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DIVISION II

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STATE OF WASHINGTON

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

**(Pierce County Superior
Court No. 08-2-07707-7)**

**Tricia Shoblom,
Appellant (Plaintiff)**

v.

**Kristina Dyer and E.E. Pichler
Respondents (Defendants)**

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

| | Page |
|--|------|
| I. INTRODUCTION | 1 |
| II. ARGUMENT | 4 |
| A. <u>The Record is Tainted, Requiring Reversal</u> | 4 |
| B. <u>There is a Triable Case on Tricia Shoblom’s Trespass Claim</u> | 6 |
| 1. General Law of Trespass..... | 6 |
| 2. Substantial Damages | 8 |
| a. <i>Emotional Distress Damages Are Allowed and Are Substantial in Cases of Intentional Torts</i> | 10 |
| b. <i>Even Without Emotional Distress Damages, and on Pichler and Dyer’s Understanding of Ms. Shoblom’s Damages, Ms. Shoblom’s Damages are Substantial</i> | 11 |
| 3. The Trespass Claim is Supported by Evidence.... | 12 |
| C. <u>There is a Triable Case on Tricia Shoblom’s Harassment And Battery Claims</u> | 13 |
| D. <u>The Court Erred in Award Fees</u> | 13 |
| 1. Election of Remedies | 14 |
| 2. Lack of Proper Lodestar Analysis | 15 |
| 3. Violation of the Purpose of RCW 4.84.250-300... | 16 |
| IV. CONCLUSION | 18 |

TABLE OF AUTHORITIES

| | Page |
|--|------------|
| <i>Table of Cases:</i> | |
| <u>Allyn v. Boe</u> , 87 Wn. App. 722, 943 P.2d 364 (1997) | 7, 10 |
| <u>Birchler v. Castello Land Co., Inc.</u> , 133 Wn.2d 106, 942 P.2d 968 (1997) | 7, 10 |
| <u>Bowers v. Transamerica Title Ins. Co.</u> , 100 Wn.2d 581, 675 P.2d 193 (1983) | 16 |
| <u>Bradley v. American Smelting and Refining Co.</u> , 104 Wn.2d 677, 709 P.2d 782 (1985) | 6, 7, 10 |
| <u>Johnson v. Brado</u> , 56 Wn. App. 163, 783 P.2d 92 (1989), <i>review denied</i> , 114 Wn.2d 1022, 792 P.2d 534 (1990) | 15 |
| <u>Klein v. City of Seattle</u> , 41 Wn. App. 636, 705 P.2d 806 (1985) | 14 |
| <u>Lange v. Town of Woodway</u> , 79 Wn.2d 45, 483 P.2d 116 (1971) | 15 |
| <u>Mielke v. Yellowstone Pipeline Co.</u> , 73 Wn. App. 621, 870 P.2d 1005, <i>review denied</i> , 124 Wn.2d 1030, 883 P.2d 326 (1994) | 6 |
| <u>Miotke v. City of Spokane</u> , 101 Wn.2d 307, 678 P.2d 803 (1984) | 10 |
| <u>Northside Auto Serv., Inc. v. Consumers United Ins. Co.</u> , 25 Wn. App. 486, 607 P.2d 890 (1980) | 14 |
| <u>Reynolds v. Hicks</u> , 134 Wn.2d 491, 951 P.2d 761 (1998) | 13, 14, 16 |
| <u>State ex rel. Smith v. Superior Court</u> , 26 Wash 278 at 287, 66 P. 385 (1901). | 17 |
| <u>State v. Superior Court for Klickitat County</u> , 70 Wash. 486 at 491, 127 P. 104 (1912)..... | 17 |
| <u>Wallace v. Lewis County</u> , 134 Wn. App. 1, 137 P.3d 101 (2006) | 7 |

Other Authorities:

16 Wa. Prac. §§ 13.31, 13.32, 22.22. Trespass 6, 7

Lewis, *A Treatise on the Law of Eminent Domain in the United States*
§ 56 (2d ed.1900)).17

Restatement (Second of Torts) §§ 158, 165, 166, 3296

I. INTRODUCTION

This involves a neighbor dispute that escalated, as such disputes frequently and unfortunately do, into a situation in which one neighbor (Pichler and Dyer) undertook as systematic campaign to harm the other neighbor (Ms. Shoblom) through repeated, but related, trespasses and other acts of harassment (including battery).

Many of these trespasses are admitted by Pichler and Dyer. Some trespasses are admitted with an excuse offered (such as Pichler's explanation that he set up a sprinkler on a motion sensor to spray Ms. Shoblom's driveway in an effort to spray housecats, rather than to spray Ms. Shoblom, although it is not clear why Ms. Shoblom has any less right to allow cats onto her driveway than she has a right to be there herself). (CP 64-77, 223-229.) Other trespasses are admitted, but Pichler and Dyer assert that Ms. Shoblom suffered no injury therefrom (although this disregards the emotional distress suffered by Ms. Shoblom as a result of the continuing pattern of trespass and harassment, which damages are recoverable given that these trespasses were intentional torts).

Finally, Pichler and Dyer deny other trespasses (such as the trespass by herbicide and trespass to Ms. Shoblom's truck), asserting that because Ms. Shoblom did not see them commit these trespasses, Ms. Shoblom has no evidence that Pichler and Dyer did commit these

trespasses. This argument ignores the substantial and proper circumstantial evidence offered by Ms. Shoblom in each case. Other than Ms. Shoblom, only Pichler and Dyer had ready access to the area where Ms. Shoblom (as a person trained to recognize areas where herbicide was applied) recognizes the signs of herbicide. With regard to the tree limbs placed in Ms. Shoblom's truck, those limbs were in Pichler and Dyer's yard prior to being placed in the truck, and were removed to the sidewalk in front of Pichler and Dyer's house prior to being placed in the truck a second time. The likelihood that anyone other than Pichler and Dyer could have been responsible for these trespasses is so unlikely that it can be disregarded as a live possibility.

However, despite the undisputed facts that Pichler and Dyer trespassed, and trespassed repeatedly and intentionally, on Ms. Shoblom's property, the Trial Court granted summary judgment to Pichler and Dyer and dismissed all of Ms. Shoblom's claims. In doing so, the Court disregarded the law of trespass in favor of his own personal distaste for neighbor disputes. (RP 11/7/06, p.39, l. 16 - p.41, l. 2). While such a distaste is understandable, it is not a proper basis for a court ruling.

The Court did not merely dismiss Ms. Shoblom's claims based on an improper standard, it dismissed those claims based on improperly admitted "exculpatory evidence" offered through the unsworn in-court

statements of Mr. Pichler, which the Court considered and used to resolve a disputed fact (the propriety of Pichler and Dyers' aiming a sprinkler on a motion detector such that it would soak a moving creature, including a person, on Ms. Shoblom's driveway). (RP 11/7/09, p.42, ll. 6-15; (RP 11/7/09, p.43, ll. 17-22; RP 11/7/09, p.44, l. 20 - p.46, l. 4). This is a blatant process error, which taints the ruling, requiring reversal. In Response, Pichler and Dyer do not even attempt to defend the Trial Court's improper process.

Following its improper dismissal of Ms. Shoblom's case, the Court compounded its error by granting the Respondent's motion for attorney's fees under RCW 4.84.250-300. RCW 4.84.250-300 applies only to cases unambiguously seeking damages of less than \$10,000. Although originally pled in the alternative (one alternative stating separate claims for less than \$10,000), prior to the Trial Court's ruling Ms. Shoblom had unambiguously elected to seek damages on a single, unified claim and had stated that claim as being for in excess of \$30,000 without emotional distress (CP 280-305, 279-388; 290;) and as over \$50,000 with emotional distress damages (CP 379-388). The Trial Court disregarded Ms. Shoblom's election of remedies and election of claim and awarded attorney's fees. This was also improper, and this Court should vacate the award of attorney's fees and reverse and remand this case.

II. ARGUMENT

A. The Record is Tainted, Requiring Reversal.

In their Response, Pichler and Dyer do not defend the Court's disregard of a disputed issue of material fact based on the Court's improper consideration of unsworn, in-court statements of Mr. Pichler (made at the improper invitation of the Court over objection). Rather, Pichler and Dyer focus on the Court's statement that it is "all for shooting this horse" rather than on the process used by the Court to dismiss Ms. Shoblom's triable trespass and harassment claims. It is understandable that Pichler and Dyer would not attempt to defend the Court's process (attempting rather the change the focus from the improper process to something else in a sleight-of-hand move reminiscent of Pichler and Dyer's inaccurate recasting of Ms. Shoblom's \$50,000 claim into three claims which Pichler and Dyer miscalculate as stating damages of \$3,134.80). The Court's process is not defensible under any summary judgment standard, or any standard of proof or standard for admission of evidence, in Washington. It is clear, reversible error.

The Trial Court's statement that he was he was "all for shooting this horse" (RP 11/7/06, p.39, ll. 15-16.), signaled the start of the Trial Court's erroneous process, it was not the error. The error was a compounding series of legal mistakes made by the Court as it attempted to

find a way to shoot the horse. The Court applied an idiosyncratic, nonlegal standard based upon the Judge's personal feelings about neighborly courtesy rather than on any legal principle or on our system of private property rights. (RP 11/7/06, p.39, l. 16 - p.41, l. 2). The Trial Court specifically noted that there was a key issue of material fact involved in this case (a sprinkler being placed on a motion sensor such that it would regularly spray Ms. Shoblom, which fact was essentially admitted as true by Pichler and Dyer (RP 11/7/09, p.42, ll. 6-15). In an effort to overcome this inconvenient fact, the Court, over objection, improperly invited Mr. Pichler to address this point, without oath, without prior notice to Ms. Shoblom, and without cross-examination, over the objection of Ms. Shoblom's counsel. The Court then used the information received as a rebuttal of the material facts raised in support of Ms. Shoblom's claims, granting summary judgment and dismissing the case. (RP 11/7/09, p.44, l. 20 - p.46, l. 4).

The Trial Court committed a similar, if less egregious error, in dismissing Ms. Shoblom's claim related to the damage to her fence. With regard to that issue, the Trial Courtt speculated, based apparently on the Judge's own shopping experience rather than on any evidence in the record, that the paint could be powerwashed off with a \$60 rental from Home Depot (RP 11/7/09, p.27, ll 3-4).

The Court's procedural errors in this case are a clear basis for reversal, without deeper analysis of the substantive issues. The Trial Court based its ruling on improper information not in the record, both improperly received from the moving party and injected by the Court itself. This information was used to resolve issues of properly disputed fact against the nonmoving party. This Court should reverse and remand for trial, where a jury can act as a fact-finder and resolve the disputed facts of this case, leaving the Court to apply the law without to facts established by evidence rather than suggested by the Court's idiosyncratic prejudices.

B. There is a Triable Case on Tricia Shoblom's Trespass Claim.

1. General Law of Trespass

“A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession.” 16 Wa. Prac. § 2.22. Trespass to land. A party is liable for trespass if he or she intentionally or negligently intrudes onto the property of another. Mielke v. Yellowstone Pipeline Co., 73 Wn. App. 621, 624, 870 P.2d 1005, *review denied*, 124 Wn.2d 1030, 883 P.2d 326 (1994) (citing Restatement (Second) of Torts §§ 158, 165, 166 (1965)). A person is liable for intentional trespass if he or she intentionally enters land in the possession of another, causes a thing to do so, or fails to remove from the land a thing which he or she is under a duty to remove. Bradley v. American Smelting and Refining Co., 104 Wash. 2d 677, 709

P.2d 782 (1985); 16 Wa. Prac. § 13.31. Trespass to land. Intentional trespass is an intentional tort, entitling the person whose land was trespassed upon to emotional distress damages in addition to any damages for harm caused to the property through the trespass. Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 942 P.2d 968 (1997); Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997). Washington also recognizes trespass to personalty, which can also been an intentional tort entitling the Plaintiff to emotional distress damages. 16 Wa. Prac. § 13.32 Trespass to personal property. (Both Ms. Shoblom's claim for trespass to her truck and her claim for removal of her survey stake state proper claims to trespass to personalty.)

In Washington, the tort of intentional trespass requires proof of four elements: “(1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages.” 16 Wa. Prac. § 13.31. Trespass to land; citing to Wallace v. Lewis County, 134 Wn. App. 1 at 15, 137 P.3d 101, 108 (2006); see also Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 691-92, 709 P.2d 782 (1985).

There is no dispute here that Pichler and Dyer entered, caused others to enter, and caused objects or unnatural (hose and sprinkler) water to enter Ms. Shoblom's land without permission. There is also evidence

that Pichler and Dyer placed tree limbs in Ms Shoblom's truck without permission. Ms. Shoblom further has an undisputed interest in exclusive possession of the various property trespassed upon by the Defendants (with the arguable exception of the fence). Further, intent and foreseeability are either admitted or disputed issues of material fact in each case of Pichler and Dyers' alleged trespasses. Pichler and Dyers' defense, and the Court's granting of summary judgment, comes down to the issue of substantial damages.

2. Substantial Damages

It is not contested that Washington law requires “actual and substantial damages” as an element of a cause of action for intentional trespass. However, Pichler and Dyer assert that this means that a trespass plaintiff must prove damages of thousands, perhaps of tens of thousands, of dollars in order to proceed with an otherwise fully established trespass claim. That is not the law. Rather, the law merely no longer authorizes award of *nominal damages* in *no-injury* trespass cases. Hedlund v. White, 67 Wash.App. 409, 836 P.2d 250 (1992); Grundy v. The Black Family Trust, 151 Wash.App. 557, 213 P.3d 619 (2009). However, none of these cases bar a case in which both physical property damage and emotional distress damages are asserted and substantiated.

While Washington no longer recognizes "no damage" trespass actions, for which nominal damages could be awarded, Washington has not abolished "small damage" trespass actions. Neither Hedlund and Grundy provide otherwise.

Both Hedlund and Grundy involve claims for diversion of natural water (surface water and seawater respectively) from one property onto another. Thus, while they involve water (like the current case), they involve natural waters and thus involve the common enemy doctrine (unlike the current case). Further, in both Hedlund, no damages were asserted; and in Grundy a finding of no damages at trial was not challenged. Finally, neither case involved an assertion of emotional distress damages at the trial court level (as this case does), so neither case provides any guidance whether emotional distress damages are substantial damages which, even in the absence of other damages, could support a trespass claim. (Grundy is silent on the issue; Hedlund specifically indicates that it is not deciding the issue as an issue that was not properly before the trial court.)

In this case, Ms. Shoblom clearly stated allegations of actual and real harm to her property: damage to the fence, requiring replacement; contamination of her land by herbicide placed there by Ms. Dyer; destruction of her survey stake; and damage to her truck by the wood

debris placed in it by Mr. Pichler. In the case of the fence, the damages stated as \$3,213.42 (replacement cost) (CP 228, l. 25.) In the case of the survey stake, the damages may equal the cost of the survey (\$1,150). These damages may be small, but they are not "insubstantial" as that term is used in Washington trespass law.

a. Emotional Distress Damages Are Allowed and Are Substantial in Cases of Intentional Trespass.

Additionally, intentional trespass is an intentional tort. Bradley v. American Smelting and Ref. Co., 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985). The recovery for an intentional property tort includes both compensation for injury to the property and emotional distress damages suffered by the owner of the property as a result. *See, e.g., Miotke v. City of Spokane*, 101 Wn.2d 307, 332, 678 P.2d 803 (1984) (mental suffering an element of damage in public nuisance action). Emotional distress damages are expressly authorized in cases of intentional trespass. Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 942 P.2d 968 (1997); Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997).

Pichler and Dyer do not dispute that Ms. Shoblom suffered emotional distress as a result of their trespasses. Rather, their argument is that if emotional distress damages are allowed then a party that suffers such

damages as a result will be able to recover them even if the trespass caused no physical damage to the property. That is true. It is also the law.

There is no injustice in holding intentional trespassers liable for emotional distress that their trespass causes, even if the trespass caused no physical injury. People should not commit intentional torts. Emotional distress is expressly allowed in recognition that people should not commit intentional torts. If Pichler and Dyer did not want to be held responsible for causing emotional distress to Ms. Shoblom, then they should not have intentionally trespassed on her property.

b. Even Without Emotional Distress Damages, and On Pichler and Dyer's Understatement of Ms. Shoblom's Damages, Ms. Shoblom's Damages are Substantial.

Ms. Shoblom sought more than \$30,000 in damages plus additional damages for emotional distress. (CP 290.) Thirty Thousand dollars is a substantial amount of damages. Throughout the case (including in their Response on Appeal), Pichler and Dyer have ignored this statement of claim (and, by doing so, induced the Trial Court to make the error of similarly ignoring it). However, even on Pichler and Dyer's disputed and low-ball miscalculation of Ms. Shoblom's claim (\$3,134.80), Ms Shoblom's claim is substantial. U.S. census data states that the gross median monthly household income for Tacoma Washington is \$3,157. Ms. Shoblom's claim is therefore

the equivalent of a month's income for a household in Tacoma. Loss of a month's income, or its equivalent, is a substantial loss by any reckoning.

3. The Trespass Claim is Supported by Evidence.

At summary judgment, Pichler and Dyer argued that the evidence of trespass by herbicide, trespass to the truck, and trespass to the survey stake should be dismissed because that evidence is circumstantial, rather than being based on direct observation. The Court appears to have agreed. However, in Washington, “[e]vidence may be either direct or circumstantial. ... The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.” WPI 1.03. In each case, the circumstances are such to rule out the possibility that these trespasses were committed by anyone other than Pichler or Dyer.

Similarly, it is hard to see how the damage to the fence (which is a nuisance (a violation of Ms. Shoblom's quiet enjoyment of her side of the fence by Pichler and Dyer's use of theirs) if not a trespass), which requires replacement of the fence at a cost of more than \$3500 is not substantiated by evidence. Likewise, Pichler and Dyer's intentionally spraying of Ms. Shoblom, her car, and her mother with water, both by motion-sensor activated sprinkler and by hose, is not substantiated by evidence.

It is clear that the Trial Court did not want to give this evidence a hearing at trial, but it is equally clear that there was evidence to be heard. Ms. Shoblom should have been allowed to try her claims.

C. **There is a Triable Case on Tricia Shoblom's Harassment and Battery Claims.**

In dismissing the trespass claims, the Trial Court ruled that it was dismissing all of Tricia Shoblom's claims. In doing so, it failed to address, or even recognize, Tricia Shoblom's claims for harassment and battery. These claims had been pled with sufficient particularity to satisfy liberal notice pleading rules, especially in light of Ms. Shoblom's interrogatory answers. Further, the claims were presented on a pending motion to amend (which was not heard as the dismissal left no case to amend). Thus, even if this Court accepts argument that the claims were not pled, it was improper for the Trial Court to deny Ms. Shoblom an opportunity to plead them.

D. **The Court Erred in Awarding Fees.**

Defendants argue that they are entitled to reasonable attorneys fees as the prevailing party pursuant to RCW 4.84.250 and costs pursuant to CR 68. Attorneys fees under RCW 4.84.250 are to be awarded to the prevailing party if the pleading party sought damages, exclusive of costs, of \$10,000 or less. *See* RCW 4.84.250... The intent of the statute is to enable a party to pursue a meritorious small claim of \$10,000 or less without seeing the award diminished in whole or in part by legal fees. *See Klein v. City of Seattle*, 41 Wn. App. 636, 640, 705 P.2d 806

(1985); Northside Auto Serv., Inc. v. Consumers United Ins. Co., 25 Wn. App. 486, 492, 607 P.2d 890 (1980).

In this case the Plaintiffs did not seek an award of \$10,000 or less. No specific amount was pleaded in the complaint; rather, the amount was set to be proven at trial. Thus, the Plaintiffs did not limit their award and based on their claim for damages and relief could have received well above \$10,000 in damages. Consequently, Defendants are not entitled to reasonable attorneys fees pursuant to RCW 4.84.250.

Reynolds v. Hicks, 134 Wn.2d 491 at 502, 501-02, 951 P.2d 761 (1998).

Here, the Complaint seeks a “judgment against Defendants Kristina Dyer and E. E. Pichler, in an amount to be proven at trial, but known to be less than \$50,000.00.” Further, in discovery, Ms. Shoblom stated her claim to be "over \$30,000" (CP 290, 1.10) and as "over \$50,000" in settlement negotiations (CP 268-278; 379-388). There is no entitlement to fees under RCW 4.84.250-.300 in this case.

Pichler and Dyer have no argument for fees except for an argument that Ms. Shoblom would have asserted a claim to fees under RCW 4.84.250-300. However, Ms. Shoblom elected remedies and claims that do not entitle her to fees. If Ms. Shoblom had prevailed and had made a claim for fees under RCW 4.84.250-300, Pichler and Dyer are could have defeated that claim by citing to the same interrogatory answer and settlement briefing cited to by Ms. Shoblom. Fees are not appropriately awarded under RCW 4.84.250-300 in this case, and the Court erred in awarding them.

1. Election of Remedies

“One is bound by an election of remedies when all of the three essential conditions are present: (1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them.” Lange v. Town of Woodway, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). The Plaintiff is given the first opportunity to elect from among the available claims and remedies, and Plaintiff forecloses any party from pursuit of the unelected remedies or claims, or from any recovery thereunder. See Johnson v. Brado, 56 Wn. App. 163, 167, 783 P.2d 92 (1989), *review denied*, 114 Wn.2d 1022, 792 P.2d 534 (1990).

In this case, Ms. Shoblom’s claim arose from a pattern of misbehavior by Pichler and Dyer, including acts of harassment and trespass. In such case, Ms Shoblom could pursue multiple claims for each incident or could pursue a single claim based on the pattern as a whole. However, pursuing both would allow a duplicative recovery. Ms. Shoblom, well before the fee award, had elected to pursue a single claim rather than a piecemeal case with multiple claims.

However, the Court allowed Pichler and Dyer to disregard Plaintiff’s election and essentially make their own election of remedies for her, after knowing the result of the case. This denied Plaintiff the effect and benefit of her election. The fee award was error and should be reversed.

2. Lack of Proper Lodestar Analysis

Washington requires that judges follow a process in awarding attorney's fees. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983). This process, the "lodestar method," involves a fairly elaborate analysis based on the twelve elements for proper fee arrangements set forth in the Model Rules of Professional Conduct (1982).

This analysis should be done by the party seeking fees in the moving papers. The Trial Court should consider that analysis and either accept, reject, or modify it. This should be expressly done.

Here, Pichler and Dyer did not do any such lodestar analysis. Further, the Court did not correct this oversight by doing its own lodestar analysis. This resulted in an award of fees without any proper analysis. This was error. Even if Pichler and Dyer were entitled to an award of fees, which they are not, they are not entitled to an award of fees unless there is a reviewable analysis supporting the amount of fees awarded.

3. Violation of Purpose of RCW 4.84.250-300

"The intent of [RCW 4.84.250-300] is to enable a party to pursue a meritorious small claim of \$10,000 or less without seeing the award diminished in whole or in part by legal fees." Reynolds, supra. However, Pichler and Dyers' argument, especially when coupled with their argument

that a person must suffer thousands, or even tens of thousands, of dollars of property damage before she can pursue and otherwise fully-substantiated trespass claim, presents a Catch-22 that violates the purpose of RCW 4.84.250-300. On Defendants' argument, a Plaintiff has to suffer thousands of dollars of damages to recover. In such case, Plaintiffs with a "meritorious small claim" for trespass would not only be deprived of the intended benefit of the statute, such a person would be harmed by the statute, which would apply only to award fees to trespassers.

Such a result, in addition to violating the spirit and purpose of RCW 4.84.250-300, would completely undermine the right of exclusion from private property. This would, in turn, violate one of the primary duties of civil courts, protecting and preserving legitimate property rights.

The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *See State ex rel. Smith v. Superior Court*, 26 Wash 278 at 287, 66 P. 385 (1901). "If property, then, consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed;"). John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 56

(2d ed.1900)). "It is the duty of the courts to see that private property is not taken for private uses..." State v. Superior Court for Klickitat County, 70 Wash. 486 at 491, 127 P. 104 (1912).

The arguments asserted by Pichler and Dyer in this case have the effect of depriving private property owners of the right to exclude, appropriating that right for the private uses of any trespasser, provided the trespasser otherwise does no harm to the property. Such a rule is not proper or authorized by law. The Trial Court, in accepting these arguments, disregarded the right to exclude and the substance and intent of trespass law. This was error, and this Court should reverse.

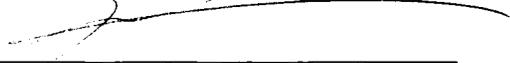
VI. CONCLUSION

This is a neighbor dispute. It is understandable that the Trial Court was frustrated by such a dispute and considered it petty. However, the Trial Court, even in considering the dispute petty, did not have the right to consider the dispute improper or unworthy of the Court's notice and time. Protecting private property rights, including the right to exclude, from appropriation by government or private parties is one of the core duties of the civil courts. This Trial Court failed to do its duty in this case, and this Court should reverse and remand that case with instructions that the Trial Court fulfill its obligation to allow Ms. Shoblom to air her evidence and try her case.

The Trial Court's error is exacerbated by its award of attorney's fees against Ms. Shoblom, an award that is not supported by the proper analysis and which appears to have been made for punitive purposes based on the Court's distaste for neighbor disputes. Besides being unsupported by analysis, this award was not supported by law. Ms. Shoblom elected to pursue a single claim, which she stated as being valued above \$30,000 without emotional distress and above \$50,000 with emotional distress. Therefore, even if the Trial Court's summary dismissal of Ms. Shoblom's case were proper, that dismissal did not support an award of fees under RCW 4.84.250-300.

SUBMITTED this 18th day of October, 2010.

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DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I declare under penalty of perjury according to the laws ~~of the State~~ ^{DEPUTY} of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel indentified below:

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