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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**THE BRACK FAMILY TRUST, CALVIN BRACK and
JOYCE M. BRACK, Trustees,**

Appellants,

v.

EVELYNE GRUNDY,

Respondent.

APPELLANT'S OPENING BRIEF

Alexander W. Mackie, WSBA No. 6404
AMackie@perkinscoie.com
Eric Merrifield, WSBA No. 32949
EMerrifield@perkinscoie.com
J. Christopher Baird, WSBA #38944
JCBaird@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Appellant
The Brack Family Trust, Calvin Brack
and Joyce M. Brack, Trustees

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I. INTRODUCTION

This case is about whether a waterfront property owner on Puget Sound may bring a trespass action against a neighbor, when the only intrusion is sea spray from winter wind- and storm-driven waves crashing, at high tide, against a plaintiff's seawall. The superior court held that such facts did support a trespass claim. It ordered the defendants, the Brack Family Trust, Calvin Brack and Joyce M. Brack, Trustees (the "Bracks"), to pay \$16,000 to plaintiff Evelyne Grundy ("Grundy"), even though the superior court found that Grundy suffered only *de minimis* injury from the alleged trespass. Indeed, the superior court found that the only injury was a limited water trespass from sea spray, as evidenced by the yellowing of Grundy's grass and debris (such as pieces of kelp and bits of shells) on Grundy's lawn within a "few feet" of Grundy's seawall. The superior court also concluded that Grundy was entitled to attorneys' fees, even though the statute the court relied upon, RCW 4.24.630, only authorizes attorneys' fees for "wrongful" or "intentional" trespass, and the superior court specifically concluded that the trespass here was neither "wrongful" nor "intentional."

The superior court's conclusion that the Bracks trespassed on Grundy's property by indirectly causing sea spray of marginally increased

intensity to strike Grundy's bulkhead is unprecedented. There is no reported Washington case holding that a defendant may have such control over the sea as to cause a portion of it to trespass onto a neighbor's land. Indeed, there is no reported case from any American jurisdiction so holding. Additionally, the superior court's conclusion here is contrary to the rationale underlying the Supreme Court's prior decision in this very case. *See Grundy v. Thurston County*, 155 Wn.2d 1, 10, 117 P.3d 1089 (2005). Accordingly, the superior court's conclusion that the Bracks trespassed on Grundy's property is erroneous as a matter of law, and cannot stand.

Even if this Court decides to make new law and hold that the Bracks, by lawfully increasing the height of their seawall, controlled the sea to such an extent that they trespassed on Grundy's property, the superior court erred by awarding Grundy \$16,000, plus post-judgment interest. Here, the court found that there was trespass by water "of a limited nature" that "has not caused a significant injury or appreciable harm to Plaintiff or Plaintiff's property, other than contributing to the deposit of debris on a portion of Plaintiff's property and areas of yellow and dead grass." Clerk's Papers ("CP") 885. To the extent that the award of \$16,000 is to compensate Grundy for actual injury, damages are unavailable for trespass unless actual damages are more than *de minimis*.

To the extent that the \$16,000 award is prospective compensation for the cost of improving Grundy's seawall, prospective damage awards are unavailable in trespass actions as a matter of law.

Finally, the superior court erred in awarding attorneys' fees to Grundy. The attorneys' fee award was based on RCW 4.24.630, which authorizes attorneys' fee awards where a defendant "wrongfully" trespasses. The statute states that 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 (emphasis added). Here, Grundy claimed that the Bracks committed intentional and negligent trespass, but the superior court rejected the intentional trespass claim. Because Grundy prevailed only on her negligent trespass theory, she is not entitled, as a matter of law, to recover attorneys' fees.

For these reasons, the Bracks respectfully request that this Court reverse the superior court's conclusion that the Bracks trespassed on Grundy's land. Barring that, the Bracks respectfully request that this Court reverse the award of \$16,000 and the attorneys' fees award. Because this Court can, and should, resolve all these issues in favor of the Bracks as a matter of law, it is unnecessary to remand for further proceedings at the superior court.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in holding that sea spray overtopping plaintiff's bulkhead constituted trespass by water.
2. The superior court erred in awarding plaintiff \$16,000.
3. The superior court erred in awarding plaintiff \$22,500 in attorneys' fees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the superior court erred, as a matter of law, in holding that a waterfront property owner on Puget Sound may sue a neighbor for trespass when the only alleged intrusion is sea spray from waves splashing against a plaintiff's seawall. Assignment of Error 1.
2. Whether the superior court erred, as a matter of law, in awarding a trespass plaintiff \$16,000, when the plaintiff proved only *de minimis* damages and when prospective damages are not available in a trespass action. Assignment of Error 2.
3. Whether the superior court erred, as a matter of law, in awarding attorneys' fees when the statute that the court relied upon, RCW 4.24.630, requires that a defendant act "wrongfully" or "intentionally," and the superior court expressly found that the defendants here acted neither "wrongfully" nor "intentionally." Assignment of Error 3.

IV. STATEMENT OF THE CASE

The Bracks and Grundy both own waterfront property near the tip of Johnson Point on Puget Sound. CP 879. Grundy originally filed this lawsuit against the Bracks and Thurston County¹ in 1999, alleging claims of public and private nuisance. CP 7-14. Among other claims,² Grundy argued that the Bracks, who placed sandbags behind an existing seawall on their property and later raised that seawall by less than two feet to protect their property from flooding, caused Grundy's property to flood during storms in the winter of 1998-99. CP 12.

The Bracks moved for summary judgment, arguing that, under the Land Use Petition Act and the Washington State Administrative Procedure Act, Grundy was not entitled to collaterally challenge Thurston County's or the Washington Department of Fisheries' decision to approve the raising of the Bracks' seawall. CP 48-51. The Bracks also argued that they were entitled to build and maintain their seawall under the common enemy doctrine, which allows landowners to lawfully protect their

¹ Grundy dropped her claims against Thurston County, and Thurston County is no longer a party to this action. CP 879.

² Grundy originally complained that the Bracks excavated petroleum contaminated fill from one portion of their property and stockpiled it next to Grundy's property, and that this was a public and private nuisance. CP 10-13. Also, in her First Amended Complaint, Grundy alleged that the Bracks gated a public road at the end of Johnson Point, and that this constituted a public nuisance. CP 38-39. The superior court dismissed Grundy's claims regarding the allegedly contaminated soil, and Grundy did not pursue them on appeal, *Grundy*, 155 Wn.2d at 4 n.3, or on remand to the superior court. CP 741-49. Grundy voluntarily nonsuited her claim regarding the gate over the alleged public access. *Grundy*, 155 Wn.2d at 5 n.4.

property from surface water, even if the effect is to cause increased flow of surface water onto the lands of another. CP 196-97. The superior court agreed, granting summary judgment in favor of the Bracks. CP 216-17.

Grundy appealed, losing at the Court of Appeals, *Grundy v. Brack Family Trust*, 116 Wn. App. 625, 67 P.3d 500 (2003), but ultimately prevailing at the Supreme Court, which held that the common enemy doctrine did not apply to seawater because "[s]torm-driven waves in Puget Sound remain part of a definite and identifiable body of water when splashing onto waterfront property." *Grundy v. Thurston County*, 155 Wn.2d 1, 10, 117 P.3d 1089 (2005). Therefore, the Court held, those waves were not "surface water" and the common enemy doctrine did not bar Grundy's nuisance claim.

After the case was remanded, Grundy filed a Second Amended Complaint, asserting claims of common-law private nuisance, statutory private nuisance, statutory public nuisance, enumerated public nuisance, water trespass, and illegal water diversion. CP 268-73. Each of Grundy's new claims was based on alleged flooding of her property and her neighbors' properties that she claimed occurred only after the Bracks raised their existing seawall in early 1999, pursuant to lawfully issued permits. *Id.* Specifically, Grundy alleged that after the Bracks raised their seawall, Grundy's property flooded for the first time since she purchased it

in the 1970s, repeatedly flooded during the storm events of the 1998-99 winter and flooded during winter storms each year from 1998 through 2006. CP 271. Grundy also alleged that the raising of the Bracks' seawall had significant impacts on the marine environment "by causing geomorphological changes to the shoreline and concomitant habitat changes." CP 271-72. Grundy also alleged that she could not raise her seawall, because that would "transfer the problem further down the beach and constitute a nuisance against her neighbors." CP 271.

After a three day bench trial, the superior court entered 53 separate findings of fact which are, in pertinent part, summarized below.

CP 878-88.

Grundy has, since 1981, resided at low-bank waterfront property on the western side of Johnson Point. CP 880. Grundy's property is protected by a seawall; indeed, all of the waterfront properties on Johnson Point are now, and have historically been, protected by seawalls. *Id.* Grundy's home is set back approximately 25 feet from the shoreline of Puget Sound, and a grass lawn lies between Grundy's home and her seawall. *Id.*

In 1991, the Bracks purchased property at the northern tip of Johnson Point, immediately adjacent and to the east of Grundy's property. *Id.* When the Bracks purchased the property, there was already a seawall

in place, and that seawall was approximately twelve inches lower than Grundy's seawall. *Id.* However, the Bracks' property sometimes flooded, leaving significant deposits of standing water on the Bracks' property. *Id.*

Between 1993 and 1998, the Bracks remodeled a home on the property. CP 880. As part of that remodel, the Bracks first placed sandbags between the seawall and the home,³ and later raised their seawall by less than two feet. *Id.* After the Bracks raised their seawall, it was approximately six to nine inches higher than Grundy's seawall at the boundary line between their respective properties. *Id.*

Grundy argued that the higher seawall on the Bracks' property caused waves to overtop her seawall, flooding her property, damaging her lawn and leaving debris on her property. CP 880-81. She offered photographic evidence and testimony "showing lines of debris and yellow grass on her property during the winter months following weather events producing high winds at high tide," and testimony that the debris and yellow grass had not been present on Grundy's property before the Bracks raised their bulkhead. CP 881. Grundy also presented testimony that wave splash "would occur along the bulkhead of their properties and

³ Although Grundy had originally argued that the sandbagging of the Bracks' property caused her property to flood, the superior court found that the sandbagging did not cause her property flood, did not contribute to any sea spray overtopping Grundy's seawall and that the sandbagging did not cause sea spray to trespass on Grundy's property. CP 880-93.

Defendants' property during the winter months when weather events producing high winds also occurred at high tide, but that the intensity and amount of the invasion from this splash increased after the Brack bulkhead was raised." *Id.*

The Bracks and Grundy produced qualified experts that offered conflicting opinions to explain the alleged increase in sea spray striking Grundy's seawall, as evidenced by debris and yellowing grass, as well as the alleged flooding. CP 881-83. The experts agreed that when waves came from the north or northeast at high tide, the Bracks' heightened seawall could, at least in theory, cause those waves to hit Grundy's seawall with marginally increased intensity. CP 881. The court found that because Grundy's seawall did not have a cap on it, her "bulkhead permits more sea spray and splash to overtop it than would a bulkhead with a cap," and that "in absence of a cap on her bulkhead, sea spray and splash causes occasional debris and yellowed and dead grass on a portion of Plaintiff's property." CP 883.

The experts disagreed about what would occur when the wind and waves came from the south. CP 882-83. Grundy's experts testified that two phenomena, "wave trapping" and "wave wrapping," could, in connection with the Bracks' raised seawall, cause waves of greater intensity to strike Grundy's seawall. CP 882. The Bracks' expert

disagreed, and the court found that "neither 'wave trapping' nor 'wave wrapping' attributable to the raising of Defendants' bulkhead has caused flooding of Plaintiff's property." CP 883.

Based on these facts, the superior court found that Grundy had not met her burden of showing, by a preponderance of the evidence, that the Bracks' slightly higher seawall was the cause of flooding on Grundy's property or on her neighbors' property. CP 885. The superior court also found that the Bracks, by raising their seawall, had not substantially or unreasonably interfered with the use or enjoyment of Grundy's property. *Id.* Accordingly, the court concluded that the Bracks' heightened seawall was not a private nuisance. CP 889-90.

The experts also disagreed about whether increasing the height of the Bracks' seawall affected the nearshore environment, amounting to a public nuisance. CP 883-84. The superior court found that Grundy's evidence of adverse effects on the nearshore environment and habitat was not persuasive, and that the increase in the height of the Bracks' bulkhead did not result in any damage to the public health or nearshore environment. CP 884. Accordingly, the superior court concluded that the Bracks' heightened seawall was not a public nuisance. CP 890.

Regarding Grundy's trespass claim, the court concluded that Grundy "has established water trespass in that the Court finds that debris

and yellowed and dead grass on [Grundy's] property has been proximately caused, by water intrusion and sea spray from high wind and waves amplified by the increase in height of [the Bracks'] bulkhead." CP 891. And because Grundy's illegal diversion claim required proof of the same elements as the water trespass claim, the superior court concluded that Grundy prevailed on that claim as well. *Id.*

In determining whether the alleged trespass was intentional or negligent, the superior court struck the words "intentionally" and "wrongfully" from Grundy's proposed findings of fact and conclusions of law, which the superior court ultimately adopted, as modified. *See* CP 887 ("The trial court finds that Defendants ~~intentionally~~ raised their bulkhead to repel water from their property without considering consequences to Plaintiff and that they maintained their bulkhead ~~after water intrusion on Plaintiff's property became manifest through debris lines and yellowed grass.~~") (alteration by superior court); CP 891 ("Plaintiff has established that defendants' ~~intentionally~~ raised their bulkhead without considering the consequences to Grundy, water thereby intruded onto Plaintiff's property, ~~and defendants continued the trespass well after they knew that the actual intrusion had occurred.~~") (alterations by superior court); CP 892 ("Plaintiff has proven ~~wrongful~~ trespass by water, entitling her to award of

reasonable attorneys' fees and costs pursuant to [RCW 4.24.630].") (first alteration by superior court).

Regarding remedies, the superior court found that Grundy had not requested monetary damages. CP 885. Rather, she sought only "abatement of the alleged nuisance through an order to force Defendants to remove the increased portion of their bulkhead." CP 885. But the superior court found that removing the increased portion of the Bracks' seawall "could be considered environmentally unsound"; accordingly, the superior court refused to order the Bracks to reduce the height of their seawall. CP 886. However, the superior court did order the Bracks to pay Grundy \$16,000, "[b]ased upon the Court's finding that the installation of a 'lip' or 'cap' on Plaintiff's existing bulkhead would prevent future damage to Plaintiff's property." CP 891. The superior court also awarded Grundy attorneys' fees under RCW 4.24.630, because Grundy "has proven wrongful trespass by water, entitling her to award of reasonable attorneys' fees and costs pursuant to this statute." CP 892 (alteration in original).

V. ARGUMENT AND AUTHORITY

A. Standard of review.

This Court reviews legal questions and conclusions of law *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). "Findings of fact are reviewed under a substantial evidence

standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Id.* at 879.

B. Wave spray from Puget Sound onto Grundy's property does not constitute a trespass.

Grundy alleged, and the superior court found, that by raising their seawall less than two feet the Bracks exerted such an influence over Puget Sound that they caused waves of increased intensity to strike Grundy's seawall. The superior court also found that when some of those waves struck Grundy's seawall, some sea spray overtopped Grundy's seawall,⁴ but not enough to cause Grundy "significant compensable injury." CP 885. Based on these findings of fact, the superior court concluded that the Bracks negligently trespassed on Grundy's property.

That one oceanfront property owner may successfully sue another for trespass, when the only intrusion—spray from the sea—is one of the inherent incidents of oceanfront property ownership, is unprecedented. No Washington court has held that marine waters, let alone sea spray, entering waterfront property constitutes trespass. Indeed, research did not uncover a single federal or state case, from any American jurisdiction, so holding. Under these facts, where the superior court found that intrusion

⁴ The superior court also found that the sea spray left debris, such as pieces of kelp and bits of shells, on Grundy's property. CP 887. However, Grundy did not argue, and the superior court did not hold, that the intrusion of this debris was a trespass. The superior court concluded that this debris was evidence of sea spray overtopping the bulkhead, and that spray constituted trespass by water. CP 887, 890-91.

onto Grundy's waterfront property was sea spray overtopping her seawall, this Court should decline to make new law, and should reverse the superior court's determination that the Bracks so influenced Puget Sound as to cause a trespass here.

In addition to being unprecedented, the superior court's holding that "water intrusion and sea spray from high wind and waves amplified by the increase in height of [the Bracks'] bulkhead," CP 891, constitute a trespass is contrary to the rationale underlying the Supreme Court's holding in this very case in *Grundy v. Thurston County*, 155 Wn.2d 1, 117 P.3d 1089 (2005).

In *Grundy*, the Supreme Court considered whether waterfront property owners were entitled to protect themselves, under the common enemy doctrine, from wind- and storm-driven waves in Puget Sound. *Id.* at 9. The Court noted that under the common enemy doctrine "[s]urface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others." *Id.* (quoting *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896)). The Court noted that the common enemy doctrine does not apply to all waters, just surface waters:

"The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course or collected into and forming a definite and identifiable body, such as a lake or pond."

Id. at 10 (quoting *Halverson v. Skagit County*, 139 Wn.2d 1, 15, 983 P.2d 643 (1999)). The Supreme Court held that wind- and storm-driven waves, and spray from those waves, remain part of Puget Sound and therefore are not surface water. *Id.* ("Washington courts have neither characterized storm-driven waves as surface water nor applied the common enemy doctrine to seawater. We decline to do so here."). That those same waves now strike Grundy's property does not alter their essential character; they remain part of Puget Sound.

In holding that spray from waves in Puget Sound is not "surface water," the Supreme Court implicitly held that spray from waves splashing in Puget Sound is not a trespass.⁵ Writing separately in *Grundy*, Justice Sanders observed that the rationale underlying the common enemy doctrine was the right of a landowner to be free from the trespass of

⁵ Trespass is "an intentional or negligent intrusion onto or into the property of another." *Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002) (internal quotation marks and citation omitted). The concept of trespass includes "trespass by water." *Hedlund v. White*, 67 Wn. App. 409, 418 n.12, 836 P.2d 250 (1992) (internal quotation marks and citation omitted). Intentional trespass requires proof that the defendant desired to cause the consequences of his or her act or knew that the consequences were certain, or substantially certain, to occur. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985). Negligent trespass requires proof of the elements of negligence: duty, breach, injury, and proximate cause. *Pruitt v. Douglas County*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003).

outlaw surface water: "The rule is based upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of lands has a right to the free and unrestrained use of it, above, upon and beneath the surface." 155 Wn.2d at 17 (Sanders, J., concurring in part and dissenting in part) (quoting *Cass*, 14 Wash. at 78). That is, an owner of land may legally, but within the limits of the common enemy doctrine, divert surface water from his or her land because otherwise the owner would be required to endure a trespass at the hands of such "outlaw" surface water. See *King County v. Boeing Co.*, 62 Wn.2d 545, 550, 384 P.2d 122 (1963) ("Surface waters are to be regarded as outlaw or common enemy waters, against which every proprietor of land may defend himself, even to the consequent injury of others."); *Island County v. Mackie*, 36 Wn. App. 385, 388, 675 P.2d 607 (1984) (same). And the corollary is also true: one who discharges surface water in a manner different from the natural flow of those waters and onto another's property is liable for trespass. See *Hedlund v. White*, 67 Wn. App. 409, 416-18, 836 P.2d 250 (1992).

In holding that the common enemy doctrine does not apply to waves in Puget Sound and that spray from those waves is not surface water, the Supreme Court necessarily, but implicitly, held that such waters are not "outlaw" waters from which property owners may protect

themselves. That is, because spray from waves in Puget Sound remains part of Puget Sound, it is not legally a trespass on waterfront property, and waterfront property owners in Puget Sound do not have the absolute right to protect themselves from that trespass.

Just as the spray from waves in Puget Sound remained part of Puget Sound in *Grundy*, the spray from the waves onto Grundy's property here remains part of Puget Sound. Therefore, that spray intruding onto Grundy's property cannot constitute trespass because it is not "outlaw" water on her property. It is water that remains part of Puget Sound, and it is one of the inherent incidents of waterfront property ownership.

Therefore, the Bracks request that this court reverse the superior court's judgment in favor of Grundy, and direct that verdict be entered in favor of the Bracks on Grundy's trespass claim.⁶

C. Damages are unavailable to remedy *de minimis* trespass, and prospective damages are not available in trespass cases.

Even if this Court determines that the superior court correctly found that the Bracks' heightened seawall contributed to an increase of Puget Sound spray on Grundy's lawn, thereby trespassing on Grundy's property, the superior court's \$16,000 award to Grundy was erroneous.

⁶ Because the elements of Grundy's "illegal diversion" claim are the same as the elements of her trespass claims, CP 891, the Bracks also request that this Court reverse the superior court's judgment in favor of Grundy on this issue, and direct that verdict be entered in favor of the Bracks.

Trial court found that "raising of Defendants' bulkhead did not proximately cause a significant compensable injury to Plaintiffs, other than contributing to the deposit of debris on a portion of Plaintiff's property and areas of yellow and dead grass." CP 885. Nevertheless, the superior court awarded Grundy \$16,000. To the extent the superior court intended to compensate Grundy for injury to her property, the award is improper because damages are not available in trespass cases involving *de minimis* injury. To the extent that the \$16,000 award is intended to prospectively compensate Grundy for installing a cap on her seawall to prevent sea spray from overtopping it, the award cannot stand because prospective damages are unavailable in trespass cases.⁷

In a trespass action, the plaintiff has the burden of proving actual damages. *Hedlund*, 67 Wn. App. at 413. Damages (other than nominal damages) for trespass are not available unless the injury to plaintiff's property is more than *de minimis*. *Keesling v. City of Seattle*, 52 Wn.2d 247, 254, 324 P.2d 806 (1958) ("Having established a technical trespass,

⁷ There is a third possibility: that the \$16,000 award is an equitable injunction that essentially requires the Bracks to install a cap on Grundy's bulkhead to stop sea spray from overtopping it. However, "[o]ne of the essential criteria for injunctive relief is actual and substantial injury sustained by the person seeking the injunction." *Brown v. Voss*, 105 Wn.2d 366, 372-73, 715 P.2d 514 (1986). Here, Grundy has shown no "actual and substantial" injury; in fact, the superior court found that Grundy suffered no "significant compensable injury" at all, CP 885, and therefore the award of \$16,000 is, if construed by this Court to be an equitable injunction, erroneous.

the plaintiff was entitled to nominal damages. The damages awarded were substantial and have no basis in the evidence.").

Here, Grundy introduced no proof regarding actual damages. Indeed, she testified at trial that she was not seeking damages from the Bracks at all. CP 885. Grundy offered no testimony, expert or otherwise, regarding a reduction in the value of her property after the alleged trespass occurred. She offered no testimony regarding damages that she suffered restoring the property to its original condition. As the superior court found, the only evidence of injury was the intrusion of some sea spray onto Grundy's property and the resulting yellowing of grass and deposit of small debris on Grundy's lawn, and these injuries were not "compensable." CP 885.

Because the trespass and resulting injury, if any, was *de minimis*, Grundy is entitled to no more than nominal damages. *Keesling* is instructive. There, Keesling claimed that electricity wires and a crossarm supporting those wires had trespassed on his property, obstructing his view. 52 Wn.2d at 249. The superior court awarded Keesling damages in the amount of one dollar per day, beginning 90 days after he filed his trespass claim. *Id.* at 253. The Supreme Court held that although "the plaintiff was entitled to such damages as he could prove,"

[t]here is in the record no evidence to support the trial court's finding that the plaintiff had been damaged in the sum of one dollar a day

. . . .

Having established a technical trespass, the plaintiff was entitled to nominal damages. The damages awarded were substantial and have no basis in the evidence.

Id. at 253-54. Here, even assuming that sea spray splashing over a seawall is a trespass, Grundy has at most established a technical trespass. But she did not establish that she suffered any compensable harm as a result. Indeed, the superior court found that Grundy did not suffer any "significant compensable injury" entitling her to damages. CP 885. Accordingly, Grundy was entitled to nominal damages at most, and the superior court's award of \$16,000 in damages to Grundy is erroneous.

Additionally, a plaintiff in a trespass action may recover damages suffered up to the time of trial, but "prospective damages are not allowed." *Woldson v. Woodhead*, 159 Wn.2d 215, 223, 149 P.3d 361 (2006). To the extent that the \$16,000 award to Grundy is intended to compensate her for installing a cap on her seawall, that award is erroneous because prospective damages are not available in trespass actions. *Id.* (holding, in a trespass action, that an award of damages for the future repair of a wall separating two properties was a prospective damage award, and thus improper). In *Woldson*, a masonry wall, which was mostly on Woldson's

property, separated Woldson's property from Woodhead's. *Id.* at 216-17. Although the wall was not designed to be a retaining wall, prior owners of Woodhead's property added fill dirt to their property, built a carport near the wall, and later built a garage where the carport had stood. *Id.* at 217. Because of the lateral pressure exerted by Woodhead's fill dirt, Woldson's wall crumbled and cracked. *Id.* Woldson alleged, and the trial court found, that the placing of Woodhead's fill dirt was a continuing trespass. *Id.* Woldson introduced evidence, and the court concluded, that the cost of removing and replacing the portion of the wall would be \$70,762. *Id.* at 217-18. But that wall had not yet been removed or replaced.⁸ *Id.* at 218.

Woodhead appealed, arguing, among other things, that the damage award was an impermissible prospective damage award. *Id.* The Supreme Court agreed:

[D]amages in a continuing trespass may not be awarded for injuries sustained after the trial. Unlike other torts, the offending conduct and subsequent damages in a continuing trespass may be abated—the dirt, in this case, could be removed following trial but before judgment. As such, it is improper to award damages that have not been proved at trial; they are inherently prospective and, as explained below, prospective damages may not be awarded for a continuing trespass.

Id. at 218 n.3. The Supreme Court held that "prospective damages are not allowed." *Id.* at 223.

⁸ Because only a portion of the damage to the wall had occurred within the applicable statute of limitations period, the court awarded Woldson \$33,353 in damages. *Id.*

In *Woldson*, the erroneous prospective damage award was based on the estimated future cost of repairing a wall. Here, the prospective damage award is based on the estimated future cost of placing a cap on Grundy's seawall. The record does not show that Grundy had made any alteration to her seawall or spent any money in response to the sea spray by the conclusion of trial. Under *Woldson*, a plaintiff in a continuing trespass claim may not recover prospective damages for repairing a wall. Accordingly, to the extent that the superior court's award of damages to Grundy was intended to compensate Grundy for the predicted future expense of adding a cap to her seawall, it is erroneous and the Bracks respectfully request that this Court reverse the award.

D. Attorneys' fees are unavailable to Grundy because the superior court held that there was no intentional trespass here.

The superior court awarded Grundy attorneys' fees, under RCW 4.24.630, for prevailing on her trespass claim. Because RCW 4.24.630 authorizes attorneys' fees for intentional trespass but not negligent trespass, and because the superior court found that the Bracks' trespass was not intentional, the award of attorneys' fees was erroneous.

Washington follows the American rule in awarding attorneys' fees. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Attorneys' fee awards are available to a prevailing party "only if

authorized by "contract, statute, or recognized ground in equity.""

McGreevy v. Or. Mut. Ins. Co., 90 Wn. App. 283, 289, 951 P.2d 798

(1998) (quoting *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70, 847

P.2d 440 (1993) (citation omitted)). Here, the superior court relied on

RCW 4.24.630 as authority to award fees. That statute provides, in

relevant part, as follows:

Every person who goes onto the land of another and who . . . 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. 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. 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.

RCW 4.24.630 (emphasis added). The statute authorizes attorneys' fees only for "wrongfully" trespassing, and it defines "wrongfully" as acting "intentionally and unreasonably." *Id.* Addressing the merits of an award of attorneys' fees under this statute, the Court of Appeals stated that such an award

requires a showing of wrongful (intentional and unreasonable) conduct resulting in some dollar amount of

damages. *Standing Rock Homeowners Ass'n v. Misich*, [106 Wn. App. 231, 244-45, 23 P.3d 520 (2001)]. In other words, without a showing of damages the claim has no value.

Colwell v. Etzell, 119 Wn. App. 432, 442, 81 P.3d 895 (2003).⁹

Under Washington law there are two types of trespass claims, intentional trespass and negligent trespass. See *Pruitt v. Douglas County*, 116 Wn. App. 547, 66 P.3d 1111 (2003); *Seal v. Naches-Selah Irrigation Dist.*, 51 Wn. App. 1, 751 P.2d 873 (1988). Grundy claimed both. Intentional trespass requires proof that defendant desires to cause consequences of his or her act, or knows that the consequences are certain, or substantially certain, to result from his or her act. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985). Negligent trespass requires proof of the elements of negligence: duty, breach, injury, and proximate cause. *Pruitt*, 116 Wn. App. at 554.

In order for the award of attorneys' fees to have been proper here, the superior court would have to have found that the Bracks acted "wrongfully," which, under the statute, means "intentionally and unreasonably." RCW 4.24.630. The superior court made no such finding.

⁹ If this Court agrees with the Bracks that Grundy has indeed suffered no compensable injury, as discussed in section IV.C. *supra*, the award of attorneys' fees is erroneous here because RCW 4.24.630 requires that a plaintiff in an intentional trespass case prove actual damages before he or she is entitled to attorneys' fees. Moreover, Grundy neither offered proof of nor claimed any injury, other than yellowing of grass and having to pick up small debris off her lawn more often, or any financial loss trial, and the superior court concluded that she suffered no "significant compensable injury." CP 885. Under these facts, Grundy is not entitled to recovery of attorneys' fees under RCW 4.24.630.

To the contrary, before adopting Grundy's proposed findings of fact and conclusions of law, the superior court struck each of Grundy's proposed references to the Bracks acting wrongfully or with intent. *See* CP 887 ("The trial court finds that Defendants ~~intentionally~~ raised their bulkhead to repel water from their property without considering consequences to Plaintiff and that they maintained their bulkhead ~~after water intrusion on Plaintiff's property became manifest through debris lines and yellowed grass.~~") (alteration by superior court); CP 891 ("Plaintiff has established that defendants' ~~intentionally~~ raised their bulkhead without considering the consequences to Grundy, water thereby intruded onto Plaintiff's property, ~~and defendants continued the trespass well after they knew that the actual intrusion had occurred.~~") (alterations by superior court); CP 892 ("Plaintiff has proven ~~wrongful~~ trespass by water, entitling her to award of reasonable attorneys' fees and costs pursuant to [RCW 4.24.630].") (first alteration by superior court).

Grundy did not prove the elements of an intentional trespass necessary for recovery of attorneys' fees under RCW 4.24.630. Because the superior court found that the Bracks did not act "wrongfully" or "intentionally," the superior court erred in awarding attorneys' fees to

Grundy under RCW 4.24.630. Therefore, the Bracks respectfully request that the award of attorneys' fees be reversed.¹⁰

VI. CONCLUSION

The superior court's conclusion that the Bracks trespassed on Grundy's property by causing waves in Puget Sound to send sea spray over Grundy's seawall is unsupported by precedent and contrary to the Supreme Court's prior opinion in this case. Even if this Court decides to create new law here and hold that a waterfront property owner on Puget Sound can sue a neighbor for trespass when the only intrusion is sea spray from waves splashing against a plaintiff's seawall, the superior court's \$16,000 award to Grundy and its award of attorneys' fees to her are erroneous.

¹⁰ The superior court determined that Grundy was entitled to recover \$22,500 in reasonable attorneys' fees under RCW 4.24.630. However, because the court had previously awarded the Bracks \$3,000 in reasonable attorneys' fees stemming from a discovery dispute between the parties, *see* CP 825, 892, the court reduced Grundy's fee award to \$19,500. If this Court reverses the fee award to Grundy under RCW 4.24.630, the Bracks respectfully request that this Court direct that final judgment be entered in favor of the Bracks for the \$3,000 in attorneys' fees to which they are entitled.

DATED: July 7, 2008

PERKINS COIE LLP

By: _____



Alexander W. Mackie, WSBA No. 6404

AMackie@perkinscoie.com

Eric Merrifield, WSBA No. 32949

EMerrifield@perkinscoie.com

J. Christopher Baird, WSBA #38944

JCBaird@perkinscoie.com

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Appellants

The Brack Family Trust, Calvin Brack and

Joyce M. Brack, Trustees

No. 37251-7-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EVELYNE GRUNDY,

Respondent,

v.

The BRACK FAMILY TRUST,
CALVIN BRACK and JOYCE M.
BRACK, Trustees,

Appellants.

CERTIFICATE OF SERVICE

Teresa McLain certifies and states:

I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein. On July 7, 2008, I caused to be served, a true and correct copy of the following:

1. Appellant's Opening Brief;
2. Certificate of Service

upon the following at the address as stated below by the method of service indicated:

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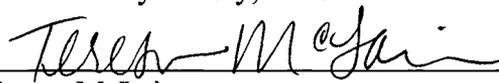
Barnett M. Kalikow
Kalikow & Gusa, PLLC
1405 Harrison Avenue NW, Suite 207
Olympia, WA 98502

Fax: (360) 705-0175

VIA U.S. MAIL

Allen T. Miller
Law Offices of Allen T. Miller, PLLC
1801 W. Bay Dr. NW
Suite 205
Olympia, WA 98502

DATED at Seattle, Washington this 7th day of July, 2008.



Teresa McLain