded the Galvins damages plainly not recoverable under RCW 4.24.630. Specifically, the trial court awarded the Galvins \$10,000 in damages for Meire's alleged trespass on the county's land, not the land of the Galvins. RCW 4.24.630 does not provide a claimant relief for a trespass on a third-party's land. Thus, this Court should reverse and vacate this part of the trial court's judgment, as well as the trial court's judgment trebling such damages.

Additionally, the trial court committed reversible error when, under RCW 4.24.630, it awarded the Galvins \$14,265 in damages that are plainly not supported by sufficient evidence or proven to a reasonable certainty. Because the Galvins failed to produce evidence of their damages to a reasonable certainty, this Court should reverse and vacate the trial court's award of \$14,265, as well as the trial court's award trebling such damages.

Finally, the trial court committed reversible error when it awarded the Galvins all of their costs of suit, attorneys' fees, and investigative costs pursuant to RCW 4.24.630 and CR 11. First, the trial court erred in

awarding the Galvins all of their fees and costs under CR 11 because there was insufficient evidence of a CR 11 violation. Not only was there no evidence of a CR 11 violation, but the trial court's Order failed to state why CR 11 sanctions were warranted, and it did not properly allocate the Galvins' fees and costs. Moreover, Meire actually prevailed, in part, on one of his claims. Thus, the trial court's award pursuant to CR 11 improperly served as a fee-shifting mechanism, and not merely as a sanction, requiring the CR 11 award to be vacated.

Second, the trial court's Order awarding the Galvins their defense costs and fees under RCW 4.24.630 was in error. Indeed, a party's defense costs, including attorneys' fees and expert fees, are not recoverable under RCW 4.24.630. Rather, under this statute, only a party that successfully prosecutes a trespass claim may recover its fees and costs. There is no similar fee-shifting provision for a successful defense of such a claim. Nevertheless, the trial court awarded certain costs and fees to the Galvins that were plainly associated with their defense of Meire's claims. This requires that such an award be vacated or, alternatively, it requires a referral to the Commissioner for a proper determination of what fees and costs can be attributed to the Galvins' prosecution of their claim under RCW 4.24.630.

V. ARGUMENT

A. Standard of Review

On appeal, a court evaluates evidence produced in a bench trial to determine whether substantial evidence supports the findings of fact, and whether these findings support the conclusions of law. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 242–43, 23 P.3d 520 (2001). Substantial evidence is the “quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). A court must review all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). Finally, a court of appeals reviews questions of law de novo. *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 880.

B. **The Trial Court Erred in Awarding the Galvins \$72,795 in Damages That Are Clearly Not Recoverable Under RCW 4.24.630 as Well as Damages That Were Not Proven to a Reasonable Certainty.**

The trial court’s Order erroneously awarded the Galvins \$10,000 in damages not recoverable under RCW 4.24.630 and damages of \$14,265 not proven to a reasonable certainty. *See* CP 0021. For the reasons discussed below, this Court should vacate these damage awards, as well as any award trebling such damages.

1. The trial court erred in awarding the Galvins damages clearly not recoverable under RCW 4.24.630.

The trial court erred in awarding the Galvins \$10,000 in damages related to the Galvins' alleged costs incurred to relocate and redesign their foundation. *See* CP 0021. Such damages are not recoverable under RCW 4.24.630. RCW 4.24.630 provides a cause of action only for a land owner that suffers damages when a person goes onto the owner's land. Specifically, RCW 4.24.630(1) provides:

Every person who goes onto the land *of another* and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.

(emphasis added.) Thus, under RCW 4.24.630, a person must go onto the land of another and cause damage to that land for a claimant to have a claim. Put differently, if a person does not enter the claimant's land, the claimant has no cause of action against such person under RCW 4.24.630.

Here, the Galvins produced no evidence that Meire entered their land to place the pavers that allegedly caused the \$10,000 in damages. Rather, the undisputed evidence plainly shows that the pavers were placed on the county's land. CP 0768, 0774-0775. Indeed, the undisputed evidence shows that Meire first placed pavers on a county right-of-way

and, subsequently, the Galvins obtained a revocable-encroachment permit to use the same area. CP 0764. The Galvins produced no evidence that Meire entered their land, as required under the statute, to place the pavers. As such, under the evidence here, any damages the Galvins may have suffered as a result of the pavers are not recoverable under RCW 4.24.630 because there is no evidence that Meire entered the Galvins' land to place the pavers. Accordingly, the Galvins cannot recover any damages as a result of the pavers, and this Court should vacate the trial court's award of \$10,000 in damages.

Even if the Galvins could recover for the alleged paver trespass (which they cannot), their alleged damages for such a trespass are not supported by sufficient evidence. Under Washington law, damages must be proved with reasonable certainty, or supported by competent evidence in the record; otherwise, they are not recoverable. *Hyde v. Wellpinit Sch. Dist. No. 49*, 32 Wn. App. 465, 470, 648 P.2d 892 (1982). To this end, a claimant must produce the best evidence available under the circumstances. *Jacqueline's Wash., Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 787, 498 P.2d 870 (1972). Thus, to recover damages under Washington law, a claimant must prove them to a reasonable certainty and must produce the best evidence of them.

Here, the Galvins' testimony regarding the cost to relocate their foundation is anything but certain. *See* RP (March 20, 2012) at 801-802. Indeed, when asked "how much time and the cost to you for the time involved in relocating the foundation of you[r] house" because of the pavers, the Galvins testified: "I couldn't give you a dollar figure." RP (March 20, 2012) at 801. At their counsel's insistence to provide the court a range, the Galvins could still not provide any specific cost; rather, their testimony was pure speculation:

- Q You need to give the court a range.
A Did I say 10,000? That's between 7 and 14. Could I say 10,000 range?
Q Okay. Seven to 14 Thousand?
A Yes, sir.
Q Best guess is ten.

RP (March 20, 2012) at 801-802. This was the Galvins' only attempt to prove their damages. But such testimony does not satisfy Washington's reasonable certainty test. Therefore, the Galvins did not prove their damages related to the alleged relocation of their foundation with reasonable certainty, thereby requiring this Court to vacate the award.

Additionally, as required under *Jacqueline's Washington, Inc.*, the Galvins did not produce the best evidence of such damages. *See Jacqueline's Wash., Inc.*, 80 Wn.2d at 787. The Galvins' self-serving testimony is surely not the best evidence available to prove the \$10,000 in

alleged damages. The Galvins did not produce invoices reflecting costs incurred to construct the original foundation or the plans of each home design, evidencing a reduction in size. The Galvins did not produce the testimony of any contractor that provided the work. The Galvins did not produce expert testimony opining on the costs associated with the foundation rebuild. Rather, the Galvins merely provided ipse dixit testimony of their alleged damages. *See* RP (March 20, 2012) at 801-802. This does not satisfy Washington law. For this reason too, this Court should vacate the trial court's award of \$10,000 related to the alleged cost to rebuild the foundation.

The conclusion that the award of \$10,000 was erroneous is further buttressed by the Galvins' counsel's remarks during closing argument related to the foundation's relocation. *See* RP (March 21, 2012) at 988-989. Specifically, counsel for the Galvins argued that any such damages could be mitigated if the trial court enjoined Meire to move the pavers. RP (March 21, 2012) at 988-989. The trial court granted the Galvins' request for an injunction, thereby mitigating the Galvins' claim of damages. CP 0023. Thus, any damages the Galvins may have suffered as a result of Meire's pavers are nonexistent in light of the trial court's injunction order.

Similar to the trial court's award of \$10,000, the trial court's award of \$14,265 (\$9,000 for loading waste and \$5,265 for removal) in waste disposal damages was not properly supported by sufficient evidence or proven to a reasonable certainty. *See* CP 0021. These charges were allegedly incurred by the Galvins to remove construction waste that Meire placed, or had placed, on their property. RP (March 20, 2012) at 812-819. But at trial the Galvins did not produce sufficient evidence to prove that the \$14,265 in charges were caused by any act of Meire. Indeed, the Galvins did not prove that the charges were linked to Meire's waste and not theirs.

In an attempt to prove such damages, the Galvins presented the testimony of Robert "Bob" Jewel and an ambiguous invoice from Bob's Tractor Service. RP (March 19, 2012) at 651-658; Ex. 46. Mr. Jewell never testified that he removed materials from the Galvins' land that were put there by Meire. *See* RP (March 19, 2012) at 651-658. And the Galvins produced no evidence that any material removed, or to be removed by Mr. Jewell, was from Meire. Accordingly, the Galvins did not produce any evidence that the \$14,265 was caused by Meire's actions.

Moreover, the evidence produced at trial, namely PDS' Notice of Violation, shows that the waste removed from the Galvins' land was, at least in part, their own waste. Ex. 71. Indeed, the Notice of Violation

evidences that the Galvins were cited by the county for disposing of waste materials on their own land, namely “slabs (several feet wide) of concrete like that from a broken-up sidewalk and other chunks of concrete; electrical conduit; railroad ties; lumber; and barbed wire.” Exs. 71 & 72. Furthermore, the Galvins admitted at trial that Mr. Calder, the man who constructed the driveway on their property, brought the fill material from a “demolition site” and brought a total of six or seven loads of “riprap” to their property. RP (March 20, 2012) at 894. This evidence demonstrates that the Galvins did not prove their damages of \$14,265 with reasonable certainty. Indeed, in light of this evidence, the waste that had to be removed necessarily included materials placed on the Galvins’ land by them. Without producing evidence as to what removal costs were attributable to Meire, the Galvins cannot recover any removal damages.

With respect to the invoice, it too did not establish the Galvins’ damages to a reasonable certainty. *See* Ex. 46. The invoice contained two charges. *Id.* One, for \$2,000, was related to a bin surcharge. *Id.* The other, for \$7,000, was related to the removal and loading of the waste. *Id.* The invoice also contained a third description but no charge. *Id.* At trial, Mr. Jewell testified as to the amounts billed, but provided no reasonable support for the award of \$5,265:

Q All right. And then you have remove and load waste [on the invoice], \$7,000. So is this the bid of [a] total of seven or a total of nine?

A **No. If you look at line two, you will see \$0.13 [per] pound for disposal. I don't know what the weight will be.**

RP (March 19, 2012) at 655-656. This testimony plainly evidences that any charge for removal on a per-pound basis was not proven to a reasonable certainty, as required under *Hyde*. See *Hyde*, 32 Wn. App. 465. Thus, the trial court erred in awarding the Galvins \$5,265 in damages and this Court should vacate this award.

2. Because the trial court's award of \$24,265 (\$10,000 + \$14,265) should be vacated, this Court should also vacate the trial court's award trebling these damages.

The trial court additionally erred in trebling the \$24,265 in erroneously awarded damages, and awarding such treble damages to the Galvins. See CP 0021. Under Washington law, it is reversible error to award treble damages when there are no underlying damages. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wn. App. 653, 660, 656 P.2d 1130 (1983) (holding that the plaintiff's failure to prove any monetary damages made it error to enter an award trebling damages). Here, there was no valid basis for the trial court to award the Galvins \$24,265 in damages. Therefore, in addition to vacating the trial court's

award of \$24,265, this Court should vacate the trebled damages, thereby vacating an award of \$72,795 (\$24,265 x 3).

C. The Trial Court’s Judgment Awarding the Galvins All of Their Costs and Attorneys’ Fees Should Be Vacated.

Below, the trial court awarded the Galvins all of their “costs of suit, investigative costs, and attorney fees, pursuant to RCW 4.24.630 and CR 11.” CP 0022. In awarding the Galvins all of their costs and fees, the trial court failed to allocate the award between those costs and fees properly recoverable under RCW 4.24.630 and those costs and fees recoverable, if at all, under CR 11. Instead, the trial court lumped all of the Galvins’ fees and costs together, and then purported to award them to the Galvins, “pursuant to RCW 4.24.630 and CR 11.” CP 0022. This alone requires a remand to the trial court so that it can make a proper allocation of costs and fees. But regardless of how a court would allocate the Galvins’ costs and fees, for the reasons discussed below, the costs and fees awarded in the Order cannot stand under either RCW 4.24.630 or CR 11, and this Court must vacate those awards.

1. The trial court committed reversible error by awarding the Galvins all of their attorneys’ fees and costs under CR 11.

The trial court’s award of sanctions under CR 11 should also be vacated because there was no evidence of any CR 11 violation. A trial court’s imposition of sanctions is reviewed for abuse of discretion. *Biggs*

v. *Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). CR 11 grants the court “discretionary authority to impose sanctions upon a motion by a party or on the superior court’s own initiative.” *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 842, 100 P.3d 791 (2004). Here, the trial court abused its discretion by imposing sanctions on Meire.

By way of background, under CR 11, a party or his or her attorney must certify that any pleading, motion, or legal memorandum filed “is well grounded in fact,” “is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law,” and “is not interposed for any improper purpose.” CR 11(a). If a pleading, motion, or legal memorandum violates this rule, then “upon motion or upon its own initiative, [the court] may impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing . . . including a reasonable attorney fee.” *Id.*; see also *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 574, 27 P.2d 1208 (2001).

Under CR 11, any sanctions, including an award of fees and costs, should be awarded rarely. Indeed, CR 11 is not a fee-shifting mechanism; rather, its purpose is to serve as a deterrent to frivolous pleadings. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). As such,

a trial court should impose sanctions only when it is “patently clear that a claim has absolutely no chance of success.” *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (internal quotation marks and citations omitted). This is so because CR 11 sanctions have a potential chilling effect. *Skimming v. Boxer*, 119 Wn. App. 748, 82 P.3d 707 (2004). In short, CR 11 sanctions should be awarded in only special cases, of which this case is not.

Additionally, when awarding sanctions under CR 11, a party’s success on the merits has no bearing. Indeed, the fact that a party’s action fails on the merits is by no means dispositive of the question of CR 11 sanctions. *Bryant*, 119 Wn.2d at 220. Rather, a court applies an objective standard to determine “whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Id.*

Here, no evidence was produced that Meire or his counsel engaged in sanctionable conduct under CR 11. Indeed, the Galvins did not show that Meire’s pleadings were baseless in fact or law, or brought for an improper purpose. In fact, Meire prevailed, at least in part, on one of his claims. *See* CP 0019. In light of the fact that the Galvins did not produce any evidence that Meire filed sanctionable pleadings and Meire recovered

on one of his claims, the trial court's award of CR 11 sanctions was plainly erroneous.

Moreover, in awarding the Galvins CR 11 sanctions, the trial court failed to satisfy its obligation to issue findings properly supporting sanctions. *See* CP 0016-0025. Under Washington law, to properly award sanctions under CR 11, a “court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.” *Biggs*, 124 Wn.2d at 201 (emphases omitted). More specifically, “the court must make explicit findings as to which pleadings violated CR 11 and as to how such pleadings constituted a violation of CR 11. *Id.* The court must specify the sanctionable conduct in its order.” *N. Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 649, 151 P.3d 211 (2007) (footnote omitted).

Additionally, any award of sanctions under CR 11 must be limited to the amount the movant reasonably expended in responding to any possible sanctionable conduct. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 418, 157 P.3d 431 (2007). And “[i]f the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be

quantifiable with some precision.” *MacDonald*, 80 Wn. App. at 892 (internal quotation marks and citation omitted).

Here, the trial court’s Order completely fails to make the required findings. *See* CP 0016-0025. Indeed, the trial court’s findings failed to articulate how Meire acted in bad faith or how his pleadings violated CR 11. *Id.* Rather, the trial court’s judgment made the following findings only with respect to CR 11 sanctions:

6. Plaintiff’s claims, especially as originally filed, were grossly exaggerated and this Court finds them to have been made willfully, maliciously and in bad faith.

...

8. The plaintiff’s bad faith, from the time of the initial pleadings up through the time of trial, are striking, and plaintiff’s claims were largely unsupported by the facts presented at trial. Though some of the claims were abandoned or resolved by summary judgment, the Court cites paragraphs 2.5, 2.6, 2.7, 2.9, 2.10, 2.11, and 2.12 of the complaint to be examples of such unfounded claims.

CP 0019. Thus, the court’s only findings regarding CR 11 were merely conclusory and unsupported by any specific findings. Indeed, the trial court failed to make findings that Meire’s claims were not grounded in fact or law, that Meire failed to make a reasonable inquiry into the law or facts, or that the complaint was filed for an improper purpose. *See* CP 0016-0025.

Furthermore, the trial court's Order made no findings with respect to how paragraphs 2.5, 2.6, 2.7, 2.9, 2.10, 2.11, and 2.12 violated CR 11. *See* CP 0016-0025. In short, nowhere did the trial court specify the sanctionable conduct. Rather, the court's award served solely as an impermissible fee-shifting provision, and not as a deterrent from future violations of CR 11. Moreover, the trial court's award of sanctions failed to consider that Meire prevailed, at least in part, on one of his claims. *See* CP 0019. This fact alone precludes imposing CR 11 sanctions on Meire. As such, this Court should vacate the trial court's award of Rule 11 sanctions.¹

2. The trial court committed reversible error by awarding the Galvins, under RCW 4.24.630, their attorneys' fees and costs incurred in defending against Meire's claims.

The trial court improperly awarded the Galvins all of their costs of suit, investigative costs, and attorneys' fees pursuant to RCW 4.24.630. *See* CP 0022. The Galvins cannot recover all of these costs and fees under this statute. By way of background, RCW 4.24.630 provides a claim for

¹ Alternatively, if this Court concludes CR 11 sanctions were appropriate, it should refer the case to the Commissioner for a determination of what fees and costs are attributable to the CR 11 violation. A remand is appropriate where a trial court does not limit an attorney fee award to amounts reasonably expended in responding to specified sanctionable conduct. *MacDonald*, 80 Wn. App. at 892-93 (remand for recalculation is appropriate where a trial court does not limit an attorney fee award to amounts reasonably expended in responding to specified sanctionable conduct); *see also Biggs*, 124 Wn.2d at 20 (if a trial court grants fees under CR 11, it "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings").

trespass to land or property, and provides a successful claimant the right to recover its fees and costs associated with asserting such a claim. In relevant part, RCW 4.24.630(1) provides:

Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

Therefore, under RCW 4.24.630's plain language, only a claimant that prevails on its trespass claim can recover the "reasonable attorneys' fees and other litigation-related costs" incurred in a successful prosecution of a RCW 4.24.630 claim. No other fees or costs are recoverable.

RCW 4.24.630 does not provide a means for a party to recover costs and fees associated with bringing another claim, or successfully defending a claim, even a claim under RCW 4.24.630. *See Richardson v. Cox*, 108 Wn. App. 881, 893, 26 P.3d 970 (2001) ("[T]he Richardsons are entitled to these amounts plus a proportionate amount of attorney fees pursuant to RCW 4.24.630 for bringing the trespass issue to trial."). This means that where, like here, the plaintiff and defendant have both asserted claims under RCW 4.24.630, a court must allocate any recovery of costs and fees between those incurred for prosecution and defense. And only those fees and costs associated with a successful RCW 4.24.630 claim can

be recovered under RCW 4.24.630. All other costs and fees must be borne by the party that incurred them.

This interpretation of RCW 4.24.630 is in accord with similarly worded Washington statutes. For instance, the Consumer Protection Act provides that “[a]ny person who is injured in his or her business or property . . . may bring a civil action in superior court . . . to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney’s fee.” RCW 19.86.090. The Washington Supreme Court has interpreted this language to mean that only the claimant is authorized to recover attorney fees. *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242 (1984). Thus, like under the CPA, RCW 4.24.630 authorizes only a successful claimant to recover its fees and costs associated with bringing a claim under that statute.

Against this backdrop, the trial court committed reversible error when it improperly awarded the Galvins all of their fees and costs pursuant to RCW 4.24.630. *See* CP 0022. The trial court’s award should have instead been limited to only those fees and costs that the Galvins incurred in bringing a successful claim under RCW 4.24.630. Here, the Galvins necessarily incurred costs and fees related to both the defense of Meire’s claims and the prosecution of their claim.

For instance, the Galvins incurred \$2,200 in arborist fees, which the trial court awarded to the Galvins pursuant to RCW 4.24.630. CP 0021. The Galvins, though, did not plead nor present any evidence that Meire damaged or injured any of their trees. *See* CP 1130-1137. Rather, the Galvins incurred the arborist fees solely to defend against Meire's timber trespass and trespass claims. RP (March 15, 2012) at 525. The Galvins' arborist also testified regarding the cost to correct the Galvins' previous improper pruning, which they admitted at trial. RP (March 15, 2012) at 535-536; RP (March 14, 2012) at 192. Thus, the \$2,200 the Galvins incurred to hire an arborist was solely related to the defense of Meire's claim, not to the prosecution of their claim. Accordingly, the trial court erred in awarding these fees to the Galvins. The award of \$2,200 should therefore be vacated.

Similarly, the trial court erred by awarding the Galvins \$5,700 in engineering fees that were also related solely to the defense of Meire's claims. *See* CP 0021. Indeed, the Galvins' own testimony makes clear that these fees were incurred solely to defend Meire's claims:

Q All right. Now, in responding to the complaint of Mr. Meire, you had to hire – who did you have to hire, besides a lawyer?

A Well, I had to hire, um, the Merit Engineering, geologists, two people from there, Austin Huang and Ryan [Long]² in Merit Engineering.

RP (March 20, 2012) at 797. Thus, the Galvins' own testimony evidences that the costs associated with engaging Messrs. Huang and Long were related to their defense of Meire's claim, not to their affirmative trespass claim.

The Galvins' motion for summary judgment further buttresses this conclusion. *See* CP 0959-0963. In their motion, the Galvins articulate the specific services Messrs. Huang and Long provided:

Engineers Ryan Long and Austin Huang inspected the property and found no evidence of any damage to plaintiff's property caused by run-off diverted from defendant's land.

...

Engineers, Ryan Long and Austin Huang, inspected the plaintiff's house, inside, [and] out and Mr. Long crawled underneath to inspect and photograph the foundation and crawl space. They saw no signs of sloughing or distress of the plaintiff's land.

CP 0960. The Galvins' motion for summary judgment therefore clearly demonstrates that they incurred the \$5,700 in engineering fees in order to defend against Meire's claims, not to prosecute their trespass claim.

² At trial, the Galvins referred to a Ryan Long and a Ryan Bradley, both with Merit Engineering. These individuals appear to be the same person. For purposes of this appeal, Meire refers to this person as Ryan Long.

Accordingly, this Court should vacate the trial court's award of \$5,700 in engineering fees.³

Finally, all of the Galvins' attorney fees cannot be attributed to their affirmative claim under RCW 4.24.630. Nor can all of the Galvins' other costs, including their costs of transcription. Nevertheless, the trial court awarded the Galvins all of their fees and costs pursuant to the statute. *See* CP 0022. This was error. Accordingly, this Court should vacate the trial court's award pursuant to RCW 4.24.630.⁴ Alternatively, and only to the extent necessary, this Court should refer this matter to the Commissioner for an appropriate allocation and award of fees and costs under RCW 4.24.630.

VI. CONCLUSION

For the foregoing reasons, this Court should (a) vacate the trial court's award of \$72,795 in damages not recoverable under RCW 4.24.630; (b) vacate the trial court's award of costs and fees that the Galvins incurred in defending Meire's claims, or that were otherwise not

³ To the extent these fees did relate to the Galvins' affirmative claim, such damages are not recoverable under RCW 4.24.630 for the reasons discussed above in Section B.1.

⁴ As discussed above, the Galvins should not have recovered any damages under their RCW 4.24.630 claim. As a result, they were not entitled to recover any fees or costs pursuant to RCW 4.24.630.

supported by substantial evidence; and (c) vacate the trial court's award of the Galvins' fees and costs under CR 11.

DATED this 9th day of October, 2012.

STOEL RIVES LLP

By 

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William Meire

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the foregoing OPENING BRIEF OF APPELLANT was caused to be re-served on opposing counsel below as set forth (pursuant to the Court's 10/1/2012 compliance request letter):

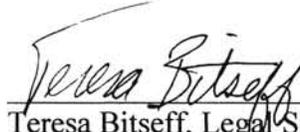
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Teresa Bitseff, Legal Secretary

DATED: October 9, 2012 @ Seattle, WA