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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

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TRICIA SHOBLOM,

Appellant (Plaintiff)

v.

KRISTINA DYER and E.E. PICHLER,

Respondents (Defendants)

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RESPONDENTS' BRIEF

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 ORIGINAL

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## **INTRODUCTION**

This is a trespass lawsuit involving a dispute between neighbors. It is about wood-colored stain on a wood boundary fence co-owned by the litigants. It is also about a child retrieving a ball thrown over plaintiff's fence, and a sprinkler system causing water to sprinkle on a neighbor's property. It is about unfounded accusations of removing survey stakes, placing branches in the bed of a truck, spraying the plaintiff with water and claims of trespass based on the defendants landscaping their own property.

But this case is not about any valid claims. The trial court correctly recognized that all of plaintiff's claims are either not cognizable, or are not supported by evidence sufficient to withstand summary judgment. The trial court correctly dismissed all of plaintiff's claims and correctly awarded fees to defendants. The trial court's rulings should be affirmed.

## **COUNTERSTATEMENT OF THE CASE**

### **A. Factual Overview**

This is an alleged trespass case with various allegations of trespass. Plaintiff claims she constructed a fence "located entirely" on her property "and is some distance inside her property from the legal property line." CP 7. She claims that "Defendants have painted, or otherwise damaged

this fence, in a manner that causes the paint to bleed through and discolor Trisha Shoblom's side of the fence." CP 7. Plaintiff also claims that the defendants have "trespassed over the property line into Trisha Shoblom's property, digging, trenching, destroying landscaping, and otherwise damaging and causing waste to Trisha Shoblom's real property, landscaping, and personal property." CP 7. In discovery, plaintiff asserted other trespasses including the defendants' child going into her yard to retrieve a ball, water from sprinklers going on her property and allegations that defendants allowed herbicide to go onto plaintiff's property. CP 204-05. None of the alleged acts constitute an actionable trespass and plaintiff failed to make a prima facie case.

**B. First Motion for Summary Judgment - October 2008.**

Defendants brought a motion for summary judgment in October 2008. As part of that motion, defendants sought to establish that the true boundary line between the properties was the fence line. To support this argument, defendants submitted several declarations of prior owners of both properties, all stating that they had always considered the fence line the true boundary line. CP 17-19; 115-17; 23-25; 38-40.

Additionally, defendants sought to dismiss a claim brought by plaintiffs under RCW 58.04.015, alleging that the defendants removed survey stakes. This allegation was denied by the defendants, who

provided a picture showing the stakes in the ground. CP 41-47. Plaintiff had no evidence that defendants had moved the stakes.

At the hearing in October 2008, the trial court determined that the fence line was the true boundary line. CP 118-20. The trial court entered an Order establishing the boundary line, as well as dismissing all other claims based on the boundary line and the claim involving the movement of the survey stakes under RCW 58.04.015. As part of this Order, the trial court held that the fence was “co-owned” and was to be “co-maintained” by both parties. CP 120.

It is of note that plaintiff’s “fence related” claims were all based on a survey she commissioned. This original survey, conducted by Jerry Garman, found that Ms. Shoblom’s property extended approximately 2.5 feet south of the fence line on what is currently defendants’ property. Thus, plaintiff’s argument was that even by painting their side of the fence defendants were trespassing.

Following the summary judgment ruling in October 2008, defendants commissioned their own survey. Paul Mabry, of Informed Land Survey, conducted this survey and found Mr. Garman incorrectly executed his survey. As a matter of fact, the Garman Survey was off by 3 feet and defendants’ original lot extended approximately 0.5 feet north of the fence line onto what is now plaintiff’s property. CP 193-95; 260.

After reviewing the Mabry survey, Mr. Garman agreed, corrected his errors and filed an Amended Survey to show the fence at issue here was *never* exclusively on Ms. Shoblom's property. CP 260.

**C. Plaintiff's Deposition Testimony**

In her deposition, plaintiff made several admissions regarding her trespass claims that clearly demonstrate that her claims lack merit and that she has no actual or substantial damage.

**1. Plaintiff's deposition testimony regarding the alleged trespass by the defendants' son.**

Q. ...Did you suffer any damage as a result of that incident involving Mr. Pichler's son?

A. Not at that time.

Q. Have you since then?

A. Not since.

CP 268.

**2. Plaintiff's deposition testimony regarding the allegation that defendants placed tree limbs in plaintiff's truck.**

Q. And are you claiming damages to your truck as part of this lawsuit?

A. No.

CP 270.

Moreover, plaintiff has absolutely no evidence that defendants placed limbs and debris in the bed of her truck, beyond the products of her imagination:

- Q. You reference the police and you say, 'They could not do anything because I did not see him put his limbs into my truck either time.' Correct?
- A. Correct.
- Q. So I take it on this allegation that you did not witness Mr. Pichler put any limbs in your truck; correct?
- A. Correct.
- Q. Are you aware of any witness who did see Mr. Pichler put any limbs in your truck?
- A. No.
- Q. And you believe that happened twice...?
- A. Yes.
- Q. And you didn't see Mr. Pichler either time I take it; is that correct?
- A. That is correct.
- Q. And you didn't see Ms. Dyer either; correct?
- A. Correct.

CP 271-72.

When asked, Ms. Shoblom could not even describe the origin of the offending limbs:

- Q. I think you're saying the limbs you're talking about you don't know if they were from your yard or from Mr. Pichler's yard or from the street; correct?
- A. I can't be certain where the limbs came from. If they were in the street, I don't know.

CP 273.

**3. Plaintiff's deposition testimony regarding herbicide on her property.**

In her deposition, plaintiff admitted that she could not say that the substance she alleges defendants caused to go on her property was herbicide and could not state any damage from this act.

Q. In Paragraph H [of your discovery responses] you say 'Pichler and his wife sprayed a portion of my gravel driveway with some type of Glyphosate...what damage are you claiming from the spraying of Glyphosate on your driveway?

A. Again, it's trespass. I don't use pesticides in my yard and I'm absolutely opposed to having any pesticides sprayed in my property.

Q. So, Ma'am, are you claiming any damages from that?

A. Yes.

Q. What are the damages?

A. Trespass.

Q. And what is the amount of damage, Ma'am?

A. I don't know.

Q. And how do you know it was a Glyphosate herbicide product?

A. It's a standard – It's a standard chemical that's used for home use.

Q. It's a standard chemical that's used for home use. So how do you know that's what it was?

A. For certain, I don't know, but it more than likely was some type of Glyphosate product. It's a broad spectrum.

Q. The answer's you don't know?

A. I'm not positive that it was Glyphosate.

Q. Did you do any testing on it?

A. No.

CP 274-75.

In her responses to discovery, Ms. Shoblom states: "I did not see either of them [defendants] spray my driveway, but it is clear that my driveway was sprayed with some type of herbicide."

CP 205.

## ARGUMENT

### A. Standard of Review

Defendants agree that the standard of review is de novo except the amount of attorneys' fees awarded. See Section N, *infra*. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). For this reason, all of plaintiff's diatribe regarding the trial court's alleged "bias" is irrelevant and designed only to attempt to poison this court

For example, plaintiff refers multiple times to the trial court's comment regarding "shooting this horse." This comment, irrelevant though it is, flowed out of a comment of undersigned counsel. At the hearing in November 2009, defense counsel commented in the reply argument that "[w]ith all due respect - - I mean, the tortured argument they

just went through, this case - - and again, I don't mean to be flip, but if this case was a horse, we would shoot it." RP, November 6, 2009 at 35. It was in this context that the court made the "horse" comment.

Defendants disagree, however, that there are any credibility determinations to be made here. The trial court's decisions were based on a lack of evidence, not a weighing of the evidence. The issue is not credibility but rather whether plaintiff's "evidence" was sufficient to state a prima facie case. Additionally, plaintiff's references to "inferences" are not inferences, but rather speculation.

Finally, plaintiff's references to the alleged "testimony" provided by the defendants at the summary judgment hearing is a red-herring. First, this is a de novo review. Second, because of plaintiff's counsel's objection, the trial court struck this testimony from the record. RP, November 6, 2009 at 45-46.

#### **B. The law of trespass**

To establish intentional trespass, plaintiff must show "(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."

*Wallace v. Lewis County*, 134 Wn.App. 1, 15, 137 P.3d 101 (2006).

The requirement of actual and substantial damages was discussed more specifically in *Grundy v. The Brack Family Trust*, 151 Wn.App. 557, 213 P.3d 619 (2009). In *Grundy*, the court reiterated that an act of intentional trespass is only compensable if there is **actual and substantial damage** to the property of the complaining party. The *Grundy* case is controlling and on point here.

In *Grundy*, the defendants intentionally raised a bulkhead causing water and debris from the Puget Sound to trespass onto the plaintiffs' property. *Id.* at 563. The trial court in *Grundy* found that the defendants "raised their bulkhead without considering the consequences to [plaintiffs]." *Id.* But the trial court held that defendants "actions were neither intentional nor wrongful." *Id.* The trial court further found that though the defendants raising of their bulkhead caused debris and areas of yellow and dead grass on plaintiff's property, defendants had "not caused a significant injury or appreciable harm to [plaintiffs]." *Id.* at 568. Plaintiff's "failure to prove substantial injury" was "fatal to her claim" in *Grundy*. It is likewise fatal to plaintiff's claims in this case, as plaintiff cannot show actual or substantial damage from any of the alleged trespasses in this case.

**C. The claims regarding the boundary line are not at issue in this appeal.**

As noted above, in October 2008 the trial court established that the true boundary line was the fence line between the properties. The plaintiff has not challenged this ruling, and it is a verity on appeal.

**D. There is no trespass regarding the fence or the maintenance of the fence.**

Though plaintiff is not challenging the determination that the fence line is the true boundary line, she is nonetheless asserting that the staining by the defendants of their side of the fence constitutes a trespass, arguing that some of the stain “bled” onto her side of the wood. Plaintiff is incorrect.

As noted above, to establish intentional trespass, plaintiff must show “(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.” *Wallace*, 134 Wn.App. 1, 15, 137 P.3d 101.

The plaintiff cannot meet her burden. First, the boundary fence between the two properties at issue is not the plaintiff’s exclusive property. The trial court’s October 2008 Order found that the fence was co-owned and was to be co-maintained. Moreover, Garman’s amended

survey now shows that even prior to the trial court's order, the fence was on defendants' property.

Plaintiff now suggests that she has an interest in exclusive possession of her half of the fence. This cannot be true. Plaintiff's suggestion that an imaginary dividing line exists giving fee simple ownership of exactly one half of the boundary fence would lead to the absurd result facing this Court now; where the owner of a fence discharging their duties to maintain the fence (by placing stain on the fence), are hailed into court on claims of intentional trespass, facing thousands of dollars in fees and potential damages. Under plaintiff's theory, one drop of wood stain seeping through half-inch wooden boards on a co-owned fence subjects the owner of a boundary fence to an intentional trespass and waste lawsuit from a litigious neighbor.

If plaintiff's theory of liability for co-owned fences is given effect, it would lead to perilous exposure to litigation every time any party seeks to maintain their co-owned boundary fence. Absurdly, plaintiff's theory of liability makes her liable for intentional trespass and waste as plaintiff herself slopped white paint in a slipshod manner with no legitimate purpose on the top of the fence. According to her theory of liability, her

act is one of intentional trespass and waste which subjects her to liability for treble damages and defendants' attorneys' fees.<sup>1</sup>

Co-ownership of the fence requires a right to possession of the entirety of the fence.<sup>2</sup> This is the proper characterization of the real property interests of a boundary fence where there is not only concurrent ownership interests in a single indivisible fixture, but also an obligation to maintain that fixture as a whole. Because plaintiff has **always** lacked the right to exclusive possession of the boundary fence at issue here, defendants' act of staining the fence cannot be an act of negligent or intentional trespass or waste.

Furthermore, the act of staining – as required by the court order – is not an intentional act of trespass. Even if this could constitute trespass,

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<sup>1</sup> CP 41-47. These photos show that defendants have stained the entire fence enclosing their yard. This stain is not "red paint." This stain is wood stain meant to extend the life of the fence. Accordingly, defendants were maintaining their co-owned fence and not trespassing on any property over which plaintiff is entitled to exclusive possession. The white paint, on the other hand, appears to be done for no legitimate purpose of maintenance.

<sup>2</sup> A fence is a permanent fixture and, therefore, part of the real property dividing these two properties. See, *Grays Harbor Energy, LLC v. Grays Harbor County*, 151 Wn.App. 550, 213 P.3d 609 (2009)(discussing fixtures as real property); see also, *Cutler v. Keller*, 88 Wash. 334, 337, 153 P. 15 (fences are permanent fixtures becoming part of the realty). Because the fence at issue here is co-owned, each owner has a right to possession of the entire fence. The interests of a boundary fence are similar to the interests of tenants in common. Tenancy in common and joint tenancy are the two major forms of co-ownership in real property in Washington State. See, *Gottwig v. Blaine*, 59 Wn.App. 99, 102, 795 P.2d 1196 (1990). Tenants in common are each entitled to full possession of the real property at issue. Therefore, one co-owner is not entitled to exclusive possession. *In re Foreclosure of Liens*, 130 Wn.2d 142, 148, 922 P.2d 73 (1996). In this case, plaintiff is not entitled to exclusive possession of the fence.

which it cannot as discussed above, it would at most be a negligent trespass, which has never been pled by plaintiff. It is clear that all of plaintiff's claims are for intentional trespass. CP 7.

Third, there is no reasonable foreseeability that this "act" would "disturb the plaintiff's possessory interest" (to the extent one exists) and there is no substantial damage. Plaintiff's allegations of damage include complete replacement of the fence. There is no separate allegation of damage for the few fence boards that may have actually been affected, even accepting plaintiff's allegations as true. In any event, this does not constitute "actual and substantial damage" as a matter of law.

**E. The "removal of the survey stake" claim was properly dismissed.**

Plaintiff filed an Amended Complaint on or about May 22, 2008 asserting that defendants removed stakes placed by plaintiff's hired surveyor. CP 7. When learning of this allegation, defendant Pichler, unaware that any stakes had been removed, investigated the property and determined that all stakes placed by the surveyor appeared in place. CP 42. Defendants did not disturb any markings or stakes placed by plaintiff's surveyor. CP 42. Plaintiff had no evidence that they did.

In addition to lacking evidence that defendants moved or altered the stakes, the trial court's decision regarding the boundary line made the

claim moot. When the trial court determined that the true boundary line was the fence line, the survey stakes – which showed an incorrect boundary line – were no longer accurate. This was confirmed by the plaintiff’s surveyor’s amendment of his survey.

The statute on which this claim is based, RCW 58.04.015, is a very short statute. It provides that “[a] person who intentionally disturbs a survey monument placed by a surveyor in the performance of the surveyor’s duties is guilty of a gross misdemeanor and is liable for the cost of the reestablishment.” There are no cases interpreting this statute.

First, it is not clear that there is a civil cause of action from this statute. The fact that it defines the act as a “gross misdemeanor” certainly seems to define it as criminal, not civil. But even if there is a civil cause of action, the obvious point of the statute is to prevent the removal or alteration of a valid survey stake. There is no dispute in this case that the survey stakes at issue were incorrectly placed. Thus, there is nothing to “protect.” Plaintiff’s argument that these stakes provide evidence of an incorrectly placed stake for a subsequent case against the surveyor does not provide justification for imposition of the statute. Moreover, the fact that Garman filed an amended survey is itself evidence that the first survey was incorrect.

**F. There is no trespass for a child retrieving his ball.**

The defendants' son was retrieving a ball that had landed in plaintiff's yard when plaintiff saw him running back to defendants' property. Defendants did not intentionally act to cause this alleged trespass. Further, plaintiff admitted that she had no damages from this act and therefore she cannot make out a prima facie trespass claim.

**G. The claim related to placing the tree limbs in plaintiff's truck was properly dismissed.**

While plaintiff alleges that defendants placed tree limbs in her truck, she has no valid claim. First, as set forth in the factual section, she is not claiming any damage to her truck. CP 270. That alone is grounds for dismissing her claim.

Second, she claims that she has "circumstantial" evidence that defendants placed limbs in her truck. This again contradicts her deposition testimony in which she admitted that she never saw either defendant place limbs in her truck and is not aware of any witness who saw that alleged act. CP 271-72. Moreover, she does not know whether the limbs were from her own yard, the street or the defendants' yard. CP 272. There is no circumstantial evidence, but rather only pure speculation by plaintiff. *See Boguch v. Landover Corp.*, 153 Wn. App. 595, 613-14, 224 P.3d 795 (2009). This is insufficient to withstand summary judgment.

**H. There is no valid trespass claim for the alleged herbicide on plaintiff's property.**

Plaintiff has failed to support any claim related to alleged herbicide on her property. First, she cannot show that there was any herbicide on her property. She admitted that she never tested the substance. CP 274-75. She claims to be an "expert." She was never qualified by the trial court as an expert, and in any event, even if she was an expert she must have facts on which to base her opinion. *Anderson v. Hay*, 119 Wn. App. 249, 259, 76 P.3d 1205 (2003)(holding that "an expert's testimony for summary judgment must be supported by the specific facts underlying the opinion); *Rothweiler v. Clark County*, 108 Wn. App. 91, 100-01, 29 P.3d 758 (2001)(holding that "an expert must support his opinion with specific facts and a court will disregard expert opinions where the factual basis for the opinion is found to be inadequate."). Because she never tested the substance, she has no evidence that it was a herbicide and therefore there is no factual basis for that "opinion." Finally, she admitted that she did not know what her damage was from this alleged act. This claim was properly dismissed.

**I. The alleged trespass from sprinklers was properly dismissed.**

Plaintiff claims that water from defendants' sprinklers went onto her property. Under the rule in *Grundy*, causing water to be sprayed onto the property of another is not an actionable trespass without actual

evidence of intentional or wrongful direction of the sprinkles of water. *Grundy*, 151 Wn. App. at 570 (“That the [defendants’] seawall caused water to enter [plaintiff’s] property does not, without more, create liability for trespass.”) To hold otherwise, according to the *Grundy* decision, would create “excessive litigation.” *Id.*

Here it would lead to the absurd result requiring a neighbor to keep vigilant watch over common lawn sprinklers and the pattern of the winds to ensure that no trespassing drops of water invade her neighbors’ property. Plaintiff has submitted dozens of photos showing defendants working on their yard. But strangely, she has no photographic evidence of water being sprayed on her property. Again, *Grundy* also requires *actual* and *substantial* damages, even when all other elements of intentional trespass are met. Plaintiff has presented no evidence of *actual* and *substantial* damages. Her claims of trespass by lawn sprinkler therefore fail, as a matter of law.

**J. There are no claims regarding landscaping before this Court.**

Plaintiff alleges that Ms. Dyer has cut plants that plaintiff planted in the boundary berm in front of her house. This claim was not identified in her complaint, in discovery responses, or in deposition testimony.

When asked in discovery requests to identify all instances of trespass and

waste, plaintiff failed to mention any incident where defendants cut plants in the boundary berm.

This “boundary berm” was the disputed area identified by the plaintiff’s first (erroneous) survey. With the corrected survey, it was undisputed that the “berm” is entirely on the defendants’ property, and therefore there could be no trespass. Thus, even if the claim existed, it was properly dismissed in the October 2008 Order. Finally, plaintiff never identified any damages from this alleged trespass, which provides yet another reason why this claim, if it ever existed, was properly dismissed.

**K. Plaintiff has never pled battery and cannot satisfy its elements.**

Plaintiff, perhaps realizing that the trespass claims are meritless, appears to seek to reconstitute her lawsuit as one involving a civil claim for “battery,” a claim she first raised in response to the second summary judgment motion. But a review of plaintiff’s Amended Complaint (CP 6-8), and discovery responses (CP 202-07) does not demonstrate any claim of battery.

In response to the second summary judgment motion, plaintiff submitted a declaration in which she stated that Dyer sprayed her with a garden hose: “...spraying my car, my yard and me...” CP 228. Plaintiff’s declaration contradicts her deposition testimony, where, at length, she was asked to describe incidents in which she felt “intimidated”

or “accosted” by defendants. In that questioning, Ms. Shoblom describes the alleged hose-spraying incident:

“...there she was with her hose in her hand in my property...spraying my yard, spraying my driveway and my truck, smiling at me, having a good old time spraying it, and then she sprayed my window of my house as well...”

CP 269.

Plaintiff testified that her neighbor sprayed her truck, her yard, her driveway, and the window of her house “having a good old time,” but she failed to mention that Ms. Dyer had committed a battery and sprayed Ms. Shoblom personally with the offending water. CP 269. Plaintiff cannot now contradict her deposition testimony with a subsequent declaration. *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). Even if plaintiff’s suit alleged battery (which it did not), she fails to meet the elements of battery. To have the requisite intent for a civil action premised on an act of battery, the defendant must have intentionally inflicted harmful bodily contact. *Garratt v. Dailey*, 46 Wn.2d 197, 200, 279 P.3d 1091 (1955). “To have the requisite intent, the actor must know with substantial certainty that the harm will occur.” *Garratt*, 46 Wn.2d 197, 200, 279 P.3d 1091. Plaintiff’s declaration and her deposition testimony fail to support the requisite showing that defendants intended for any water from a garden hose to hit Ms.

Shoblom and intended for the drops of water to be a harm-causing bodily contact. Accordingly, any prospective battery claims must be dismissed.

**L. Plaintiff has not sought injunctive relief and cannot satisfy the requirements for injunctive relief.**

Though plaintiff references injunctive relief in various parts of her brief, she never asked for injunctive relief in her Complaint or Amended Complaint. Plaintiff's Amended Complaint contains a section entitled "PRAYER FOR RELIEF." In this section, plaintiff does not request injunctive relief. CP 7-8. Plaintiff did file a motion for leave to amend to add a claim for injunctive relief, but that motion was noted for after the motion for summary judgment on November 9, 2009 and therefore was never heard.

Even if plaintiff had pled injunctive relief, she cannot meet her burden of justifying this remedy. "An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury." *Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 796, 638 P.2d 1213 (1983). One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate

invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. *Kucera v. State*, 140 Wn.2d 200, 209-10, 995 P.2d 63 (2000). Further, “injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law.” *Tyler Pipe Industries, Inc.*, 96 Wn.2d at 791.

Plaintiff alleged past trespasses, but offered no evidence of a continuing trespass or impending trespass. Plaintiff did not allege any actionable harassment. She can identify no well-grounded fear of an immediate invasion of a right. Also, she seeks monetary damages as her plain and complete relief for her alleged injuries. Because she cannot meet the requirements to obtain injunctive relief, and, instead, actually seeks monetary damages as a complete remedy at law, plaintiff may not seek injunctive relief. Therefore, any claim for injunctive relief, to the extent it existed, was properly dismissed.

**M. Plaintiff’s allegations of “emotional distress” do not save her trespass claims.**

Plaintiff argues that even for the claims for which she has no actual damages, she nonetheless has a valid trespass claim because she is alleging emotional distress damages. But there is no case law support for the proposition that emotional distress can provide the necessary “actual and substantial damage” in the absence of other damage. In other words,

if a plaintiff can prove “actual and substantial” damage to the property as a result of the trespass, then she may be able to also collect emotional distress damages.

Plaintiff cites several cases to support her argument that emotional distress damages are available. Many of these cases are not in the trespass context. In those cases, the courts held that if the plaintiff can prove the intentional tort independently, then he or she may be entitled to emotional distress, as an element of her damages. *See e.g., Cagle v. Burns and Roe, Inc.*, 106 Wn.2d 911, 726 P.2d 434 (1986). In *Cagle*, a wrongful termination case, the court held that if intentional wrongful termination is proved, then a plaintiff may be able to recover emotional distress. But in that type of case, whether a person has suffered emotional distress does not prove liability. Rather, liability is separately proved and then, if proved, emotional distress is an element of damages. The court made clear the distinction between liability and damages when it discussed the standard for proving these damages. The court wrote that “[t]his court has not required a plaintiff to prove that emotional distress was intended or reasonably foreseeable by the defendant in order to recover damages for emotional distress *where there is an independent basis for liability.*” *Id.* at 920 (emphasis added).

Thus, the emotional distress damages in *Cagle* did not prove liability as plaintiff tries to do here. Additionally, plaintiff cited to no common law trespass cases to support her argument. She did cite to two timber trespass cases, *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 942 P.2d 968 (1997) and *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997). But in both of those cases, the factfinder found separate actual and substantial damages. *Birchler*, 133 Wn.2d at 109-110; *Allyn*, 87 Wn. App. at 735. The plaintiff was then allowed to also recover emotional distress damages. Those cases do not support plaintiff's argument.

Emotional distress damages alone cannot serve as the "actual and substantial damage." To hold otherwise would mean that any plaintiff could avoid summary judgment on an trespass claim simply by alleging emotional distress damages. But even if this could support a trespass claim alone, there is no evidence that plaintiff's emotional distress is "actual and substantial."

**N. The trial court properly awarded fees and costs.**

RCW 4.84.250 pertains to actions in which the amount of damages claimed does not exceed \$10,000. It provides that in such actions "there shall be allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees." RCW 4.84.250. A defendant is the prevailing party for purposes of this fee

statute when the plaintiff recovers nothing. RCW 4.84.270. In actions where RCW 4.84.250 is applicable, Washington law mandates an award of attorneys' fees and costs to the prevailing party. RCW 4.84.270

The common law has added a prerequisite to the award of attorney's fees under RCW 4.84.250: "The party from whom fees are sought must have received notice prior to trial that it may be subject to fees under the statute." *Public Utilities District No. 1 of Grays Harbor v. Crea*, 88 Wn.App. 390, 393-94, 945 P.2d 722 (1997). Division 2 of the Court of Appeals of Washington provides the controlling rule of law regarding this notice requirement in *Public Utilities District No. 1 of Grays Harbor*, 88 Wn.App. 390, 945 P.2d 722. The *Crea* court held that plaintiff had "actual notice" that it could be assessed attorneys' fees because plaintiff in that case cited RCW 4.84.250 in its own settlement document, thereby demonstrating "knowledge of the potential for an adverse award of attorney's fees if the [plaintiff] did not prevail." *Id.* at 395. Because plaintiff asserted that she was entitled to fees under RCW 4.84.250 in her Amended Complaint, plaintiff here has the requisite actual notice, triggering the statutorily-mandated award of defendants' fees and costs. *Public Utilities District No. 1 of Grays Harbor*, 88 Wn.App. 390, 393-94, 945 P.2d 722.

Plaintiff's Amended Complaint alleged that she was "entitled to attorneys [sic] fees under 4.84.250-300." In her prayer for relief, plaintiff reasserted RCW 4.84.250, seeking "interest and attorneys [sic] fees" under that statute. Plaintiff cited the statute because she alleged that her "per occurrence damages in this case total less than \$10,000.00..." *Id.*

Though plaintiff's Amended Complaint asserts RCW 4.84.250 as a vehicle for recovery of her fees and costs in this litigation, she did not set forth a specific amount of damages. However, in responses to discovery, plaintiff's alleged damages were:

- \$1,954.80 for the replacement cost of the fence
- \$1,150.00 for the erroneous Garman survey
- \$300 to replace the survey stakes plaintiff alleged went missing

CP 412.

Plaintiff's claims were dismissed on November 6, 2009. Because plaintiff recovered nothing in this lawsuit, defendants are the prevailing parties. RCW 4.84.250 mandated an award of reasonable attorneys' fees and costs "to be fixed by the court."

As to the amount of the fee award, the Standard of Review is abuse of discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). The Supreme Court has indicated that the "purpose of RCW

4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims.” *Beckmann v. Spokane Transit Authority*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). To that end, defendants made numerous settlement offers in this case. In October 2008, just before the first summary judgment hearing, defendants offered to, among other things, pay half the cost of extending the fence between the two parties and paying to replace fence boards that plaintiff claimed were damaged by defendants’ stain. CP 316-17. Right after the first summary judgment hearing, defendants made a similar offer, and also offered to pay \$500. CP 318-19. Finally, in October of 2009, was an offer for \$3,213.42. CP 320. Plaintiff rejected all settlement offers.

On November 6, 2009, plaintiff’s claims were dismissed with prejudice. Through October 2009, Defendants incurred over \$30,000 in legal fees and costs. CP 321-358. This amount did not include the November fees, which included the preparation for and attending of the hearing on summary judgment. The trial court’s decision to allow \$25,000 in fees was more than reasonable, especially considering the history of the settlement offers in this case.

Plaintiff argues that there was an improper lodestar analysis. But there was no lodestar analysis here, as that concept is used in dealing with contingent fee cases. Rather, the court’s award was based on its review of

the submitted bills in this case. All of the charges by defendants in this case were on a straight hourly basis.

Even if a lodestar analysis was done here, the fees awarded were appropriate. The Supreme Court has ruled that under a lodestar methodology, a court must first determine that counsel expended a reasonable amount of time in securing a successful recovery for the client. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). This requires the exclusion of any wasteful or duplicative time spend pertaining to unsuccessful theories or claims. *Id.* All that is required for the Court to undertake this analysis is for counsel seeking fees to provide records documenting the hours worked and for the Court to determine that the attorneys' rate is reasonable and to exclude duplicative or wasteful fees and costs. *Id.*

A careful examination of defense counsel's fees and costs reveals little or no duplicative time billed, and no wasteful or unsuccessful efforts undertaken on behalf of the defendants. Defendants' first successful Motion for Summary Judgment involved careful research into the nature and use of the boundary fence separating plaintiff's and defendants' properties. Plaintiff's boundary-related trespass claims threatened to take a significant portion of defendants' real property. Finding numerous previous owners of both properties, defense counsel obtained numerous

declarations towards a successful dismissal of all plaintiff's boundary-related claims. In addition, defendants brought a Motion to Compel in an effort to flesh out plaintiff's damages claims based on plaintiff's refusal to engage in discovery. Finally, defense counsel deposed plaintiff and defended the depositions of the defendants. CP 402-03.

**O. Request for attorneys' fees and costs on appeal.**

Pursuant to RAP 18.1, RCW 4.84.010, and RCW 4.84.250-300, defendants request all recoverable fees and costs on appeal.

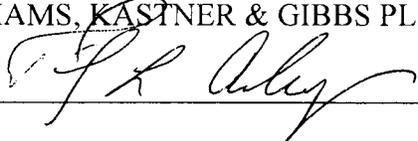
**CONCLUSION**

This is a case that never should have been brought. The plaintiff cannot make out any valid claims and the trial court should be affirmed in all respects.

DATED: September 15,  
2010

WILLIAMS, KASTNER & GIBBS PLLC

By \_\_\_\_\_

  
Timothy L. Ashcraft, WSBA #26196  
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 15th day of September, 2010, I caused a true and correct copy of the foregoing document, "RESPONDENTS' BRIEF," to be delivered by electronic mail and Legal Messenger to the following counsel of record:

Counsel for Appellant(s):

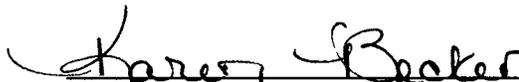
Mailing Address:

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DATED this 15th day of September, 2010, at Tacoma,

Washington.

  
Karen Becker, Legal Assistant to  
TIMOTHY L. ASHCRAFT