

No. 35307-5-II

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

---

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

Respondents,

vs.

DOUGLAS FIELD and MARY ANN FIELD, husband and wife,

Appellants.

---

07 JAN -6 PM 1:31  
STATE OF WASHINGTON  
COURT OF APPEALS  
BY [Signature]

---

**BRIEF OF RESPONDENTS**

---

Tracy E. DiGiovanni, WSBA # 18672  
Matthew S. Kaser, WSBA # 32239  
SHIERS, CHREY, COX,  
DIGIOVANNI, ZAK & KAMBICH, LLP  
600 Kitsap Street, Suite 202  
Port Orchard, WA 98366  
Telephone: (360) 876-4455  
Facsimile: (360) 876-0169  
*Attorneys for Respondents, Ronald W.  
Dawes and W. Ann Dawes*

AM 6-4-07

**ORIGINAL**

**TABLE OF CONTENTS**

**I. RESTATEMENT OF FACTS**..... 1

**II. ARGUMENT**..... 8

    A. The Fields’ Claims For Attorney Fees Fail..... 8

        1. CR 11. .... 8

        2. RCW 4.84.185 ..... 22

        3. RCW 4.28.328. .... 24

    B. The Trial Court Correctly Denied The Fields Recovery On Their  
    Damage Claims..... 29

        1. There Are No Grounds To Hold The Dawes Liable Under RCW  
        64.12.030..... 30

        2. None of the Fields’ Damages Are Cognizable. .... 33

        3. If Liability Were To Attach, Damages Should Be Limited. .... 37

**CONCLUSION** ..... 39

## TABLE OF AUTHORITIES

### **Cases**

<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350, (1992) .....	22
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994) .....	9, 12
<i>Birchler v. Castello Land Co., Inc.</i> , 133 Wn.2d 106, 942 P.2d 968 (1997) .....	34
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992)....	9, 22
<i>Coggle v. Snow</i> , 56 Wn.App. 499, 784 P.2d 554 (1990).....	25
<i>Colwell v. Etzell</i> , 119 Wn.App. 432, 81 P.3d 895 (2003).....	32
<i>Cooter &amp; Gell v. Hartmarx Corp.</i> , 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).....	12
<i>Cranwell v. Mesec</i> , 77 Wn. App. 90, 890 P.2d 491 (1995) .....	24
<i>Dexter v. Spokane County Health Dist.</i> , 76 Wn.App. 372, 884 P.2d 1353 (1994).....	25
<i>Doe v. Spokane &amp; Inland Empire Blood Bank</i> , 55 Wn.App. 106, 780 P.2d 853 (1989).....	15
<i>Eugster v. City of Spokane</i> , 110 Wn.App. 212, 39 P.3d 380 (2002) .....	9
<i>Fluke Capital &amp; Management Services Co. v. Richmond</i> , 106 Wn.2d 614, 724 P.2d 356 (1986).....	22
<i>Free Methodist Church Corp. of Greenlake v. Brown</i> , 66 Wn.2d 164, 401 P.2d 655 (1965).....	31
<i>Guay v. Washington Natural Gas Co.</i> , 62 Wn.2d 473, 383 P.2d 296 (1963) .....	38
<i>King County v. Squire Inv. Co.</i> , 59 Wn. App. 888, 801 P.2d 1022 (1990).....	28
<i>Kobza v. Tripp</i> , 105 Wn.App. 90, 18 P.3d 621 (2001) .....	11, 29
<i>Koch v. Mutual of Enumclaw Ins. Co.</i> , 108 Wn.App. 500, 31 P.3d 698 (2001).....	35
<i>Lidstrand v. Silvercrest Industries</i> , 28 Wn.App. 359, 623 P.2d 710 (1981) .....	38
<i>MacDonald v. Korum Ford</i> , 80 Wn.App. 877, 912 P.2d 1052 (1996).....	15
<i>Marketing Unlimited, Inc. v. Jefferson Chemical Co.</i> , 90 Wn.2d 410, 583 P.2d 630 (1978).....	22
<i>McGuinness v. Hargiss</i> , 56 Wash. 162, 105 P. 233 (1909) .....	11
<i>Mullally v. Parks</i> , 29 Wn.2d 899, 190 P.2d 107 (1948) .....	31
<i>Prefontaine v. McMicken</i> , 16 Wash. 16, 47 Pac. 231 (1896) .....	27
<i>Rorvig v. Douglas</i> , 123 Wn.2d 854, 873 P.2d 492 (1994).....	11
<i>Rupert v. Gunter</i> , 31 Wn.App. 27, 640 P.2d 36 (1982) .....	32
<i>Scott v. Rainbow Ambulance Service, Inc.</i> , 75 Wn.2d 494, 452 P.2d 220 (1969).....	36
<i>Skimming v. Boxer</i> , 119 Wn. App. 748, 82 P.3d 707 (2004).....	9

<i>South Kitsap Family Worship Center v. Weir</i> , 135 Wn.App. 900, 146 P.3d 935 (2006).....	25
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	9
<i>State v. Estabrook</i> , 68 Wn. App. 309, 842 P.2d 1001 (1993).....	10
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	35
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	9
<i>Udall v. T.D. Escrow Servs., Inc.</i> , 132 Wn. App. 290, 130 P.3d 908 (2006), <i>rev'd on other grounds</i> , 154 P.3d 882 (2007).....	25
<i>United Savings and Loan Bank v. Pallis</i> , 107 Wn. App. 398, 27 P.3d 629 (2001).....	24, 29
<i>Washington State Physicians Ins. Exchange &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	9
<i>West v. Keith</i> , 154 Wash. 682, 690, 283 P. 198 (1929).....	14
<i>White River Estates v. Hiltbruner</i> , 134 Wn.2d 761, 953 P.2d 796 (1998).....	35

**Foreign Authorities**

<i>Castro v. Barry</i> , 79 Cal. 443, 21 P. 946 (1889).....	11
<i>Keystone Land Development Co. v. Xerox Corp.</i> , 353 F.3d 1070, 1075 (9th Cir. 2003).....	25

**Statutes**

RCW 4.28.320 .....	24
RCW 4.28.328(3).....	8, 24, 28, 29
RCW 4.84.185 .....	8, 22, 23
RCW 7.48.210 .....	14
RCW 11.04.250 .....	15
RCW 64.12.030 .....	passim
RCW 64.12.040 .....	30, 37

**Rules**

CR 11 .....	passim
RAP 10.3(g).....	35

## **I. RESTATEMENT OF FACTS**

This case involves competing claims of land ownership, use and damages by adjacent neighbours, the Dawes and the Fields.

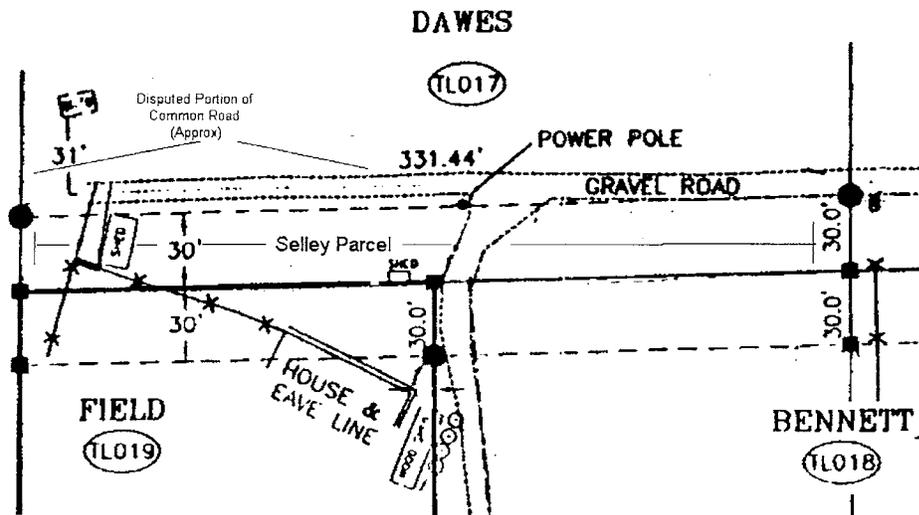
Ronald Dawes, and his wife, W. Ann Dawes live in rural Kitsap County. (RP 100). They gain access to their property by means of a dirt road which runs east-west from a local highway. (RP 54). This road ranges from approximately 10 to 15 feet in width. (RP 54). Across this road from the Dawes live Douglas Field and Mary Ann Field (to the southwest) and David and Susan Bennett (to the southeast).<sup>1</sup> (RP 54; Ex 29).

In September 1970, a number of local property owners entered into an Easement Agreement (Ex 17). The Easement Agreement formalized the property owners' rights of access to this road and a local well. (Id.) The Easement Agreement also purported to create an easement for ingress and egress along the parties' north-south boundary lines, thirty feet in width to the north and thirty feet to the south (for a total of a sixty foot easement). (Id.). The parties agreed that, (1) the legal description in the Easement Agreement was wrong (it referenced the wrong Section); and (2) as the road approached the parties' properties, it angled northward. (CP 1122, FF 20). At the point where the road reaches the Dawes and Field

---

<sup>1</sup> David and Susan Bennett, together with the beneficiaries of deeds of trust on their property were also parties to this litigation. They reached a settlement prior to trial.

properties, it is located more than 30 feet to the north of what was believed to be the parties' north-south boundary line and is located entirely within the southern portion of the Daweses' property.



(Trial Exhibit 29 (Modified for illustrative use))

The Dawes acquired nearly 2.5 acres of vacant land in 1978 via statutory warranty deed from James B. Selley. (Ex 22). Mr. Selley, in turn, had acquired the property from Wesley Erickson via statutory warranty deed. (Ex. 21). The legal descriptions of the property conveyed in the Selley-to-Dawes and Erickson-to-Selley deeds are not the same. (Compare Exs. 21 & 22). Instead, the Selley-to-Dawes deed omits a

thirty-foot wide swath of land adjoining the southern boundary of the Daweses' property (i.e., the Selley Parcel). (*Compare* Exs. 21 & 22).<sup>2</sup>

Also in 1978, Douglass Field together with his then-girlfriend entered into a real estate contract to acquire a 1.25 acre parcel of vacant land to the southwest of the Daweses' property. (Ex. 136, 137; RP 1012). The Fields' use of their property was marked by a series of lengthy absences in the 1990s when they lived in Alaska, Texas and Diablo, Washington. (RP 69-70, 204, 1015-1016, 1018).

Historically, the parties used the Common Road for ingress and egress to their homes. (RP 54). However, when the Fields returned to their property full-time in approximately 1997, the Fields' use of the Common Road began to change. (RP 77-81, 672-673). Mr. Field, who was a self-employed forester, began using heavy logging equipment on the Common Road, expanding the Common Road, building a large garage to shelter his commercial trucks and a white storage shed/tent for his lumber. (RP 210-211, 233, 1098-1100). Even after litigation had started, the Fields destroyed their neighbors' fence adjoining the Common Road, uprooted trees, and started to alter the composition of the Common Road

---

<sup>2</sup> Throughout this litigation, the parties have used different terms to describe the various pieces of land in dispute. The Dawes utilize those terms which the trial court used in the Findings of Fact and Conclusions of Law, describing the disputed gravel road as the "Common Road," and the 30' strip of property, which is also referred by the parties alternatively as the "30' strip," or the "gap parcel," as the "Selley Parcel."

to accommodate their logging equipment (CP 589-90; RP 215). One of the individuals hired by the Fields to place gravel on the Common Road even assaulted Mr. Dawes when Mr. Dawes inquired as to why gravel was being placed on the disputed portion of the Common Road. (RP 128-130). Indeed, Fields' conduct was so sufficiently disturbing that a neighbor applied for a district court restraining order against the Fields. (RP 284). And, a year after the entry of an agreed mutual restraining order, the trial court held the Fields in contempt for intruding on the Daweses' property. (CP 56). Since 2001, the Fields also maintained the disputed areas under surveillance with surveillance cameras. (RP 1348-1354). The Fields admitted that the surveillance cameras didn't show any wrongdoing by the Dawes. (Id). The first time the existence of these cameras was disclosed, notwithstanding the Daweses' prior discovery requests, was at the time of trial. (RP 1348-1352).

Prompted by the Fields' increased use of the Common Road, Ron Dawes and David Bennett commissioned a survey which confirmed Mr. Daweses' understanding that the Common Road laid entirely on the Daweses' property. (Ex. 158). This survey also reflected that the Dawes

held interests to an approximately 30' strip (i.e., the Selley Parcel) south of the Common Road.<sup>3</sup> (Ex. 158).

Matters came to a head in May 2001 when Mr. Field dumped a load of bedrock gravel on the disputed portion of Common Road, to improve the roadway beyond what had been its historical use. (RP 106-108). In July 2001, the Dawes sued the Fields claiming that the Fields were encroaching on the Daweses' property and sought to quiet title. (CP 3). However, at no time did the Dawes dispute or object to the Fields' use of the Common Road beyond that which had been historically used by the Fields. (CP 26, ¶ 6). The Fields counterclaimed, requesting (i) reformation of property and easement boundaries to conform with the 1970 Easement Agreement; (ii) realignment of the common north-south boundary line to be the centerline of the Common Road; and (iii) providing easement rights thirty feet (30') to both the north (into the Daweses' property) and to the south of the Common Road (into the Field/Selley property). (CP 9). In the Fields' initial August 2001 Counterclaims, the Fields acknowledged that the Dawes had extensive rights to property extending south of the Common Road (what would ultimately be identified as the Selley Parcel):

---

<sup>3</sup> A survey obtained by the Fields suggests the same as well. Ex. 29.

Notwithstanding the [Fields'] physical occupation, use and claim of title to all land lying south of the centerline of the Existing Driveway, [Fields] have recognized the following:

\* \* \*

The right of Dawes to expand the Existing Driveway within an area not to exceed 30 feet on either side of the centerline of the Existing driveway as may be necessary to afford reasonable ingress and egress to the Dawes' Parcel.

(CP 11 at ¶ 2.8(b)(Emphasis Added)).

In Fall 2001, the Fields first discovered that the Selley-to-Dawes deed omitted the Selley Parcel (contrary the appearance set forth in the parties' surveys) and learned that record title was apparently held by the heirs and devisees of James B. Selley (who had since died). (CP 49). It was not until after the Daweses' depositions in November 2001 that Dawes independently learned that they lacked legal title to the Selley Parcel. (CP 640). The Fields brought a third-party complaint against James B. Selley's heirs to quiet title to the Selley Parcel.<sup>4</sup> (CP 53, 1448). The Dawes obtained a quit claim deed from one of James B. Selley's heirs to the Selley Parcel. (Ex. 160). The Fields funded the reopening of James B. Selley's probate and paid \$ 8,000-\$10,000 to obtain a Personal Representative's deed to the Selley Parcel. (Ex. 23, 25-28, 175; RP 1296).

---

<sup>4</sup> No order of dismissal was entered regarding these third-party claims, nor is there any evidence that service of process was accomplished. It appears that following the acquisition of a Personal Representative's Deed, the Fields abandoned these claims.

Five years after the initial filing, this case proceeded to a ten-day bench trial in February-March 2006, with five central issues submitted for determination by the trial court namely, (1) the parties' claims to the Selley Parcel; (2) the parties' rights in the Common Road; (3) claims by the Dawes that the Fields had damaged their property (i.e. that section of the Common Road on the Dawes property); (4) Counterclaims by the Fields against the Dawes for damage to land and intentional infliction of emotional distress; and (5) Counterclaims by the Fields that the Dawes brought a frivolous lawsuit.

Following trial, the trial court entered extensive findings of fact and conclusions of law. The trial court readjusted the Dawes-Field boundary line to the northern edge of the Common Road, granted the Dawes an easement for ingress and egress extending fifteen feet south from this new boundary line, quieted title of the Selley Parcel to the Fields,<sup>5</sup> and denied both parties' requests for damages and attorney fees. The Fields brought a motion for reconsideration on the sanctions and damages issues, which the trial court denied. (CP 1129-1148, 1163). The Fields appeal. (CP 1168).

---

<sup>5</sup> Notably, the trial court's oral opinion traces the chain of title and indicated that legal title to the Selley Parcel was held by a non-party. (RP 1616-1619). A fair inference from the opinion is that the trial court did not hold that the Fields held title to the Selley Parcel, but only that the Fields held superior claims vis-à-vis the Dawes. (CP 1125-26; CL 8).

## **II. ARGUMENT**

None of the issues raised by the Fields give rise to reversible error.

First, the trial court did not abuse its discretion in denying the Fields' multiple requests for reasonable attorney fees under RCW 4.28.328(3), Civil Rule 11 or RCW 4.84.185. Given the issues at stake and the respective facts adduced at trial, the trial court correctly exercised its discretion in denying the Fields any recovery.

Second, the Fields' claims for damages fail. Substantial evidence supports the trial court's findings, and in turn, its conclusions, to deny the Fields' damages under RCW 64.12.030.

Because the trial court did not err as claimed by the Fields, this Court should affirm the trial court in full.

### A. The Fields' Claims For Attorney Fees Fail.

The trial court correctly denied the Fields recovery for attorney fees as either sanctions under CR 11, RCW 4.84.185 or RCW 4.28.328(3). The Fields fail to demonstrate that the trial court abused its discretion in denying them their fees.

#### 1. CR 11.

Civil Rule 11(a) authorizes sanctions only in those circumstances where a complaint or other pleading is (1) lacking a factual or legal basis, and (2) the trial court finds that the attorney who signed and filed the

complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). An appellate court reviews a trial court’s denial of fees under CR 11 for an abuse of discretion. *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). “An abuse of discretion will be found ‘only when no reasonable judge would have reached the same conclusion.’” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)(quoting *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)). An appellate court’s deference to a trial court’s sanctions decision, “accounts for the trial judge’s personal and sometimes exhaustive contact with the case.” *See, Skimming v. Boxer*, 119 Wn.App. 748, 754, 82 P.3d 707 (2004) (footnoted citations omitted).

The threshold for the imposition of sanctions by a trial court is high. *Id.*, 119 Wn. App. at 755, *citations omitted*. As the Washington Supreme Court noted, “we share the federal court’s concern that sanctions be reserved for egregious conduct and not be viewed as simply another weapon in a litigator’s arsenal.” *Biggs v. Vail*, 124 Wn.2d 193, 198, fn. 2, 876 P.2d 448 (1994).

As the moving party, the Fields had the burden to justify the request for sanctions. *Eugster v. City of Spokane*, 110 Wn.App. 212, 232, 39 P.3d 380 (2002), *citing*, *Biggs*, 124 Wn.2d at 202. At three separate

points throughout the course of the proceedings, the trial court denied the Fields' requests to impose sanctions. The Fields sought sanctions concurrently with seeking summary judgment (CP 684); again at trial (CP 977-979; RP 50, 1601-1602); and on reconsideration. (CP 1129).<sup>6</sup> During trial, the trial court paid particular attention by questioning Mrs. Field and asked her what she considered to be detrimental litigation-related conduct of the Dawes. (RP 1306-1309). After considering both Mrs. Fields' testimony and the multiple arguments of counsel, the trial court still made the correct decision by declining to impose sanctions.

During the course of this real property dispute, since 2000, the Fields had several attorneys. (RP 1371). But, it was not until April 2003, that by way of counterclaim against the Dawes, the Fields first claimed for an award of sanctions against the Dawes. The Fields initially claimed that sanctions should be imposed because the Dawes "refus[ed] to recognize the Fields' superior title to the property in dispute ..." and because the Fields' amassed "abundant evidence," and to which the Dawes refused to yield. (CP 77 at ¶¶ 52, 53).

---

<sup>6</sup> The trial court's order on reconsideration (i.e. denying the sanctions request) reflects that oral argument was heard. (CP 1163). The transcript of this hearing was not designated as part of the record on review. "[T]he party seeking review, bears the burden of perfecting the record so that [the appellate court has] those portions of the report of proceedings necessary to review the issues presented." *State v. Estabrook*, 68 Wn. App. 309, 315, 842 P.2d 1001 (1993).

Washington case law has supported the position that parties have a liberal right to litigate the right to and possession of real property:

An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination. Even if the claim asserted (here the absence of an easement) is absolutely invalid, the parties are still entitled to a decree saying so. *McGuinness v. Hargiss*, 56 Wash. 162, 164, 105 P. 233 (1909), *overruled on other grounds by Rorvig [v. Douglas]*, 123 Wn.2d 854, 873 P.2d 492 (1994). Another and more colorful way of stating the same proposition is that “the object of the statute is to authorize proceedings ‘for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff’s property. It is not aimed at a particular piece of evidence, but at the pretensions of the individual[.]’” *McGuinness*, 56 Wash. at 164, 105 P. 233 (quoting *Castro v. Barry*, 79 Cal. 443, 21 P. 946 (1889)).

*Kobza v. Tripp*, 105 Wn.App. 90, 95, 18 P.3d 621 (2001)(Emphasis Added).

To be justifiably entitled to bring a quiet title action, “[i]t is sufficient that the party in possession is incommoded or damnified by the assertion of some claim or interest in the property adverse to him.”

*McGuinness*, 56 Wash. at 164, *citation omitted*.

Thus, to the extent that the Fields maintain that sanctions should be imposed for insufficiency of evidence or that the trial court found that certain testimony by Mr. Dawes was not credible, this is not the standard by which sanctions are to be assessed. “[T]he imposition of a CR 11

sanction is not a judgment on the merits of an action.” *Biggs*, 124 Wn.2d at 198. Instead, sanctions are reserved when the judicial process has been abused. *Id.*, quoting, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Neither before the trial court, nor on appeal, have the Fields shown any abuse of the judicial process to suggest that the trial court abused its considerable discretion in declining to impose CR 11 sanctions.

Since 2001, the Fields acknowledged that the Dawes had interests to the Selley Parcel. The parties did, however, dispute the nature and extent of their respective interests, placing into dispute the means by which each party acquired their interests and the manner in which those interests are best classified. (CP 11 at ¶ 2.8(b)).

To that end, the Dawes articulated four principal arguments in conjunction with their claims to the Selley Parcel: (1) that the Selley-to-Dawes deed inadvertently omitted the south 30’ (the Selley Parcel); (2) that the Selley-to-Dawes deed violated the applicable Kitsap County Ordinances applicable to short plats by conveying a portion of the original Selley property (i.e. that property conveyed to Selley in the Erickson-to-Selley statutory warranty deed) to the Dawes and retaining the south 30’ feet of the property; (3) that the Dawes held legal interests as a tenant-in-common with the other Selley heirs; and (4) that the Fields could not

establish adverse possession. With respect to the Common Road, the Dawes did not request that the trial court alter, vacate or relocate the Fields' historical means of ingress and egress. (CP 621, ¶ 5). But, because the Common Road was placed wholly on the Daweses' property, the Dawes argued that the onus was on the Fields to establish rights to the Common Road beyond their historical driveways under a prescriptive easement analysis. (CP 550-554). Under a prescriptive easement analysis, the Dawes claimed that the Fields lacked several key elements, namely that the Fields, owing principally to their absence from the property in the 1990s, could not satisfy the requirements of establishing the continuous use for a ten year period. (*See id.*)

The Fields, asserted claims to the Selley Parcel by claiming, (1) that they held legal title; (2) that they had claims by adverse possession; and (3) that the doctrine of mutual recognition defined the common boundary line. (CP 963-969). The trial court expressly noted in its oral opinion that both parties' claims "were admittedly pled in the alternative." (CP 1081).

At trial, the Dawes argued that Kitsap County Ordinance 53-1975 (Ex. 31, 32) voided any attempt by James B. Selley to convey to the Dawes a less-than-full interest in his property, leaving the Dawes with full

legal title to this strip.<sup>7</sup> At no time, was there any explanation as to why James B. Selley (who died prior to this litigation) omitted the south thirty feet of the property which was conveyed to him by Mr. Erickson's deed when he entered into the transaction with the Dawes. Nevertheless, at the time of the Selley-to-Dawes transaction, Kitsap County Ordinance 53-1975 provided that in the event a parcel of land is divided into four or less lots without an approved short plat, such action was unlawful and a nuisance. (Ex. 31).<sup>8</sup> In appropriate circumstances, a party has the right to bring a private cause of action to abate a public nuisance where it is injurious to them. RCW 7.48.210; *West v. Keith*, 154 Wash. 682, 690, 283 P. 198 (1929). Under a plain reading of the then-applicable ordinance, there would have been no basis for Mr. Selley to have omitted the Selley Parcel when he conveyed the property to the Dawes, and indeed, such omission should not have been recognized and constituted an actionable nuisance, thereby giving the Dawes a superior claim of legal title to the Selley Parcel vis-à-vis the Fields.

---

<sup>7</sup> When the Fields' sought summary judgment, the Bennetts also filed opposition materials in which they made a similar argument as made by the Dawes. (CP 668-672).

<sup>8</sup> The relevant portion of the ordinance provides,

Section 23. Violation – Injunctive Relief. Whenever any parcel of land is divided into four or less lots, tracts, or parcels of land and any person, firm or corporation or any agent of any of them sells or transfers or offers or advertise for sale or transfer, any such lot, tract, or parcel without having a short plat of such subdivision approved pursuant to this ordinance, then such action is hereby declared to be unlawful and a public nuisance ...

The trial court did not address this argument, because the trial court concluded that Mr. Erickson never had title to the Selley Parcel when he conveyed it to Mr. Selley. Thus, Ordinance 53-1975 was inapposite. (RP 1617-1618). “CR 11 does not provide for sanctions, however, merely because an action's factual basis proves deficient or a party’s view of the law proves incorrect; CR 11 is not a mechanism for providing attorney's fees, otherwise unavailable, to a prevailing party.” *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn.App. 106, 111, 780 P.2d 853 (1989). “To avoid being swayed by the benefit of hindsight, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success.” *MacDonald v. Korum Ford*, 80 Wn.App. 877, 884, 912 P.2d 1052 (1996), *internal citation omitted*.

The Fields overstated the nature of the Daweses’ claim to title based on the quit claim deed which they obtained from an heir of James B. Selley, William F. Selley. (Ex. 160). The Fields categorized the Daweses’ trial position as this deed gave them full legal title to the Selley Parcel. (CP 964). Rather, it was the Daweses’ position that under RCW 11.04.250, a tenancy-in-common was created with the other heirs and devisees of James B. Selley giving the Dawes the stronger claim to legal title to the Selley Parcel. (CP 874, 1047-1052). Thus, as the Dawes argued, the trial court could only adjudicate the rights of the Dawes and

the Fields, and not the rights of the other Selley heirs, leaving the parties' with incomplete relief. The trial court concluded that both the quit claim deed obtained by the Dawes and the Personal Representative's deed obtained by the Fields to the Selley Parcel were of no effect -- not because it rejected the legal analysis offered by the Dawes -- but because it rejected both parties' shared view that James B. Selley had title to the Selley Parcel. This rendered an examination of the interests conveyed by these deeds moot. (CP 1121, FF 13).

Finally, the Fields make much ado about what they perceive to be false testimony on the part of the Dawes, particularly in conjunction with the Daweses' claims of adverse possession and in conjunction with the condition of the Common Road past the Fields' historical driveway. The Fields' focus is misplaced. There was a factual dispute as to each parties' perspective as to what constituted the existence of a road, such as condition, nature of use and frequency of use. As the Dawes argued, the Fields could obtain rights to the Common Road past their historical driveway only under a prescriptive easement analysis. (CP 1040-1046; RP 1533-1540). In such an analysis, the *condition* of the roadway together as to how and when the Fields *used* the Common Road are factors governing an prescriptive easement analysis. As such, an evaluation of

these factors delineated what rights the parties derived by and through the Common Road.

More to the point, in general, the Daweses' position was that there was no clearly defined road. Rather, this area consisted of natural grasses, vegetation and brush and contained a footpath that Mrs. Daweses and other neighbors could occasionally use. Pretrial, the Dawes obtained a number of declarations from third-parties attesting to the nature, condition and character of the Common Road past the Fields' historical driveway. This declaration testimony comports with the Daweses' understanding of the character of the Common Road. Additionally, testimony was proffered supporting the Daweses' use of the Selley Parcel. An examination of this testimony supports the view that the Daweses' trial position was well-founded in-fact under CR 11:

- Edward Dawes testified that from 1987-1999/2000 he never saw anyone using the disputed areas of the Common Road, which at that time was generally woodlands and brush. (CP 642).
- Anthony Dawes testified that he never saw the disputed portions of the Common Road utilized by the Fields' tenants. Nor, did he believe that the Common Road was passable by vehicle. (CP 647).

- John W. Russell, who participated in the construction of the Daweses' residence, related that it would be difficult to drive a vehicle into the disputed portions of the roadway past the Fields' driveway. (CP 34-35; CP 650).
- David Bennett, a neighbor of both parties, testified both via declaration and at trial that past the Fields' driveway, the area was in a grassy, natural state. (CP 655).
- Ronald L. Nelson, who was a former neighbor, testified that past the Fields' driveway, the area did not appear passable by vehicles and consisted of natural vegetation. (CP 660).
- Miles Paul, PhD is a retired professor from the University of Victoria. He provided a declaration attesting that he and Mr. Dawes would place their telescopes south of the shed and in the disputed area, in the Selley Parcel. (CP 664).
- William Flaherty supplied a declaration in support of the Daweses' motion for a restraining order. (CP 36). In it, Mr. Flaherty related that (1) he maintained the Common Road; and (2) there has never been a need to gravel the Common Road past the Fields' historical driveway because historically, that area had been covered by grass and brush.

The testimony set forth in the above declarations is largely consistent with the testimony which the Daweses' elicited at the time of trial.

David Bennett, as with his prior deposition, explained to the trial court that the disputed area of the Common Roadway looked like a footpath. (RP 201-202).

Susan Bennett, David Bennett's wife, described the Common Roadway in dispute as follows:

Q. Can you please explain to the Court the condition -- back in '88, '89, where did this gravel road end?

A. Where did it end? It ended west of Dawes' western-most driveway, near the house, on the north side. And on the south side, the Fields had a -- I guess you'd call it their primary driveway. And then a short distance down beyond that, there was kind of a grassy, brushy area that went right into the woods. The road just sort of stopped right there.

Q. And was it graveled past that point?

A. No.

Q. Was there a roadbed that you recall?

A. A roadbed?

Q. A roadbed, tire tracks where there was grass in the middle?

A. No. It was just kind of overgrown, brushy. There was a path that came out of it, kind of a footpath that came up into that area onto the end of the road, but there was no gravel. It was just dirt, unfinished road.

Q. Is this the path that you would walk on?

A. Uh-huh, yes.

(RP 298).

Indeed, based on her historical experience with the Common Road, Mrs. Bennett seemed surprised that it was drivable past the Fields' historical driveway. (RP 301).

Additionally, the Dawes elicited the following additional testimony at trial:

- Ed Dawes testified that he never saw any activity on the part of the Fields near the disputed portions of the Common Road. (RP 338).
- The Fields' own witness, the local UPS driver, differentiated (maintenance, gravel, width) the Common Road with the disputed portions past the Fields' driveway. (RP 616-617).
- Notably, Douglas Field testified that he observed Mr. Dawes log south of the roadway in the early 1990s. (RP 1090).

In addition to relating their observations on the condition of the Common Road, the Dawes had a further good faith belief that they had claims to the Selley Parcel. As Mr. Dawes testified at trial, he continued to receive tax statements from the Kitsap County Treasurer which described his legal description of the property, including his southern

boundary as “EX S 30 FT easement of record.” (RP 583-584). Mr. Dawes understood that he owned (and thus, was taxed) on this property subject to a thirty foot easement. (RP 582-585).

The Fields also claim that Mr. Dawes intended to misrepresent the location of the Common Road on a survey which he obtained. This is also belied by Mr. Dawes’ testimony and the written trial exhibits. At trial, Mr. Dawes testified that he hired ADA Surveying for the purpose of placing two stakes “at easement,” (i.e., the northwest corner of the easement/southwest corner of his property and the northeast corner of the easement/southeast corner of the property). (RP 573-582). Tying in the Common Road simply was not within the scope of Mr. Dawes’ survey request. (Id.).

As noted above, sanctions are appropriate when a party has utilized the judicial process for an “improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” CR 11(a). The Dawes did no such thing. The Dawes, like the Fields, sought a judicial determination as to their rights to the Selley Parcel and the disputed portions of the Common Road. The Dawes presented facts in support of their claims and defenses. While the trial court reached a result under a different analysis, and did not grant either party the precise form of relief which they respectively sought, the trial court’s decision on the

merits “is by no means dispositive of the question of CR 11 sanctions.”  
*See e.g., Bryant v. Joseph Tree.*, 119 Wn.2d at 220. Instead, both parties put before the court the issue of who had both superior legal title and equitable claims to the properties in dispute. The trial court did not abuse its discretion by declining to sanction the Dawes under CR 11(a).

2. RCW 4.84.185

A trial court’s decision not to award attorney fees under RCW 4.84.185 “is left to the trial court's discretion and will not be disturbed in the absence of a clear showing of abuse of discretion.” *Fluke Capital & Management Services Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986), *quoting*, *Marketing Unlimited, Inc. v. Jefferson Chemical Co.*, 90 Wn.2d 410, 412, 583 P.2d 630 (1978)(Emphasis by the Court; additional citation omitted). “The lawsuit or defense, in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorneys’ fees may be made pursuant to the frivolous lawsuit statute, RCW 4.84.185.” *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350, (1992)(Emphasis by the Court).

At its crux, this lawsuit was a quiet title action pertaining to two areas of property over which both parties sought a respective declaration of rights as to which party held the superior claim of title together with their respective rights and liabilities: the Selley Parcel and disputed areas

of the Common Road. Notably, while the Fields take issue with the Daweses' claims to the Selley Parcel, they nevertheless agreed that the Dawes had some rights to the Selley Parcel. (CP 11 at ¶ 2.8(b)). Likewise, they utterly fail to brief, much less argue, that the Daweses' claims to the disputed areas of the Common Road (which were located within the entirety of the Dawes' legal boundaries) were somehow frivolous or advanced without reasonable cause.<sup>9</sup>

With the erroneous Easement Agreement, together with disputed testimony on the nature of the Fields' use of the Common Roadway, coupled with the lack of a meaningful explanation as to why the Selley-to-Dawes deed omitted the Selley Parcel, the Dawes were absolutely entitled to obtain a judicial declaration to determine the parties' respective legal and equitable rights to these properties. The trial court established these respective rights and obligations of the parties when it defined the common boundary line and proscribed the parties' easement rights. Thus, the trial court correctly denied the Fields' attorney fees pursuant to RCW 4.84.185.

---

<sup>9</sup> The Dawes note that it seems somewhat hypocritical for the Fields to assert that the Daweses' requests to adjudicate their rights to properties south of the Common Road are somehow sanctionable, yet the Fields claimed easement rights to the Daweses' property north of the Common Road are not sanctionable. (CP 12, ¶ 2.9; CP 41, ¶ 4; CP 74, ¶¶ 36, 37; RP 1331).

3. RCW 4.28.328.

There is likewise no basis to reverse the trial court's denial of reasonable attorney fees under RCW 4.28.328(3). Under the statute:

Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

(Emphasis Added).

“The purpose of a lis pendens is to give notice of pending litigation affecting the title to real property, and to give notice that anyone who subsequently deals with the affected property will be bound by the outcome of the action to the same extent as if he or she were a party to the action.” *United Savings and Loan Bank v. Pallis*, 107 Wn. App. 398, 405, 27 P.3d 629 (2001), *citations omitted*; RCW 4.28.320. A lis pendens is a procedural device to give third-parties notice of the action; it does not operate as a lien or seizure of a property interest. *Cranwell v. Mesec*, 77 Wn. App. 90, 109-111, 890 P.2d 491 (1995).

Under the plain language of RCW 4.28.328(3), because fees and costs are within the discretion of the trial court, the trial court's decision whether to award reasonable attorney fees and costs is reviewed for an abuse of discretion. *Dexter v. Spokane County Health Dist.*, 76 Wn.App.

372, 377, 884 P.2d 1353 (1994), *citing*, *Coggle v. Snow*, 56 Wn.App. 499, 504, 784 P.2d 554 (1990)(“Reasons justifying discretionary decisions are tested under the abuse of discretion standard.”).

“[W]here [a] claimant[] ha[s] a reasonable, good faith basis in fact or law for believing they have an interest in the property, a lis pendens is substantially justified.” *South Kitsap Family Worship Center v. Weir*, 135 Wn.App. 900, 913, 146 P.3d 935 (2006)(*citing*, *Keystone Land Development Co. v. Xerox Corp.*, 353 F.3d 1070, 1075 (9th Cir. 2003); *Udall v. T.D. Escrow Servs., Inc.*, 132 Wn. App. 290, 303, 130 P.3d 908 (2006), *rev’d on other grounds*, 154 P.3d 882 (2007)). The Ninth Circuit Court of Appeals, in interpreting RCW 4.28.328(3), has noted that it is not whether a party’s legal claims upon which the lis pendens stems are ultimately proved to be correct, but rather whether there was a triable basis in fact or law in the first instance for filing the lis pendens. *See, Keystone Land & Development Co.*, 353 F.3d at 1075. Here, there was a triable basis.

In the case at bar, the Dawes justifiably filed a lis pendens affecting the Selley Parcel. All parties shared the same initial assumption that the Dawes had some interest to the Selley Parcel but disagreed as to nature, extent and scope of each of their interests. To that end, all parties sought a determination of their respective interests in the Selley Parcel.

(CP 63-64, ¶¶ 12, 13, 18 (Fields' claims to Selley Parcel against Bennett); CP 70-71 (Fields' claims to Selley Parcel against Dawes); CP 97-98, ¶¶ 3.18-3.19 (Bennett claims to Selley Parcel against Fields); CP 105-107 (Daweses' claims to Selley Parcel against Field); CP 1448 (Fields' claims to Selley Parcel against Selley Estate & Heirs)). As can be seen from the multitude of claims, a judicial resolution to the parties' claims to the Selley Parcel was required. More importantly, not only did the parties recognize that title to the Selley Parcel was disputed when they entered into the September 2001 agreed temporary restraining order (CP 41, ¶ 4); but also the Fields conceded that the Dawes had rights to the Selley Parcel, which the subject of the lis pendens. (CP 11, ¶ 2.8(b)). Further, even in her trial testimony, Mrs. Field implicitly stated that the Dawes had interests in the Selley Parcel arising under the Easement Agreement which provides for a sixty-foot easement, centered on the Common Road (Ex. 17):

I believe the easement agreement indicated that the easement was centered on the roadbed. And that was the understanding. And I'm asking for the historic understanding and belief that we all recognized and cooperated with.

(RP 1331; Emphasis Added)<sup>10</sup>

---

<sup>10</sup> Mrs. Field testified during direct examination that, "the easement, as we understood it and as the easement agreement said, was 60 feet wide." (RP 1209).

Moreover, as the Fields then-counsel certified in a declaration filed with the trial court:

The Bennetts, Dawes and Fields have an interest in the Gravel Road and a 60 foot Common Easement that abuts the Field, Bennett and Dawes Parcels. The precise location of the easement and/or road and/or the scope and/or extent of the parties' rights and interests in the Road and Easement are in dispute. It is essential that the interest and claims of the Dawes, Bennetts and Fields as to the Road, Easement and 30 foot strip be determined in one action to avoid inconsistent results.

(CP 49-50, ¶ 7).

As acknowledged by the Fields' and their counsel, the Daweses had rights in the Selley Parcel and had substantial justification for recording the lis pendens.

Additionally, after the discovery that both parties lacked legal title to the Selley Parcel, the Dawes were able to reinforce their claims by obtaining the quit claim deed from one of Mr. Selley's heirs giving them a share of the legal title to the property whereas the Fields attempted to reopen Mr. Selley's estate and alter the property distribution. *But see, Prefontaine v. McMicken*, 16 Wash. 16, 21, 47 Pac. 231 (1896)(attempts to alter property distributions after conclusion of probate are void). And, before the trial court, arguably the only basis which the Fields asserted a claim of fees under RCW 4.28.328(3) was that the Fields had a superior claim of legal title by virtue of the Personal Representative's deed – an

argument which they do not advance on appeal. (Ex. 23; CP 975-976, 1137-1139; RP 50). The trial court found that the Personal Representative's deed conferred no rights on the Fields. (CP 1121, FF 13).

The trial court correctly recognized that it was not just the Dawes who sought a determination of their rights when it observed in its oral opinion:

A claim has been made that the lis pendens was illegally filed and terms should be imposed. Concerning the lis pendens, were it not for the fact that both parties thought that Erickson dropped the ball in not conveying the south 30 feet to Selley, and were it not for the fact that both parties pursued legal title to the disputed strip, I would have found -- I would have imposed terms for the filing of the lis pendens. But since both parties felt that the 30-foot strip had the same legal import, no terms will be imposed.

(RP 1632; Emphasis Added).

Moreover, to construe RCW 4.28.328(3) as proposed by the Fields would also have a profound impact on quiet title litigation: it would offer a fee-shifting mechanism in disputed boundary-line cases and similar quiet title cases where none was previously available to litigants. "In a typical quiet title action, there is no statutory basis for awarding attorney fees to prevailing parties." *King County v. Squire Inv. Co.*, 59 Wn. App. 888, 896, 801 P.2d 1022 (1990). This is so because the relief in a quiet title case is principally equitable; "[a]n action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to

compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination.” *Kobza*, 105 Wn.App. at 95. As discussed *supra*, the purpose of a lis pendens is to place third-parties on notice of litigation affecting real property. *United Savings and Loan Bank*, 107 Wn. App. at 405. Although RCW 4.28.328(3) provides a mechanism for imposing damages and reasonable attorney fees against a party for which the filing of a lis pendens was not substantially justified, this statute should not be used as a mechanism to obtain reasonable attorney fees where fees would have otherwise been denied under the long-standing rule that parties to quiet title actions should bear their own attorney fees.

Under these circumstances, the Fields cannot fairly argue that there was no reasonable basis in fact or law for the filing of the lis pendens or that the trial court abused its discretion in declining to award fees under RCW 4.28.328(3). *South Kitsap Family Worship Ctr.*, *supra*.

B. The Trial Court Correctly Denied The Fields Recovery On Their Damage Claims.

The trial court correctly denied the Fields recovery under RCW 64.12.030 for Mr. Daweses’ one-time application of weed killer to native

grasses and brush for several reasons.<sup>11</sup> *First*, there was no basis for the trial court to have established liability against the Dawes under the statute insofar as the sole area which it found that Mr. Dawes applied weedkiller was located wholly on the Daweses' property. *Second*, even assuming that the Dawes lacked title to the areas where Mr. Dawes applied weedkiller, they held equitable interests to this property. *Third*, even assuming that the trial court erred in finding the Dawes not liable for a violation of RCW 64.12.030, none of the damages which the Fields sought were recoverable on these facts. *Fourth*, even assuming that the Fields are entitled to damages, based on the trial court's unchallenged findings of fact, the trial court implicitly found mitigating circumstances under RCW 64.12.040, limiting the Fields to single damages in the event of any remand. *Finally*, even if the Fields are somehow entitled to damages, they are limited to nominal damages of \$1.00.

1. There Are No Grounds To Hold The Dawes Liable Under RCW 64.12.030.

In the case at bar, none of the places where Mr. Dawes applied Roundup were owned by the Fields and as such, the Fields lacked standing to maintain any claims under RCW 64.12.030. Alternatively, even if the Fields did hold title to these areas, under the parties' view of the Easement

---

<sup>11</sup> The Fields also sought damages on theories of intentional infliction of emotional distress and common-law trespass and were denied recoveries on these theories. (CP 1126; CL 10). No error is assigned to the dismissal of these claims.

Agreement, because the Dawes held rights under the Easement Agreement, the Dawes were entitled to spray weedkiller along the edge of the Common Road.

In this case, the trial court entered an unchallenged finding of fact, consistent with Mr. Daweses' testimony that Mr. Dawes applied Roundup (weedkiller) to the south side of the Common Road. (CP 1122; FF 21). Mr. Dawes applied Roundup on one occasion in 2001. (RP 148). At the time that Mr. Dawes applied Roundup at this location, the Common Road laid entirely upon the Daweses' property – and not within the Selley Parcel. (*Compare* CP 1122 with Ex. 29). Where a party lacks title to the land, they cannot maintain claims for damage to the land. *See, Free Methodist Church Corp. of Greenlake v. Brown*, 66 Wn.2d 164, 166, 401 P.2d 655 (1965). The Fields simply lack standing to claim damages in conjunction with damages to the Selley Parcel at the timeframe in question.

Nor does the Fields' reliance on *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948) compel reversal. Rather, the *Mullally* court observed that a claim for damages may lie under RCW 64.12.030 where a party who, having knowledge of a bona fide boundary dispute, intentionally interferes with the property interests of another. *Id.*, 29 Wn.2d at 911. Thus, while the parties may have been aware of a bona fide boundary

dispute, *Mullally* nevertheless requires that the actor intentionally sought to inflict harm or interfere with the property right (whether disputed or not) of another. Here, the trial court specifically found that Mr. Dawes did not seek to interfere or harm with any rights the Fields may have had. (CP 1122, FF 21).

Moreover, assuming that the Fields held interests to the Selley Parcel on which they could premise a damages claim, because the Fields also asserted that the Daweses' held interests under the Easement Agreement, the Daweses' conduct was permissible.

As of the time Mr. Dawes applied the weedkiller, the Fields maintained the position that the Easement Agreement provided that the parties' common boundary laid on the centerline of the Common Road and the parties had easement rights thirty feet to either side of the Common Road, including southward toward the Selley Parcel. (Ex 17). The holder of a servient estate may not unreasonably interfere with the use of the easement by the dominant estate. *See e.g., Rupert v. Gunter*, 31 Wn.App. 27, 31, 640 P.2d 36 (1982); *see also, Colwell v. Etzell*, 119 Wn.App. 432, 81 P.3d 895 (2003)(no statutory basis for damages where servient estate interfered with easement rights of dominant estate). Here, Mr. Dawes testified that his sole purpose in applying the weedkiller was “[t]o kill the weeds around the survey stakes and to make the tree trunks

more visible,” in conjunction with recently-performed surveys to outline the contours of the perceived easement. (RP 150). Mr. Dawes expressly denied applying weedkiller to harass or intimidate the Fields. (RP 150). It is important to note that the weedkiller was applied to native grasses/brush in a manner consistent with maintaining the visibility of the edge of the Common Road and the recently-placed survey stakes. (RP 150). The weedkiller was not placed in landscaping, flowerbeds, or around ornamental trees. (RP 147-150). As the servient estate in this context, because the Dawes did not engage in conduct which exceeded their grant under the Easement Agreement, it cannot be said that the Daweses’ conduct is somehow actionable.

2. None of the Fields’ Damages Are Cognizable.

Assuming that there is a basis under RCW 64.12.030 to establish liability against the Dawes, the Fields’ request for a remand simply for “damages,” alleged to have been caused by the Dawes fails. (Brief of App. at p. 50). This is so because none of the damages sought by the Fields were either established by evidence or cognizable on these facts. At trial, so far as can be discerned, the Fields’ sought damages for claimed

emotional distress, time spent as a litigant, and for plant damage.<sup>12</sup> Each is taken in turn.

At trial, the Fields sought damages under RCW 64.12.030 for emotional distress, with a particular emphasis of those damages claimed by Mary Ann Field. (RP 1313). The denial of these damages was correct. 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.” *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 113, 942 P.2d 968 (1997). It is only where the actor intentionally interferes with the property interests that emotional distress damages may lie in connection with a violation RCW 64.12.030. *Id.*, 113 Wn.2d at 116-17. In *Birchler*, the Washington Supreme Court set forth that 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.” *Id.*, 133 Wn.2d at 116 (Emphasis Added). The Court went on to observe that the threshold for damages under RCW 64.12.030 require a “‘willful’ trespass,” while “emotional distress damages in the

---

<sup>12</sup> In closing argument, the Fields’ counsel indicated that the Fields “have laid out for the Court in testimony the different categories of damages.” (RP 1601). Douglas Field testified that he had not decided on what he believed is a fair and reasonable figure for damages in this case (RP 1086). There is no concise summary of the damages sought. Mrs. Fields’ testimony is the closest which lends itself to a summary, and thus, we utilize her testimony to guide the instant analysis.

property context require an ‘intentional’ interference with a property interest.” *Id.*, 133 Wn.2d at 117, fn 5; *see also*, *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 768, 953 P.2d 796 (1998) (observing that that damages for emotional suffering are available only upon proof on an intentional tort, and emotional suffering damages will be disallowed where the statutory violation is merely negligent).

In the case at bar, the trial court entered an unchallenged finding of fact that it “cannot find that there was intentional infliction of emotional distress of such a nature over such a period of time that would justify a finding as defined in Washington law.” (CP 1123, FF 21).<sup>13</sup> Implicit in the trial court’s finding is that there was no intentional interference on the part of Mr. Dawes or directed towards the Fields to award damages for emotional distress under any damage theory. There remains no basis to award the Fields damages for emotional distress under RCW 64.12.030.

The Fields also claimed damages for Mrs. Field’s time spent as a litigant in this case. (RP 1314). Time spent as a litigant is ordinarily not compensable. *See e.g.*, *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn.App. 500, 511, 31 P.3d 698 (2001).

---

<sup>13</sup> The Fields do not assign error to this finding of fact. RAP 10.3(g). Unchallenged findings of fact become verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

The Fields also claimed damages for the loss of use of their property. (RP 1312). But the loss of use was not attributable to the Daweses' alleged violations of RCW 64.12.030; instead, the loss of use was claimed for what the Fields perceived to be the consequence of a restraining order to which they agreed. (RP 1267-1273; CP 42).

The Fields also sought damages in conjunction with restoration costs. (RP 1313). But there was no testimony that these damages were attributable to the Daweses' claimed violations of RCW 64.12.030 or in conjunction with the Fields' claimed inability to utilize their yard pursuant to the agreed restraining order. Where damages are claimed that can be caused by one of several factors or actors, the burden is upon the claimant to segregate damages caused by a tortfeasor. *See e.g., Scott v. Rainbow Ambulance Service, Inc.*, 75 Wn.2d 494, 497-498, 452 P.2d 220 (1969). The failure to do so will result in no recovery to a claimant. *See id.* Here, the Fields made no attempt to segregate those damages which they believed were caused by the Daweses' wrongful conduct and those which were caused by what they perceived the mutual restraining order to entail. Nor, for that matter, did the Fields establish any of the claimed restoration damages were claimed in connection with any of the Daweses' allegedly wrongful conduct. As such, there is no basis to award the Fields' damages in connection with claimed restoration costs.

In sum, because none of the damages sought by the Fields were either cognizable or proven at the time of trial, there is no basis to remand for damages.

3. If Liability Were To Attach, Damages Should Be Limited.

If this Court were to remand for damages, it should also remand with instructions to limit the Fields' recoveries to single damages or alternatively, to nominal damages. This is so because that the trial court implicitly found a mitigating circumstance under RCW 64.12.040 and limited to nominal damages insofar as the trial court's findings precludes the Fields from relitigating certain damage claims.

Under RCW 64.12.040, single damages are awardable only when the claimed wrongdoer has "probable cause to believe that the land on which such trespass was committed was his own." Here, the trial court entered an unchallenged finding that Mr. Daweses' conduct "may arguably be consistent with a claim of ownership, based upon a misunderstanding about the legal title to the Selley Parcel and, specifically, the legal significance of the exclusion of the south 30 feet of that property identified in the deed by which the Daweses obtained title to their property." (CP 1122-23; FF 21). This finding of fact puts the Dawes squarely within the mitigating circumstances of RCW 64.12.040. *See e.g.*,

*Lidstrand v. Silvercrest Industries*, 28 Wn.App. 359, 364-365, 623 P.2d 710 (1981)(“Upon appeal of nonjury trials, ‘respondents are entitled to the benefit of all evidence and reasonable inference therefrom in support of the findings of fact entered by the trial court.’”)(Citations omitted). If this Court is to remand, it should remand with instructions to award only single damages in conjunction with these items.

However, if this Court agrees that the Fields failed to prove any damages in connection with the one instance of weedkiller being applied to mark survey stakes, in those circumstances where even the fact of trespass is established and no other land-based damages are quantified, nominal damages in the amount of \$1.00 for damage to the land is the appropriate measure of damages. *Guay v. Washington Natural Gas Co.*, 62 Wn.2d 473, 383 P.2d 296 (1963). Thus, if this Court is to reverse, it should instruct the trial court to award nominal damages on remand.

**CONCLUSION**

The trial court did not err in any of the manners claimed by the Fields. The trial court should be affirmed in all respects.

DATED this 4th day of June 2007.

SHIERS, CHREY, COX,  
DIGIOVANNI, ZAK & KAMBICH, LLP

By: 

TRACY E. DIGIOVANNI, WSBA # 18624  
MATTHEW S. KASER, WSBA # 32239  
*Attorneys for Respondents*

**DECLARATION OF SERVICE/PROOF OF MAILING**

I certify under penalty of perjury under the laws of the State of Washington that on this day, that I served a true and correct copy of the foregoing document, by the method below, and addressed as follows:

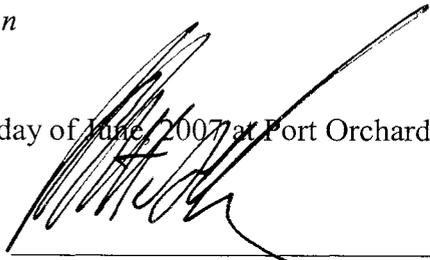
Mr. Rob J. Crichton  
Keller Rohrback, LLP  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052  
*Attorneys for Appellants,  
Douglass Field and Mary Ann  
Field*

- Hand Delivered
- US Mail, Postage Pre-Paid
- US Mail, Certified
- Via Facsimile
- Via Messenger (Falcorp, Inc)

Mr. Charles K. Wiggins  
Mr. Kenneth W. Masters  
Shelby R. Frost Lemmel  
Wiggins & Masters, PLLC  
241 Madison Ave. N.  
Bainbridge Island, WA 98110  
*Attorneys for Appellants,  
Douglass Field and Mary Ann  
Field*

- Hand Delivered
- US Mail, Postage Pre-Paid
- US Mail, Certified
- Via Facsimile
- Via Messenger (Falcorp, Inc)

EXECUTED this 4<sup>th</sup> day of June, 2007 at Port Orchard,  
Washington.

  
\_\_\_\_\_  
MATTHEW S. KASER

COURT OF APPEALS  
DIVISION II  
07 JUN 26 PM 1:31  
STATE OF WASHINGTON  
BY KASER  
DEPUTY