

NO. 35307-5-II

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

STATE OF WASHINGTON  
BY SCOTT  
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JAMES H. ...

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RONALD W. DAWES and W. ANN DAWES, husband and wife,

Respondents,

v.

DOUGLAS FIELD and MARY ANN FIELD, husband and wife,

Appellants,

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**REPLY BRIEF**

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## REPLY TO RESTATEMENT OF THE CASE

The Daweses do not contradict the facts set forth in the Fields' opening brief. Instead, they offer a different version of events, which is in many respects inconsistent with the trial court's findings and the testimony the trial court chose to believe. The following corrects the Daweses' misrepresentations.

The Daweses claim that the Fields historically used the Common Road "for ingress and egress to their home[]," and that the Fields' use of the Road "began to change" in 1997. BR 3. The Fields did not use the Road just to access their home, they used it to access the entire western portion of their property, running all the way to the Pope land, long before their home was even built. BA 6-7. Nor did the Fields change the manner in which they used the areas surrounding the Common Road in 1997 – they have always used their western property for things like milling, stonecutting, burning debris and the like. *Compare Id.*; RP 1022, 1017, 1109 *with* BR 3. The Fields also placed a duck pen on the western portion of their property in 1984, erected a gate in 1985-86, and built a temporary structure for storing lumber in the early 1990s. RP 1028, 1036-37, 1126-27. The Road is, and has always been, much more than a way to get in and out of the Fields' driveway. *Id.*

The Daweses also claim that “[m]atters came to a head” when the Fields graveled “the disputed portion of Common Road [sic] to improve the roadway beyond what had been its historical use.” BR 5 (citing RP 106-08). This claim is incorrect in two particulars: (1) matters came to a head when Ronald bulldozed 55-foot into what had historically been considered the Fields’ front yard; and (2) after the bulldozing, the Fields graveled the Road to prevent the Daweses from further changing its character by bulldozing, seeding, and filling – not to expand it. *Compare* BR 5 *with* RP 1042-44. Moreover, the citation the Daweses provide says nothing about why the Fields graveled the Road and simply does not support the Daweses’ assertion that they did so to “improve the roadway beyond what had been its historical use.” RP 106-08.

The Daweses also claim that the Fields “destroyed” a neighbor’s fence (BR 3), but neglect to mention that when the Bennetts installed their fence, they broke the water main that services the Fields’ house. RP 232-33; Ex 19. The fence was almost to the Road’s edge, well within the 30-foot easement running along the south side of the Common Road. *Id.*; RP 1206-07. The fence restricted access, narrowing the Road such that large trucks could not pass through without hitting the fence. Ex

19. The Bennetts subsequently moved the fence back four feet (RP 233) and agreed to remove it entirely as part of their settlement with the Fields. RP 266.

More misleading (and irrelevant) claims include:

- ◆ “The Fields’ use of their property was marked by a series of lengthy absences in the 1990s . . . .” BR 3. While the Fields at times lived off-site for work or to care for sick family (RP 1015, 1017) there was never an extended time period when Douglas Field was not either living in the house or working on it. RP 1018.
- ◆ “[T]he trial court held the Fields in contempt for intruding on the Daweses’ property.” BR 4. The Fields were held in contempt because Douglas Field trimmed blackberry bushes growing over the Common Road. The Court found that he “intentionally, but not willfully,” violated the mutual restraining order – in other words, that the violation was “technical.” CP 58-59. The court ultimately found that the Common Road had “migrated to the south due to the Daweses’ intentional neglect of maintaining the vegetation on the north” (CP 1122, F/F 19) and awarded the Fields the right to trim vegetation encroaching on the easement. CP 1125, C/L 4.
- ◆ “[T]he Fields acknowledged that the Daweses had extensive rights to property extending south of the Common Road.” BR 5; *see also* BR 12, 23, 25, 26, 27. The Fields have always acknowledged that everyone living along the Common Road, including the Daweses, has easement rights 30 feet north and south of the Road. CP 11. The Fields never acknowledged more than an easement interest.

## REPLY ARGUMENT

**A. The Fields are entitled to attorneys' fees under CR 11 because the Daweses (1) conceded that the Common Road continues west past the Fields' home, contrary to numerous declarations and pleadings; and (2) acquiesced in the Common Road as the true boundary for 22 years. (BA 27-44, BR 8-22).**

- 1. The Court should reverse and remand for an award of attorneys' fees under CR 11 because the Daweses' claims were based on gross misrepresentations about the Common Road's western terminus, propagated to avoid summary judgment.**

The Fields argued in their opening brief that the trial court erred in failing to award them attorneys' fees as a CR 11 sanction, where the Daweses submitted false declarations and pleadings to overcome summary judgment related to the Common Road's western terminus. BA 27-38. The Fields provided examples of declaration testimony from Ronald, Ann, and Edward, all of which they directly contradicted in their trial testimony. BA 30-35. In the most glaring example, Edward Dawes declared that the Common Road ended at the Fields' driveway by their eastern boundary, thereafter turning into forest and underbrush. BA 31; CP 643. At trial, however, Edward conceded that the Common Road extends to the Daweses' and Fields' western boundary, about 80-feet west from where he said the Common Road ended in his declaration.

BA 33. The Daweses do not address this or any other false statement in the declarations the Daweses submitted to overcome summary judgment. *Compare* BA 30-35 *with* BR 8-22.

The Daweses also all but ignore the Fields' arguments pertaining to the inaccurate map attached to Ronald's, Ann's and Edward's declarations. BA 30-35. In short, the Fields argued that the Daweses altered a survey map to show the Common Road ending by turning abruptly into the Fields' property at their eastern boundary, and intentionally attached the altered map to their declarations in opposition to summary judgment. *Id.*

At trial, Ronald conceded that the map contained markings that were not put in by the ADA survey company, which created the map, including the marking depicting the Common Road turning abruptly into the Fields' property at their eastern boundary. BA 32. Ronald conceded that the map is not accurate and that the Common Road continues west past the point marked on the map. BA 34-35. Ann also admitted that the map inaccurately depicted the Road turning sharply at the Fields' east boundary. RP 715-16.

Edward denied even having seen the map when he signed his declaration. BA 33. He conceded that the map was incorrect in three respects: (1) the Common Road does not end at the Fields'

eastern boundary, but ends about 80-feet west of the place marked “end of road” on the map; (2) the Road does not turn into the Fields’ property; and (3) the Fields have two driveways and the map shows only one near the Fields’ eastern boundary. BA 32.

The Daweses’ only response is that Ronald hired ADA only “for the purpose of placing two stakes ‘at easement’ . . . [and that t]ying in the Common Road simply was not within the scope of Mr. Daweses’ survey request.” BR 21. This too is inaccurate. CP 187, decl. of Harbert Armstrong, ADA. The Daweses (and the Bennetts) ordered the survey to (1) locate the Bennetts’ western boundary (the Fields’ eastern boundary); (2) depict any encroachments on or east of that line; (3) stake the Daweses’ southern boundary; and (4) locate the easement relative to those points. *Id.* The Daweses asked ADA “not [to] depict, on [their] survey maps, the actual location of this access road [the Common Road] any farther west than the Bennett property.” CP 188. According to ADA, the Common Road actually ends about 80-feet west of the Road end depicted on the map. CP 189.

In any event, the purpose for which the Daweses allegedly ordered the survey does not excuse altering the survey and attaching it to their declarations. The Daweses do not contest that

they altered the map attached to their declarations. BR 8-22. Nor do they address Ronald's, Ann's and Edward's admissions that the map is simply incorrect and that the Road continues 80-feet past the "END OF ROAD" on the map.

The Road's western terminus was a material issue of fact on summary judgment relevant to the mutual recognition and acquiescence claim. CP 518-22. The Daweses created a factual dispute by claiming that the Road ended at the Fields' eastern boundary. CP 551-52. There was no factual dispute – the Daweses conceded at trial that the Common Road did not end at the Fields' eastern boundary but continued west. The Daweses' claim was grounded in lies – that is worse than saying it was not well grounded in fact. CR 11 sanctions are appropriate.

2. **CR 11 sanctions are also appropriate because the Daweses conceded mutual recognition and acquiescence, acknowledging that they had acquiesced in the Common Road as the true boundary for 22 years.**

The Daweses offer no response to the Fields' argument that the trial court erred in failing to award attorneys' fees under CR 11 for defending against the Daweses' claims to the area south of the Common Road because the Daweses admitted that they acquiesced in the Common Road as the true boundary for the first

15 years (from 1978-1993) that the Daweses and Fields lived across the Road from one another. BA 41. This alone is sufficient to establish mutual recognition and acquiescence, which requires a 10-year period. BA 26, 41. Further, the trial court rejected as “not believable” the Daweses’ claim that they discovered that the Common Road was on their property in 1993. BA 38 (citing CP 1120, F/F 7). The Daweses acknowledge that they did not act on their claimed belief until 2000, adding seven more years of acquiescence in the Road as the true boundary. BA 41.

The Fields have also shown that mutual recognition and acquiescence was established by the easement Agreement all original residents signed and that the Daweses should be bound by the Agreement, where (1) the Daweses had constructive notice of the Agreement; and (2) the Agreement clearly shows that the each property, including the Daweses’, ends where it borders the Road. BA 40. The Daweses acknowledge that the Agreement “purported to create an easement for ingress and egress along the parties’ north-south boundary lines” (BR 1) and otherwise do not respond to this argument. Thus, whether by the Agreement or by their own admission, the Daweses recognized that the Common Road was the true boundary for double the statutory period. Here too,

summary judgment would have been appropriate but for the Daweses' fabricated factual dispute. BA 42.

What's more, the trial court found that the Daweses' factual assertions as to the area south of the Common Road were not credible or believable. BA 42-43. The Daweses' claimed use of the area south of the Road rested entirely on Ronald's assertion that he stargazed from there. BA 42. The Court rejected Ronald's testimony as "not credible," found that stars were not even visible from the area where Ronald claimed to have stargazed, and accepted a former neighbor's testimony who stated that Ronald had stargazed on his property, not the Fields' property. BA 42-43; CP 1122, F/F 17. The Daweses also do not respond to this argument.

**3. The Daweses' primary response is that they had a valid claim to title, but title is irrelevant, and one allegedly valid claim does not lend the required factual basis to other claims in any event.**

Rather than addressing their false declarations, fabricated claims, and outright admission of the claim upon which the Fields' ultimately prevailed, the Daweses contend that CR 11 sanctions are inappropriate because they had a legitimate claim of title in the area south of the Common Road. BR 12-16, 20-22. Title is irrelevant. BA 46. The Fields sought CR 11 sanctions because the

Daweses lied about the Common Road's western terminus and claimed a right to the area south of the Common Road even though they had acquiesced in the Road as the proper boundary for 22 years. Claiming title, legitimate or not, does not remedy that the Daweses' defenses were not well-grounded in fact.

Suppose that in response to the Fields' motion for partial summary judgment, the Daweses had not fabricated factual disputes, but had simply said "we have title." Suppose even that the Fields did not dispute title, but agreed that the Daweses had title to the disputed area south of the Common Road. The appropriate ruling would have been to grant summary judgment to the Fields because record title is not a defense to mutual recognition and acquiescence or adverse possession. BA 46. Rather both doctrines award title to those who do not have title, often against those who do.

The point is not whether the Daweses have had title to the area south of the Common Road since they purchased in 1978, or whether they acquired title when they tried to purchase it from one of the Selley heirs during the litigation. BR 12-16. The point is that their claim to the disputed property lacks factual basis because they acquiesced in the boundary for 22-years before suing the Fields.

Moreover, the Daweses' claims about title – legitimate or not – have no bearing on the validity of their claims that the Common Road ended 80-feet east of where it actually ends. CR 11 sanctions are available when a claim lacks factual basis and does not require that the suit is frivolous in its entirety. BA 28. Lying about where the Road ended – a material fact – is sanctionable regardless of whether some other claim is well-grounded in fact.

The Daweses also claim that the “Fields’ focus” on the Daweses fabricated factual dispute “is misplaced,” arguing that there was a factual dispute about “each parties’ [*sic*] perspective as to what constituted the existence of a road” (BR 16) and that “the Daweses’ position was that there was no clearly defined road.” BR 17. This post hoc recharacterization is plainly inaccurate.

The Fields’ argument for sanctions is that the Daweses fabricated a factual dispute to overcome summary judgment, and gradually admitted that there was no factual dispute as the trial progressed. BA 36. The Daweses’ declarations in opposition to partial summary judgment do not say that “there was no clearly defined road” (BR 17) or give a “perspective [on the] condition, nature of use and frequency of use” of the Common Road. BR 16.

The declarations unequivocally state that the Road “ended” at the Fields’ eastern boundary:

- ◆ The “road ended at the Field property, approximately in-line with the front of the current Field house . . . The land to the west, past the end of the access road, was covered with brush, weeds and wild grass.” CP 621.
- ◆ “At the entrance/driveway to the Field property, the road ended, with natural forest growth on the other side/westerly . . . The Area was natural/native growing grasses and brush 2-3 feet high.” CP 638.
- ◆ “The gravel road which provided access to [the Dawes] property and the Field property went as far as the driveway that leads up to the front door of [the Fields’] log cabin . . . The rest of the area, to the west of the road and Field driveway, was generally forest and underbrush.” CP 643.

In fact, Ann clearly maintained her position that the Common Road “ended” at the Fields’ eastern boundary in response to the Fields’ claim that this statement was false (CP 640):

Regarding the assertion by Field that I “falsely” stated that the common road ended at the Field driveway, as can be seen by this Declaration, I continue to stand by my statement. The significant point is that neither a driveway nor roadway extended west beyond the entrance to the Field house . . . .

The map attached to the declarations inaccurately depicts the “END OF ROAD” at the Fields’ eastern boundary. *Supra* Argument § A.1.

The position in the Daweses’ declarations was that the Common Road “ended” at the Fields’ eastern boundary, not that it became something other than a “clearly defined road.” BR 17.

That testimony was false, it created a fact dispute where none existed, and it unnecessarily prolonged the litigation, which should have ended on summary judgment.

It is further inaccurate to characterize the Daweses' trial testimony as debating "what constituted the existence of a road." BR 16. Edward identified a "dirt road" that extended "at least" 80-feet past the Fields' eastern boundary. RP 351-52; BA 33. Ronald admitted that the Road extended west past the point depicted on the map. RP 448; BA 34-35. And while Ann testified that the Road "petered out," she agreed that there was, in fact, "a road," past the point indicated in her declaration. RP 726; BA 34.

In short, it is for the first time on appeal that the Daweses claim that what they were actually disputing was whether the Road was clearly defined – not whether it ended entirely.<sup>1</sup> But the time has already been wasted and the money already spent, and it is too late to change the story now.

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<sup>1</sup> The Daweses continue to maintain on appeal that the area west of where they claim the Common Road ended "consisted of natural grasses, vegetation and brush and contained a footbath [*sic*]" (BR 17) despite the unequivocal finding that "[t]he Common Road did not have natural vegetation on it." CP 1120, F/F 5.

**B. The Fields are entitled to attorneys' fees under RCW 4.84.185 because the Daweses' contentions were frivolous and asserted without reasonable care. (BA 44-47, BR 22-23).**

The Fields' claim for sanctions under RCW 4.84.185 naturally includes the arguments that the Daweses' fabricated a factual dispute about the Common Road's western terminus and stubbornly pursued the area south of the Common Road, despite having acquiesced in the Road as the true boundary for 22-years. BA 45. The Fields also argued that the Daweses' adverse possession claim was frivolous, where the Daweses admitted that they did not make an overt claim of ownership until 2000, and where stargazing – their only claimed use of the disputed area (which the court found “not credible,” CP 1122, F/F 17) – could not possibly be considered “exclusive,” “uninterrupted” use. BA 45-46. As discussed above and in the opening brief, the Daweses' remaining claims are frivolous because record title is moot in light of the Daweses' admission that they acquiesced in the Common Road as the true boundary for the statutory period. BA 46.

Yet the Daweses claim that the Fields “utterly fail to brief, much less argue, that the Daweses' claims to the disputed areas of the Common Road . . . were somehow frivolous or advanced

without reasonable cause.” BR 23. These arguments, discussed above, are found at BA 44-46. The Daweses also call the Fields hypocrites for seeking sanctions against the Daweses while claiming easement rights to the 30 foot strip abutting the Common Road to the North. BR 23 fn.9. Property rights and the factual basis upon which property claims are grounded (or not) are not *quid pro quo*. The Fields’ claims were based on having lived across the Common Road from the Daweses for 22-years, during which time everyone living on the Road understood that it was the boundary line. BA 11-12, 16-18. The Daweses’ claims were based on a rejection of that reality, which they knew to be true.

The Daweses’ remaining claim is that they were “absolutely entitled to obtain a judicial declaration” of the parties’ property rights because (1) the original easement Agreement was inaccurate; (2) there was a fact dispute about the Fields’ use of the disputed area; and (3) there was no explanation of why the disputed area was omitted from the Daweses’ deed. BR 23. The Daweses miss the point. After acquiescing in the Road as the true boundary for 22-years, it was and is frivolous to claim ownership because the easement Agreement is inaccurate or because there may have been a mistake in the original Deed. *Id.* Although the easement

Agreement is sufficient to satisfy mutual recognition and acquiescence, it is not necessary (*supra* Argument § A 2), and the Daweses' deed is irrelevant because title is irrelevant. *Supra* Argument § A 3. As far as the claimed dispute about the Fields' use of the area south of the Common Road, mutual recognition and acquiescence depends on the parties' recognition of the Road as the true boundary, not the Fields' use of the area. BA 26-27.

Ultimately, the Daweses' argument is no different than claiming that even though the Daweses acknowledged that they treated the Road as the true boundary for 22-years, they had a right to sue the Fields' to pursue legal theories that are completely at odds with their acknowledgment, and to fabricate factual disputes in pursuit of a "judicial declaration" of property rights.

**C. The Fields are entitled to fees under RCW 4.28.328 because the Daweses did not have a substantial justification for filing the lis pendens. (BA 47-49, BR 24-29).**

The Fields' argument for fees resulting for the unjustified lis pendens is very straightforward: the Daweses had no substantial justification for filing a lis pendens because the lis pendens rests on the Daweses' frivolous suit. BA 47-49. The trial court expressly stated that it would have awarded fees, but for both parties' pursuit

of title. BA 48; CP 1126, C/L 8. This is error because the Fields had justifiable reasons for pursuing title, while the Daweses did not. BA 47-49. Obtaining record title could not establish the Daweses' ownership of the disputed area because title cannot overcome the Fields' ownership by mutual recognition and acquiescence. BA 48. The Fields, however, had a legitimate reason for pursuing title, where obtaining title would have eliminated the need to prove mutual recognition and acquiescence or adverse possession.

The Daweses' response misses the point. As in their response to the arguments on sanctions under CR 11 and RCW 4.84.185, the Daweses' argument is, for the most part, that their erroneous pursuit of title lent legitimacy to the otherwise unjustifiable *lis pendens*. BR 25-28. But as discussed at length above and in the opening brief, title is irrelevant because the Daweses conceded mutual recognition and acquiescence for double the statutory period. *Supra* Argument § A 3; BR 46. The Daweses also argue that fees are not appropriate because there is no statutory basis for awarding fees in "a typical quiet title action."

BR 28. But this is a fee award for an unjustified lis pendens, not a quiet title action, and RCW 4.28.328 is the statutory basis for fees.<sup>2</sup>

In short, the Daweses' claims of ownership were frivolous and thus the lis pendens was not justifiable.

**D. The Fields are entitled to damages under RCW 64.12.030 because Ronald Dawes destroyed vegetation in the area south of the Common Road. (BA 49-50, BR 29-38).**

The Fields' claim for damages under RCW 64.12.030 is similarly straightforward: the Fields are entitled to damages because Ronald destroyed vegetation in the disputed area south of the Common Road with full knowledge that the area was involved in the property dispute. BA 49-50. The Daweses raise a host of responses which the Fields address in turn.

The Daweses argue that the Fields lack standing because they did not have title when Ronald poisoned their yard. BR 31. This argument is meritless. The trial court quieted title in the Fields (CP 1124, C/L 2) and the Daweses provide no support for their assertion that a party to whom title is quieted in a court proceeding

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<sup>2</sup> The Daweses also claim that at trial, the Fields "arguably" raised only that fees were appropriate under RCW 4.28.328(3) because the Fields had a superior claim of title. BR 27-28. But the Fields argued that the Daweses' claim of title was too late as the Fields had already exclusively occupied the disputed area for two decades. CP 1136.

lacks standing to recover damages for destruction of his property because title was not adjudicated until after the injury-causing event occurred. *Id.* The one case the Daweses cite is inapposite. BR 31 (citing ***Free Methodist Church Corp. of Greenlake v. Brown***, 66 Wn.2d 164, 401 P.2d 655 (1965)).

***Brown*** involved two injuries to real property, one that arose when the plaintiff owned the property and one that arose when a predecessor in interest owned the property. 66 Wn.2d at 166. The Court held that without an assignment of the claim, the plaintiffs could not recover damages from the injury that arose when the predecessor in interest owned the property. *Id.* Here there was no predecessor in interest when Ronald poisoned the Fields' front yard – although title had not yet been adjudicated, the Fields were already the rightful owners by mutual recognition and acquiescence. *Supra* Argument § A.

The Daweses' argue that ***Mullally*** is inapplicable, misrepresenting ***Mullally*** and the finding upon which the Daweses rely. BR 31 (citing ***Mullally v. Parks***, 29 Wn.2d 899, 911, 190 P.2d 107 (1948); CP 1122, F/F 21). ***Mullally*** held that treble damages are available when a party who is aware of a property dispute intentionally destroys vegetation on the disputed area:

Where a person has knowledge of a bona fide boundary dispute, and thereafter consciously, deliberately, and intentionally enters upon the disputed area for the purpose of destroying, and does destroy, trees or other property which cannot be replaced, such acts are neither casual nor involuntary, nor can they be justified upon the basis of probable cause for belief by the tortfeasor that he owned the land, but, on the contrary, are without lawful authority and will subject such person to treble damages as provided by statute.

29 Wn.2d at 911. While the trial court rejected the Fields' Intentional Infliction of Emotional Distress claim, it did not, as the Daweses claim, "specifically [find] that Mr. Dawes did not seek to interfere or harm with [*sic*] any rights the Fields may have had." *Compare* BR 32 with CP 1122-23, F/F 21. Rather, the court unequivocally held that Ronald killed vegetation in the disputed area. CP 1122, F/F 21.

The Daweses' easement rights also do not excuse Ronald's poisoning in the disputed area. BR 32-33. The easement shared by all parties living along the Common Road is for ingress and egress, and utilities. CP 448. The Daweses admit that Ronald did not poison the disputed area to protect his ingress and egress or utility rights, but did so for the "sole purpose" of protecting stakes marking off his perceived property line. BR 32-33. Moreover, Ronald did not just spray a little Roundup on the "native

grasses/brush” around his survey stakes (*id.*) – he poisoned about 1,200 square feet of the Fields’ front yard, including ferns, shrubs, and trees. BA 20; Ex 70.

The Daweses next raise a number of different arguments about damages, only some of which apply to damages available to the Fields under RCW 64.12.030 – the only damages claim raised on appeal. BR 33-37. RCW 64.12.030 allows a party to recover treble damages for the injury to or destruction of “any tree, timber or shrub.” RCW 64.12.030. Where, as here, the injured vegetation is “residential/ornamental,” damages include the “restoration or replacement cost for the vegetation.” ***Birchler v. Castello Land Co.***, 133 Wn.2d 106, 111-12, 942 P.2d 968 (1997).

Contrary to the Daweses’ claim, emotional distress damages are also recoverable under RCW 64.12.030. *Compare* BR 34 with ***Birchler***, 133 Wn.2d at 115-17. The Daweses grossly misrepresent ***Birchler*** in claiming that it stands for the proposition that “[a] violation of RCW 64.12.030 does not ordinarily encompass emotional distress as an element of damages; instead, emotional distress is ‘merely another item of damages for a wrong committed as a result of the timber trespass.’” BR 34 (quoting ***Birchler***, 133 Wn.2d at 113). The language quoted, which the Daweses take out

of context, rejects the claim that emotional distress damages are “an alternate or cumulative remedy for timber trespass”:

A claim for damages from emotional distress is not an alternate or cumulative remedy for timber trespass that one may elect in lieu of a common-law remedy or the statutory remedy, but merely another item of damages for a wrong committed as a result of the timber trespass. Nor are emotional distress damages “repugnant and inconsistent” with damages caused by timber trespass. The facts of the present case do not present an election of remedies issue.

*Id.* at 112-13. The ***Birchler*** Court held that emotional distress damages are recoverable under RCW 64.12.030 – “the timber trespass statute” (*id.* at 116):

We believe the correct rule is that emotional distress damages are recoverable under RCW 64.12.030 for an intentional interference with property interests such as trees and vegetation.

As such, the Fields properly ask this Court to remand with instructions to award damages for the cost to repair or replace the vegetation Ronald poisoned, and for the emotional distress resulting from the same. The Fields did not appeal from the trial court’s denial of their IIED claim, and do not seek emotional distress damages resulting from the Daweses’ harassing and intimidating behavior, other than destroying a large swath of the

Fields' front yard.<sup>3</sup> BR 34-35. It is also unclear why the Daweses argue about damages for time spent as a litigant or lost property use, as the Fields did not raise these issues. BR 35-36.

The Fields sought \$5,000 "to clean up the mess and replace the plants" (RP 1313) and contrary to the Daweses' claim, the cost of restoring or replacing (*id.*) the poisoned plants is exactly the type of damages RCW 64.12.030 anticipates. Compare ***Birchler***, 133 Wn.2d at 112 *with* BR 36. Further, to the extent, if any, that the \$5,000 requested encompasses damages caused by the poisoning as well as damages caused by the restraining order, which

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<sup>3</sup> The Daweses also claim that in rejecting the Fields' IIED claim, the trial court "[i]mplicit[ly]" found that emotional distress damages were not recoverable under any damage theory. BR 35. This claim grossly misconstrues the court's finding. Compare BR 35 *with* CP 1123, F/F 21. The trial court found that there was not sufficient intentional infliction of emotion distress to support an IIED claim. CP 1123, F/F 21. It did not find, nor is it "[i]mplicit" in Finding 21, that Ronald did not intentionally interfere with the Fields' property rights. BR 35. Rather, the court expressly found that Ronald destroyed vegetation in the disputed area. CP 1222, F/F 21. That is interference with a property right. BR 35.

prevented the Fields from maintaining the yard, then the Fields can segregate damages on remand.<sup>4</sup> BR 36.

Finally, in the event that the Court remands for damages under RCW 64.12.030, the Daweses ask the Court to order the trial court to limit the Fields to (1) single damages, claiming that “the trial court implicitly found a mitigating circumstance under RCW 64.12.040”; or (2) nominal damages, claiming that the “findings preclude[] the Fields from relitigating certain damages claims.”<sup>5</sup> BR 37-38. Both arguments are meritless.

RCW 64.12.040 provides that single damages are appropriate (rather than treble damages under § .030) when the party who destroyed the property had probable cause to believe that the property was his own. But Ronald’s belief that he may have owned the disputed area does not excuse his behavior, or

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<sup>4</sup> Here again, the Daweses misunderstand the case upon which they rely. BR 36 (citing **Scott v. Rainbow Ambulance Service, Inc.**, 75 Wn.2d 494, 497-498, 452 P.2d 220 (1969)). The **Scott** Court held that a plaintiff has the burden to segregate damages, where the plaintiff is partially at fault for his own injury. 75 Wn.2d at 497-98. It simply does not follow that the Fields had to segregate the \$5,000 of damages to their vegetation between that which was caused by Ronald poisoning their yard, and that, if any, caused by the restraining order. BR 36.

<sup>5</sup> The only argument on this claim is that the Fields should be limited to nominal damages because they “failed to prove any damages in connection with” the poisoning. BR 38. To the contrary, the Fields sought \$5,000 “to clean up the mess and replace the plants.” RP 1313.

remove his actions from the purview of RCW 64.12.030 because he knew that ownership of the property he poisoned was disputed. *Supra*, Argument § D (discussing **Mullally**, 29 Wn.2d at 911).

In short, Ronald poisoned about 1,200 square feet of the Fields' front yard, with full knowledge that the area he poisoned was part of the ongoing property dispute. Ronald's actions cannot be excused by his belief – even if reasonable – that the disputed property was his, and the Court should reverse and remand with instructions to award damages under RCW 64.12.030.

#### CONCLUSION

For the reasons stated above, the Fields ask this Court to reverse and remand for the entry of fees and damages.

DATED this 10th day of August, 2007.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing REPLY BRIEF postage prepaid, via U.S. mail on the 10th day of August 2007, to the following counsel of record at the following addresses:

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