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SUPERIOR COURT
CLATSOP COUNTY
JAN 17 2009
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No. 68818-9-1

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

CARY WILLIAM MEIRE, individually

Plaintiff/Appellant,

v.

BRADLEY GALVIN and MONIKA GALVIN, husband and wife

Defendants/Respondents

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR:

1. The Galvins assign no error to the decision of the trial court.

B. STATEMENT OF THE ISSUES:

1. Did the trial court properly award the Galvins damages, attorney fees and costs, pursuant to RCW 4.24.630, when Appellant's wrongful acts committed on County right of way interfered with Galvins' rights to build a driveway thereon pursuant to their Revocable Encroachment Permit?
2. After finding Appellant lacked credibility, grossly exaggerated his claims, acted in bad faith and that his claims were unfounded, did the trial court properly award the Galvins their defense attorney fees and costs, pursuant to CR 11 and its inherent equitable powers?
3. Are the Galvins entitled to an award of attorney fees and costs, pursuant to RAP 18.1?

C. COUNTER-STATEMENT OF THE CASE

The facts and procedural history set forth below supplement and correct those presented by Appellant in his brief, and support the relief ordered by the trial court and contained in its Judgment and Order.

1. STATEMENT OF FACTS

a. Pre-Trial

Appellant's lawsuit alleged damages to his property caused by Galvins' excavation on adjacent property for the construction of a foundation and retaining wall.

Both parties to this appeal purchased their properties in 2004. Appellant purchased an existing home in March, and Galvins purchased an adjacent undeveloped lot in November. Appellant's Brief, p. 1, citing CP 0763-64, RP (March 20, 2011) at 848. Subsequently, Brad Galvin, an experienced building contractor, hired a local contractor, Brian Calder, to prepare his property for construction of a house and garage. RP 642. Calder built a road down the steep hillside and used broken concrete to stabilize the bank. Trial Ex. 27. Unbeknownst to Galvin, the use of the broken concrete constituted a violation of Whatcom County regulations. Trial Ex. 71. In response to the violation notice, Galvin hired three engineers to develop a plan for excavation, grading and construction of his home and garage. CP 933, CP 956, and RP 797-798. Due to the steep slope of the property, the engineers designed a house on the bottom floor with a garage on top, a foundation and retaining wall and access from the street directly into the garage. CP 659-662 and Trial Ex. 74-76. The driveway required a Revocable Encroachment Permit from Whatcom

County, which the Galvins eventually acquired. Trial Ex. 53. Subsequently, Galvin had numerous inspections by Whatcom County officials. CP 659-662 and Trial Ex. 71. On September 14, 2009, the County issued the Galvins a building permit, which incorporated their engineers' plans. RP 765. Galvins then hired Bob Jewell, a local contractor to finish excavating and grading the lot in conformity with the County permit. RP 652. The broken concrete chunks were placed into the bank of the excavation nearest the Appellant's property, so as to stabilize the bank. Trial Ex. 27.

On August 13, 2010, Plaintiff, Meire, sued the Galvins for damages and injunctive relief caused by Galvins' excavation. CP 1173-1179. His complaint included claims for water damage from the diversion of run-off from Defendants' land onto Plaintiff's land; damages to his house and improvements thereto, including exterior stairways; claims for declaratory relief; injunctive relief for nuisance; diminished value, lost wages, earnings and profits and decreased marketability of his property; loss of equity in his real property; expenses and out-of-pocket expenses; and damage to his trees and vegetation. *Id.*

On February 8, 2011, a Whatcom County Health Department inspector, Phil Martinez, visited the Galvins property in response to a

Meire complaint alleging Galvin's excavation damaged Meire's septic tank and drain field. CP 1162-1166. Martinez's investigative report indicated that his inspection of the Galvins' excavation revealed no drain rock, filter fabric, or sewage along the sidewall of the Defendants excavation. *Id.* His conclusion was "No further investigation required" and the Health Department's complaint file was "closed." *Id.*

As Meire had alleged damage to his septic tank and drain field in his complaint, the Galvins moved for an inspection of the Plaintiffs septic system to prove Plaintiff's claim was frivolous. CP 1125-1129. Meire refused to allow inspection, so Galvin brought a Motion to Compel. *Id.* On August 10, 2011, Meire filed a declaration stating he had discovered through conversations with an expert that the Galvins excavation had not damaged his septic drain field. CP 1111-1114. On August 12, 2011, the court, after reviewing Meire's declaration, allowed Meire to strike his claim for septic damage and denied the Galvins' request for an inspection of the entire septic system. CP 1108.

On August 16, 2011, Meire admitted in his deposition that he had never consulted with an expert about his septic system (CP 1082-1101), prompting the Galvins to renew their motion to compel inspection which was granted on October 14, 2011 (CP 1060). The intransigence of the Plaintiff continued when the Galvins attempted to have engineers inspect

the property for evidence of damage and causation, eventually prompting two subsequent motions for contempt (CP 1053-1055), which led to the Court twice ordering Meire to allow inspections and ordering sanctions and terms against Mr. Meire. CP 972-973 , 988-990.

On February 1, 2012, the Galvins filed their Motion for Summary Judgment to dismiss Meire's claims. CP 959-966. The Galvins' engineers submitted declarations that there was no visible evidence of trespass onto the Meire property, no damage to Meire's property and no threat to the Meire property as alleged in his complaint. CP 933-958. Meire's own expert engineer, J. Gordon, did not even submit a declaration in opposition to the Motion for Summary Judgment. Instead, Meire hired a new engineer at a very late date, whose report was not allowed into evidence by the trial court. CP 675-677. The court dismissed all but one of Appellant's claims in its Order Granting Partial Summary Judgment, leaving for trial only his claim for damage to his trees and vegetation: CP 675-677. Appellant filed no cross motion for summary judgment, which left all of Galvins' counterclaims for trespass, waste and injunctive relief to be heard at trial. *Id.*

Galvins' counterclaims alleged that Meire had built a parking structure on the Galvin lot using railroad ties, dumped construction waste on the Galvin property, constructed a second parking area with paver bricks and

parked a trailer, both on the land for which Mr. Galvin had acquired a Revocable Encroachment Permit from the to construct his driveway. Exhibit 53, CP 819-822 and RP 946-947.

b. Trial

Brian Calder, a local excavation contractor hired by the Galvins, testified at trial that he had performed excavation work for Appellant before being hired by the Galvins, (RP 640-641, 650) and that he had seen contractors hired by Meire dumping excavated material and demolition waste from that job (old shingles, plywood, lumber, etc.) on the Galvins' property. RP 640-642; CP 659-662; and Trial Exhibits 49, 60-64. Photos of this waste were offered into evidence, as well. *Id.*

The trial court judgment contains findings that Appellant or someone acting on his behalf, dumped discarded roofing, treated railroad ties, lumber and construction material on the defendants property without authorization, and that he intentionally interfered with Galvins' use of their property by obstructing the land covered by the Revocable Encroachment Permit; that. CP 1203-1205.

An excavation contractor, Bob Jewell, testified regarding his written estimate of the cost to haul off the dumped waste on the Galvins' property. RP at 654-656. Galvin, an expert contractor, testified without objection on what the waste material weighed per cubic foot in order to

complete the computations for total cost. RP 796-797. Respondent, Brad Galvin, testified as to the approximate amount of damages incurred as the result of the intentional interference with the Revocable Encroachment Permit (RP 796-797 and 800-801). His estimate of \$10,000.00 did not include all elements of the damage.

Appellant Meire also testified in support of his claims and in defense of the counter-claims, of which the trial court took specific note of his lack of credibility in its written findings and decision, and found that Meire misled the Court, demonstrated a selective memory when convenient, grossly exaggerated his claims, acted in bad faith in bringing the lawsuit and that his claims were unfounded and without credibility. CP 1204; *see also* CP 48. The court also found that Meire's claims of timber trespass were unfounded as any pruning of trees by Galvin was permissive, and any trespass damages were either temporary or *de minimus*. *Id.*

2. SPECIFIC MISSTATEMENTS OF FACT BY APPELLANT

The Appellant, Meire, has put forward facts to the Appellate Court that are contrary to the trial court's findings of fact, none of which were challenged on appeal and thus became verities. The specific misstatements of fact are:

- a. The Galvins' excavation "trench" "extends well onto Meire's property, including running under Meire's stairs, which do encroach on the county's (sic) right of way. Appellant's Brief at 2-3.**

First, the Plaintiff's stairs actually extended onto Defendants' land, not the County right of way. RP 132; CP 904-905; DEF EX 4; PLA EX 2. Second, the Court found in its Findings of Fact, Conclusions of Law, Judgment and Order (hereinafter "Judgment"), that any encroachment was temporary and *de minimus*. CP 48. Third, this allegation was in paragraphs 2.6 and 2.7 of Plaintiff's complaint (CP 1173-1179), and these paragraphs were found by the trial court to be unfounded bad faith claims. CP 48.

- b. The trench walls have eroded over time, causing damage to Meire's property. Appellant's Brief at 3.**

The Court twice made specific findings that no such damage occurred. First in an Order granting Summary Judgment (CP 0675-0677), and then reconfirming that finding in the final Judgment. CP 48.

- c. The excavation resulted in the removal of trees from Meire's property, including a maple tree, as well as other damage. Appellant's Brief at 3.**

The Court found no trees were removed or harmed, save the improperly pruned cedar tree, which the court found was pruned with Plaintiff/Appellant's permission. CP 48.

- d. The Galvins' excavation resulted in the dumping of excess soil and other materials onto Meire's property.** Appellant's Brief at 3.

The Court found that this claim was not clearly demonstrated or adequately proven, and that any encroachment was temporary and *de minimus*. CP 48.

- e. The Galvins entered Meire's property and pruned a cedar tree, all without Meire's authorization.** Appellant's Brief at 3.

The Court made a finding that Meire gave Galvin permission to prune the cedar tree. CP 48.

- f. That Ryan Long and Ryan Bradley are the same person.** Appellant's Brief at 25, footnote 2.

The appellant is conflating two different witnesses. Ryan Long and Ryan Bradley are two different individuals. Ryan Long is a structural engineer with Jones Engineering and Ryan Bradley is an engineer with Merit Engineering. (RP 798-799) As a result, it is not clear to whom the Appellant is referring in their brief.

D. RESPONDENTS' ARGUMENT

1. THE TRIAL COURT CORRECTLY AWARDED THE GALVINS DAMAGES PURSUANT TO RCW 4.24.630

a. Standard of review

Meire has not assigned any error to the findings of fact made by the court, but argues the damages were not proven to the standard of a

reasonable certainty. Thus, the findings of fact are verities on appeal. *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn.App. 231, 241, 23 P.3d 520 247 (2001).

The errors of law being asserted are 1) whether the proof of damages was reasonably certain and 2) whether RCW 4.24.630 applies to the Galvins' claim and the facts of this case.

Questions of law are reviewed *de novo*. *McCleary v. State*, 173 Wn.2d at 514; *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).

b. The trial court based its damages award on evidence that satisfies the “reasonable basis” standard.

The Reasonable Basis Standard

The rule in Washington on the question of the sufficiency of the evidence to prove damages is that the fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss. *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 849-850, 792 P.2d 142 (1990) (citing *Wilson v. Brand S Corp.*, 27 Wn.App. 743, 747, 621 P.2d 748 (1980)).

The amount of such damage estimates is a matter to be fixed within the judgment of the fact finder. *Rasor v. Retail Credit Co.*, 87 Wn.2d 516,

531, 554 P.2d 1041 (1976); *Sherwood v. Bellevue Dodge, Inc.*, 35 Wn.App. 741, 749, 669 P.2d 1258, 676 P.2d 557 (1983). An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice. *Id.*

Mathematical exactness is not required, and a party who has established the fact of damage will not be denied recovery, even where the amount of damage cannot be exactly ascertained. *Id.* (citing *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 476, 403 P.2d 351 (1965)); and *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn.App. 697, 703, 9 P.3d 898 (2000). “Damages must be supported by competent evidence in the record; however, evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture.” *Id.* at 704 (quoting *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn.App. 502, 510, 728 P.2d 597 (1986), *review denied*, 107 Wn.2d 1022 (1987)).

In *Eagle Point Condo Owners Ass'n v. Coy*, *supra*, when presented with conflicting estimates, the trial court, appropriately, made its own rough estimates of damage in some instances rather than accepting either party's estimate. *Id.*

The consultant hired by [Eagle Point] estimated \$15,500 as the aggregate cost to repair the gutters and replace the soffits with different material. The contractor testifying on Coy's behalf agreed that some work needed to be done, but only on the gutters. He estimated that the repair would cost about \$1,500. The court found Coy liable for repairing the gutters but not for replacing the soffits, and awarded \$5,000.

Division I found that the testimony provided the trial court with a reasonable basis to estimate the damages, even where the amount of damage cannot be exactly ascertained in testimony. *Id.* at 703-704.

In the case at hand the witnesses made their estimates and the court simply adopted them in the judgment.

17. The Court finds sufficient support in the record for the award of all damages itemized by Defendants' attorney in his closing argument. These costs include costs to haul and dispose of the construction waste that had been there discarded, along with the creosote post parking structure; costs that had been incurred to relocate and redesign the building; plus treble damages, pursuant to RCW 4.24.630; attorneys fees; and investigative costs.

a. Costs to haul and dispose of the plaintiff's construction waste: \$9,000.00 for excavation and hauling; \$5,265.00 toxic waste disposal: TOTAL \$14,265.00. TREBLED \$42,795.00

b. Costs incurred to relocate and redesign defendants' building: \$10,000.00. TREBLED \$30,000.00.

c. Total attorney fees and costs, including costs of investigation. Attorney fees \$61,302.50; Engineering fees \$5,700.00; Arborist fees \$2,200.00...
(CP 49-50)

Meire argues that the trial court's findings on damages were not proven to a reasonable certainty. Appellant's Brief at 13. Specifically, he cites the PDS Notice of Violation, Exhibit 71, as proving some of the waste on Galvin's property was put there by the Galvins, and that the estimates of removal are inaccurate as a result. But the Notice of Violation was issued long after the dumping of the Meire waste and debris, only to be dug up when Galvin was developing his property. See numerous photos in the record showing broken concrete and fill material on top of Meire's railroad tie parking structure, etc., including Exhibits 60, 21, 22, 69, 70. Those photos show that some broken concrete may need to be moved or removed in order to haul off Meire's dumped waste materials and parking structure.

Appellate courts do not disturb awards of damages made by a fact finder unless it is outside the range of the evidence on the record, or is the result of passion or prejudice. In this case, there is nothing in Appellant's brief that would indicate this was the case. The damages award is supported by sufficient evidence as cited in our Statement of the Case and those found in the court's Judgment.

Appellant also argues that the evidence regarding damages caused by Appellant's interference with Galvins' Revocable Encroachment

Permit did not provide a reasonable basis for estimating that loss. See Appellant's Brief at 11-12. Brad Galvin gave testimony in the form of an estimated range from which the trial court based its damage assessment. Damages caused by Meire's interference was explained by Brad Galvin in direct examination as follows:

Q. Now, can you give the court an approximation of how much time and the cost to you for the time involved in relocating the foundation of your house due to the refusal by Mr. Meire to move his pavers and his parked trailer?

A. Did you say -- I'm sorry, did you say time or money?

Q. Both.

A. Well, you know, re-sketching, going to the engineer, making a new plan, his hours are on a previous invoice for that part. And as far as the money, it's difficult. The whole footprint is changed. You are required to have two off-street parking stalls, so in order to do that, I had to turn the entire building to get the parking. So I have tamped and prepared, you know, half of my lot. The building footprint is now redundant, so massive, like weeks and weeks of rolling and truckloads of geofill are obsolete due to the changing in the driveway. I couldn't give you a dollar figure.

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. And where did that -- how was that money spent? Are we talking about the engineer? Did it involve the engineers?

A. No. That was the money that was spent that now became redundant. That was the truckloads of gravel and broadcasting it and tamping it in an area that is no longer a building footprint. The building is one third the size it originally was. (RP 800-801)

Prior to testifying about the damages, Brad Galvin testified regarding his credentials to testify as to the damages. The court heard testimony that he has been a very skilled carpenter for 30 years. RP 708. His experience includes the “full gamut” of work on residential and commercial buildings, including surveying, building concrete forms, framing buildings, finish carpentry, and millwork.¹ *Id.* Brad Galvin has built hundreds of single family residential homes, and his experience was comprehensive, many times beginning with the purchase of the undeveloped land, and ending with the sale of the finished product. *Id.* This experience clearly qualified him as an expert witness as to all forms of damages in this case.

Appellant presented no rebuttal evidence on damages for the Galvin counterclaims.

Meire also argues that the testimony regarding the scope of the waste disposal damages was not sufficient as to the amount and was only supported by an “ambiguous” invoice. Appellant’s Brief at 13-14. To the contrary, the record shows that the evidence behind the waste disposal damages was supported by more than an invoice.

¹ Defined as installation of doors, window casings, baseboards and molding.

Brian Calder, a local excavation contractor, testified at trial that he had performed excavation work for Meire (RP 640-641, 650) and that he had seen contractors hired by Mr. Meire dumping excavated material and demolition waste from that job, including old shingles, plywood, lumber, etc. on Mr. Galvin's property. RP 640-642; CP 659-662; Trial Exhibits 49, 60-64. Likewise, another excavation contractor, Bob Jewell, testified that he estimated the cost to haul off the dumped waste on Defendants' property:

Q. (BY MS. ZERVAS) I have handed you Exhibit 46.
Do you recognize that?

A. Yes.

Q. What is it?

A. It's my estimate of removing the debris from Brad's lot.

Q. Okay.

MR. ELLINGSON: We offer that into evidence,
Your Honor.

MS. ZERVAS: No objection.

THE COURT: Admitted.

Q. (BY MR. ELLINGSON) And it has two numbers on Exhibit 46. There is \$2,000 for a bin surcharge for contaminated waste. You would truck it to Canada. Why are you trucking it to Canada?

A. Because we can't truck it into -- out of Point Roberts into Canada and back into the United States. It has to be directly into Canada.

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

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

Q. Okay.

A. So you won't know that until it's weighed at the scales.

Q. Okay. Well, how many yards do you anticipate removing?

A. Maybe two bins, maybe five, 6,000 pounds a bin. I don't know.

Q. How many yards is that?

A. Ah --

Q. You have to give us a range so that the judge can understand how much we are seeking in damages. So is it between five yards and 25 yards or 15 yards?

A. It could be between 10 and 20 yards.

Q. So 15 yards would be safer?

A. Okay.

Q. Safer?

A. Yes.

Q. All right. So you would add that to the \$9,000 here?

A. Correct, at \$0.13 a pound.

Q. All right. Thank you.

(RP at 654-56.)

Finally, Brad Galvin, an expert contractor, also testified as to what this type of dirt mixed with debris weighs:

Q. All right. Now, Mr. Jewell testified yesterday that I think it's \$0.13 a pound to haul off that kind of material. Have you experience in determining the weight?

A. Dirt with rocks in it is about a hundred pounds a foot. Cubic foot.

Q. Cubic feet?

A. Yeah. Six cubic feet to a wheelbarrow and 27 to a yard.

Q. Soil is different in weight whether it's wet or dry or whether there is rocks. So it's your testimony today it's about a hundred pounds for that type of material?

A. That's generally the understood number. It can go anywhere from 70 for mulchy stuff to 70 pounds and over 200 for like limestone. It's real heavy. (RP 796-797)

The evidence relied upon by the court was a great deal more than mere speculation.

In its full written decision, the trial court took specific note that there was sufficient evidence based on the above to establish an award of damages in line with the Galvins' closing itemization (CP 1205).

c. There is no issue of relief for trespass on third party land.

Though Meire did not specifically designate an assignment of error on this issue, he does raise and argue the point. Appellant's Brief at 6, 9-10. The Respondent, Galvin, requests the court disregard the Appellant's argument on this issue, but provides a response as follows.

Meire argues that the trial court awarded the Galvins damages for waste and trespass that occurred on land not owned by Galvins, but rather land owned by Whatcom County, and thus the Galvins should not be awarded damages under RCW 4.24.630, which provides:

(1) 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. . . .

It is clear that Meire went onto the land of another (the County) and caused waste or injury to the land by placing paver bricks and parking his trailer thereon, thereby interfering with the permitted rights of the Galvins to exercise their rights to develop a driveway. Exhibit 53, CP 819-822 and RP 946-947.

The trial court's application of RCW 4.24.630 comports with the holding in *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 247 (2001). In *Standing Rock*, Mr. Misich admitted repeatedly damaging two gates on two stretches of the same road running across land owned by the Wenatchee Pines subdivision at the south gate, and land owned by Marvin Pearson at the north gate. The gates belonged to the Standing Rock subdivision, as they owned an easement over this road. In damaging the gates, Misich had entered onto the land of Pearson and Wenatchee Pines, not the land of Standing Rock. Nonetheless, the court affirmed the award of damages to easement owner, Standing Rock, under authority of RCW 4.24.630.

Applying the *Standing Rock* rule to the present case, it is clear that Appellant entered the land of another and wrongfully caused waste or injury to the land for which Galvins had a license to use for a driveway. As such, RCW 4.24.630 applies, and the trial court's judgment should be affirmed as to this element of damages.

It is worth noting that “land” may include any estate or interest in lands, either legal or equitable, as well as easements and incorporeal hereditaments. Black’s Law Dictionary, Sixth Edition (1990), citing *Raynard v. City of Caldwell*, 55 Idaho 352, 42 P.2d 292, 297 (1935). Likewise, this court should hold that a license or permit to use land is an interest therein capable of injury or waste.

Likewise, the principle that the holder of a non-possessory interest in real property can be damaged per RCW 4.24.630, was recognized by the Supreme Court in *Saddle Mountain Minerals, LLC v. Joshi*, where the Court held that a trial court improperly dismissed the claims for damages claimed under RCW 4.24.630 by the holder of a profit, who had no other interest in the real property. See generally *Saddle Mountain Minerals, LLC v. Joshi*, 152 Wn.2d 242, 95 P.3d 1236 (2004); See also *Colwell v. Etzell*, 119 Wn.App 432, 81 P.3d 895 (2003) (though in this case, the holder of an easement was not awarded attorney fees under RCW 4.24.630, as the interfering servient estate’s actions were not wrongful, as the interference was done under the common enemy doctrine to preserve the land, including the easement).

2. THE TRIAL COURT CORRECTLY AWARDED THE GALVINS ATTORNEY FEES AND COSTS PURSUANT TO CR11 AND ITS INHERENT AUTHORITY.

a. Standard of review – *Abuse of Discretion*

An appellate court reviews a trial court's order imposing sanctions, whether under its inherent authority or Civil Rule 11, for abuse of discretion. *Saldivar v. Momah*, 145 Wn.App. 365, 186 P.3d 1117 (2008) (as amended, review denied 165 Wn.2d 1049, 208 P.3d 555 (2009)); see also *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The imposition of sanctions is a matter addressed to the discretion of the trial court and will be reviewed only to determine if the court manifestly abused that discretion, as a *de novo* review would chill the lower courts willingness to impose such sanctions. *Cooper v. Viking Ventures*, 53 Wn.App. 739, 742-743, 770 P.2d 659 (1989). A trial court abuses its discretion in imposing sanctions when its decision is manifestly unreasonable or based upon untenable grounds. *Saldivar v. Momah*, 145 Wn.App. at 394 (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)); See also *In re Cooke*, 93 Wn.App. 526, 529, 969 P.2d 127 (1999) (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

b. The trial court had reasonable grounds to award attorney fees and costs.

The Appellant argues that the trial court improperly awarded fees and costs under CR 11, as “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..." Appellant's Brief at 7. The Galvins as Respondents disagree and argue that not only is there both legal basis and sufficient evidence for CR 11 sanctions, but that this was also stated in the final Order.

The Court's power to award attorney fees as sanctions springs from its inherent equitable powers. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799, 557 P.2d 342 (1976). Pursuant to that, Washington has recognized and revived an exception to the American Rule where a party engages in bad faith conduct. *In re Recall of Pearsall – Sipek*, 136 Wn.2d 255, 266-267, 961 P.2d 343 (1998); see also *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn.App. 918, 927-929, 982 P.2d 131 (1999) (discusses a number of bad faith scenarios in which non-statutory attorney fee awards may be made, including misrepresenting evidence, and wasting judicial resources via vexatious conduct during the course of litigation).

Furthering this, Civil Rule 11's purpose has been described by the Supreme Court as to deter baseless filings and to curb abuses of the judicial system, such as frivolous pleadings. See *Biggs v. Vail*, 124 Wn.2d at 197 (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992)). Additionally, Civil Rule 11 gives the trial court broad discretion in determining who should be sanctioned, authorizing the court

to sanction either the party or the attorney. *In re Cooke*, 93 Wn.App. at 529-530. Civil Rule 11 sanctions should be imposed directly on a party if the party is responsible for the nature of the filings. *Id.*

In the case at hand, the Galvins demonstrated to the court that not only were Meire's pleadings baseless in fact, made in bad faith and frivolous, but that he was directly responsible for them and engaged in misrepresentation to the court; this is reflected in the written decision of Judge Uhrig:

I find that there were a number of misleading photographs, or photographs offering a distorted perspective, as well as a great number of occasions on which plaintiff presented with insufficient memory regarding key factual elements, particularly when these key elements were not favorable to his case theory.

Plaintiff's claims, especially as originally filed, were grossly exaggerated and this Court finds them to have been made in bad faith. The Court can make no finding of anything but a de minimus and temporary trespass on defendant's part, and even the claimed overburden was not clearly demonstrated.

The plaintiff's bad-faith from the time of the initial pleadings up to 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. ², 2.9, 2.10, 2.11, and 2.12 of the complaint to be examples of such unfounded claims...

(CP 1204)

² This blank was filled in the Court's Findings of Fact, Conclusions of Law, Judgment and Order as paragraph 2.7

Further, and contrary to the Appellant's representations, the trial court's Findings of Fact specifically outline the rationale for such sanctions being made directly against the party.

The Court finds that the Plaintiff, **acting pro se at times** during the pendency of this lawsuit, willfully and maliciously presented as evidence, before and during the trial, misleading drawings and photographs that distorted the location of the parties' common property line.

(emphasis added, CP 48)

Additionally, the court found that a number of Meire's claims had no basis or credibility, for example: "The weight of the evidence does not support plaintiff's claims concerning removal of a maple tree from his property...;" "that there was at that time no genuine concern [by the plaintiff] about on whose side of the property line the tree was located;" "Plaintiff's claim that the pruning of the cedar tree had a profound effect upon the sound levels on his property is not credible;" CP 48-49.

Based on the findings of the court described above, the court concluded that the "[p]laintiff's Complaint was filed and prosecuted willfully, maliciously and in bad faith in violation of Superior Court Rule 11." CP 51.

It is the Galvins' position that a review of the record shows that the court found that Meire, at times acting *pro se*, from the very initiation of the case, willfully and maliciously made misrepresentations to the court,

litigated in bad faith, filed frivolous pleadings and made claims that were either grossly exaggerated or without any credible basis. The trial court's Order made the appropriate findings and conclusions stating this, and as a consequence of those appropriate Findings, the Court's Conclusion to impose sanctions was manifestly reasonable. Faced with these findings, it was not an abuse of discretion to impose sanctions; rather it was appropriate and in line with case law for the court to use sanctions to curb abuses to the judicial system, such as frivolous pleadings and the misrepresentation of evidence.

3. IT IS APPROPRIATE TO AWARD THE GALVINS ATTORNEY FEES AND COSTS ASSOCIATED WITH RESPONDING TO THIS APPEAL.

Pursuant to RAP 18.1(b), the Galvins' plea for attorney fees pursuant to all applicable statutory and common law as the court deems just.

Generally, a party may recover fees on appeal if the party was entitled to recover fees in the trial court. *Landberg v. Carlson*, 108 Wn.App. 749, 758, 33 P.3d 406 (2001), *review denied*, 146 Wn.2d 1008 (2002). Where a statute allows an award of attorney fees to the prevailing party at trial, the appellate court has inherent authority to make such an award on appeal. *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn.App. 569,

576, 928 P.2d 1149 (1997); *Sarvis v. Land Res., Inc.*, 62 Wn.App. 888, 894, 815 P.2d 840 (1991).

RCW 4.24.630, adopted in 1999, allows treble damages against people who commit damage to land or property rights, and this includes “the [prevailing] party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.”

The Galvins were originally awarded damages under RCW 4.24.630, as they were entitled to recover, at the trial court level. As the statute allows an award of attorney fees and costs at trial, on appeal the Galvins should be awarded attorney fees and costs, as the statute provides the court with the appropriate authority.

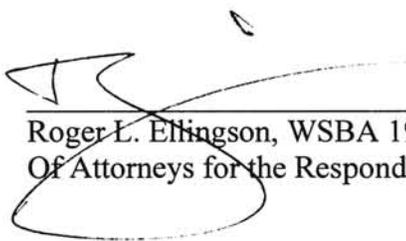
E. CONCLUSION

For the reasons set out above, the State respectfully requests that the Court affirm the trial court's judgment, and award attorney fees and costs to the Galvins pursuant to RCW 4.24.630 and RAP 18.1.

Submitted this 14th day of December, 2012.



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Of Attorneys for the Respondents

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

CARY WILLIAM MEIRE, Individually,
Plaintiff/Appellant,
vs.
BRADLEY GALVIN AND MONIKA
GALVIN, Husband and wife,
Defendants/Respondents.

No. 68818-9-1
DECLARATION OF MAILING

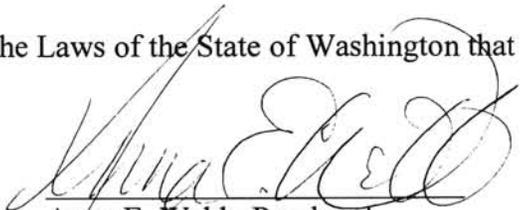
I, Anna E. Webb, declare as follows: I am a resident of the United States and a resident of the State of Washington; I am over the age of eighteen (18) years and not a party in this case. On the date below, I mailed a true copy of the following document via certified mail, return receipt requested and first class mail to the parties/addresses indicated below: BRIEF OF RESPONDENT:

Washington State Court of Appeals
Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

James Will Eidson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle WA 98101

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

DATED this 14th day of December, 2012


Anna E. Webb, Paralegal

DECLARATION OF MAILING

ORIGINAL

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