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COURT OF APPEALS  
DIVISION II

2014 SEP 18 PM 1:44

No. 45927-2-II

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

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GWYNETH POPE and DANIEL STACEY,

Appellants/Cross-Respondents,

v.

BRUCE and PATRICIA GARDNER,

Respondents/Cross-Appellants.

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**BRIEF OF RESPONDENTS/CROSS-APPELLANTS**

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## I. INTRODUCTION

This is a case that should never have been filed, never pursued, and never appealed. The Plaintiffs, Gwyneth Pope and Daniel Stacey (“Pope/Stacey”), filed suit seeking a prescriptive easement even though there was an express agreement governing that easement and precluding, as a matter of law, any claim for a prescriptive easement. Pope/Stacey filed suit seeking to enforce setback regulations even though there is no private right of action to enforce these regulations. Pope/Stacey filed suit seeking trespass damages even though they lacked evidence of actual and substantial damages necessary to claim trespass. Pope/Stacey filed suit seeking their attorney fees under a statute that requires intentionally wrongful conduct even though the encroachments by Defendants Bruce and Patricia Gardner were the result of an innocent mistake. Pope/Stacey then continued this suit even after the Gardners voluntarily removed the encroachments.

The trial court dismissed Pope/Stacey’s claims as a matter of law because these claims were not supported by Washington law or the facts of this case. The trial court also awarded the Gardners their attorney fees for defending against the easement claim because they were the prevailing party under the agreement governing the easement. Pope/Stacey have appealed these rulings without articulating viable grounds for reversing the trial court.

Because Pope/Stacey pursued meritless claims, the trial court abused its discretion when it denied the Gardners' motion for fees under CR 11. The Gardners have cross-appealed the denial of their CR 11 motion. The Gardners are also seeking their attorney fees and costs incurred in responding to this appeal.

Specifically, the Gardners request that this Court: (1) affirm the trial court's dismissal of Pope/Stacey's trespass claim; (2) affirm the trial court's award of attorney fees to the Gardners as the prevailing part under the agreement governing the easement; (3) reverse the trial court's denial of Gardners' CR 11 motion; and (4) award the Gardners their attorney fees and costs on appeal.

## **II. ASSIGNMENT OF ERROR FOR THE GARDNERS' CROSS-APPEAL**

### **A. Assignment of error for cross-appeal**

1. Did the trial court abuse its discretion by failing to impose CR 11 sanctions against Pope/Stacey and their counsel?

### **B. Issue related to assignment of error for cross-appeal.**

1. Did the trial court abuse its discretion when it failed to impose CR 11 sanctions against Pope/Stacey and their counsel for pursuing damages not recognized under Washington law and for a time period not allowed under Washington law? (*Assignment of Error No. 1*)

### III. COUNTERSTATEMENT OF THE CASE

#### A. The Parties and their adjoining properties

Plaintiffs Gwyneth Pope and Daniel Stacey (hereafter "Pope/Stacey") are the owners of property at 1703 Summit Lakeshore Road, Northwest, Olympia, Washington, 98502, legally described as Lot 202 of Summit Lake Tracts No. 2 (the "Pope/Stacey Property"). Clerk's Papers (CP) at 5. Prior to 2004, the Pope/Stacey Property had been owned by James Heath. CP at 96.

Defendants Bruce and Patricia Gardner own adjoining property commonly known as 1701 Summit Lakeshore Road, Northwest, Olympia, Washington 98502 and legally described as Lot 201 of Summit Lake Tracts No. 2 (the "Gardner Property"). CP at 6, 96. The Gardners purchased the Gardner Property in 2002. CP at 96.

In the spring of 2003, the Gardners hired Sound Surveyors to assist in locating property corners at the Gardner Property. CP at 96, 102-03. Jay Salmon, a licensed surveyor at Sound Surveyors, met at the Gardner Property with Bruce Gardner and James Heath, who at that time owned the Pope/Stacey Property. CP at 102-03. Salmon, Gardner and Heath located Plat monuments for the Plat of Summit Lake No.2 and then located rebar property corner markers on the Gardner property that were a close match to the record platted distances. CP at 97, 103. Salmon, Gardner and Heath all believed at the time that they had properly located the northerly property corners of the Gardner Property. CP at 97, 103. Relying on these property

corners, the Gardners constructed a residence, and other improvements, including a deck, exterior steps, and retaining wall, in 2003. CP at 97.

**B. Pope/Stacey purchase their property and a survey discloses an error.**

Pope/Stacey purchased the Pope/Stacey Property in 2004 and in December 2004 retained Apogee Land Surveying to survey the boundaries of their property. CP at 6. The 2004 Apogee survey disclosed that the 2003 property corner location by Salmon, Gardner and Heath was incorrect. *Id.* Specifically, the Apogee survey identified a brick retaining wall and an exterior stairway constructed by the Gardners that encroached slightly onto the Pope/Stacey Property, and an exterior deck and stairwell that were constructed within the 6-foot setback of the Gardner Property. CP at 6, 9.

**C. Pope/Stacey file suit and the trial court dismisses their easement and setback violation claims.**

In 2010, Pope/Stacey sued the Gardners in Thurston County Superior Court. The Complaint sought a prescriptive easement for a driveway across the Gardners' property, injunctive relief requiring that the Gardners remove the encroaching improvements, trespass damages, and attorney fees under RCW 4.24.630. CP at 5-10, 401.

In August 2011, the Gardners moved for partial summary judgment, seeking dismissal of Pope/Stacey's prescriptive easement claim because there was an existing agreement governing the driveway easement. CP at 21-22. Under Washington law, the existence of an agreement prohibits a claim for prescriptive easement. In addition, the Gardners sought to dismiss

Pope/Stacey's claim for a violation of Thurston County's setback regulations because there is no private right of action to enforce these regulations. CP at 22-23. In October 2011, the trial court granted the motion and dismissed the easement and setback claims. CP 69-70. Pope/Stacey have not appealed the dismissal of these claims. *See* CP at 235.

**D. Pope/Stacey's trespass claim**

In addition to their easement and setback violation claims, Pope/Stacey also asserted a trespass claim. CP at 7. The trespass claim stemmed from a brick retaining wall and portion of an exterior stairway mistakenly constructed by Gardners on the Pope/Stacey Property (collectively referred to as the "Encroachments"). CP at 7. Pope/Stacey also claimed that the Gardners built their deck, wall, and a corner of their house in violation of Thurston County's setback regulations. CP at 6-7.

For the trespass claim, Pope/Stacey sought damages and injunctive relief requiring the Gardners to remove the Encroachments. CP at 7-8. In August 2012, the Gardners agreed to remove all Encroachments and this work was completed by September 2012. CP at 97. Although the Encroachments were removed and the Pope/Stacey property fully restored in September 2012, Appellant's brief incorrectly claims that the Encroachments were not removed until July 2013. *See* App. Br. at 5, 9, 11.

Even though the Encroachments had been removed, Pope/Stacey continued to pursue a trespass damages claim. Pope/Stacey argued that the

Encroachments caused \$56,000.00 in damages resulting from a delay in constructing a new residence on the Pope/Stacey Property. CP at 91, 94-5. In addition, Pope/Stacey sought their attorney fees under RCW 4.24.630, which allows attorney fees and other damages for the intentional injury to property. CP at 8, 401.

To support their damages claim, Pope/Stacey relied upon on a report prepared by Todd Wilmovsky, a real estate appraiser practicing in Thurston County. CP 91. Mr. Wilmovsky concluded that Pope/Stacey suffered \$56,140.25 in loss of value damages resulting from the alleged inability to construct a hypothetical 1000–1200 square foot house on the Pope/Stacey Property in 2005. CP at 94-5.

There were three elements of the Wilmovsky report that were critical to his analysis. First was the type of damage claimed: a loss in property value of \$56,140.25 stemming from the inability to construct the hypothetical residence. CP at 94-5. Second, was the time period over which the loss in value damages were measured: 2005 to 2012. *Id.* Third was the underlying assumption that Pope/Stacey were unable to construct a residence on their property as a result of the Encroachments. CP at 94-5.

**E. The trial court summarily dismisses the trespass damages claim and the claim for attorney fees under RCW 4.24.630.**

In December 2013, the Gardners moved for the summary judgment dismissal of the trespass claim, contending that Pope/Stacey had failed to establish actual and substantial damages, a required element of a trespass claim. CP at 83-88. Pope/Stacey had failed to establish damages as a matter

of law because their damages were hypothetical: Pope/Stacey had never attempted to develop their property, and the Thurston County Planning Department stated that the existence of the Encroachments would not have precluded approval of a development application for the Pope/Stacey Property had a development application been filed. CP at 100-01. Also, the evidence of damages provided by Mr. Wilmovsky, Pope/Stacey's expert, was inadmissible because he used the wrong standard for calculating damages, loss of value, and he applied this legally incorrect standard over a time period, from 2005 to 2012, that violated the statute of limitations for a trespass claim. CP at 86-88. Because Pope/Stacey's damages were hypothetical and calculated using the wrong standard over an improper period of time, they could not establish the actual and substantial damages necessary to maintain a trespass claim.

In addition, the Gardners moved for dismissal of Pope/Stacey's claim for attorney fees under RCW 4.24.630. CP at 88. That statute requires that a party intentionally and unreasonably injure another party's property, a standard that cannot be met as a matter of law by the inadvertent encroachment of the Gardners.

On January 17, 2014, the trial court granted the Gardners' summary judgment motion and dismissed Pope/Stacey's trespass damage claim and claim for fees under RCW 4.24.630. CP at 154-55. Pope/Stacey has appealed the trial court's summary judgment order, CP at 235-36, although they have not assigned error to trial court's dismissal of their claim for attorney fees under RCW 4.24.630. *See* App. Br. at 2.

**F. The Gardners' move for their attorneys fees and for CR 11 sanctions.**

On January 27, 2014, the Gardners moved for an award of attorney fees for successfully defeating Appellants' prescriptive easement claim. CP at 156-63. Previously, the trial court had granted the Gardners' motion to dismiss the easement claim because there was an agreement allowing the Gardners to terminate the easement and the existence of an agreement prohibits a prescriptive easement claim. CP at 21-22, 70. Because the agreement had an attorney fee clause and the Gardners were the prevailing party under the agreement, the trial court subsequently awarded the Gardners \$6,643.75 for their attorney fees related to the easement claim. CP at 231-34.

On January 27, 2014, the Gardners also moved for their attorney fees under CR 11 for Pope/Stacey's pursuit of their trespass damages claim. CP at 156-63. The trial court deferred ruling on the CR 11 motion to allow counsel for Pope/Stacey an opportunity to identify in the record deposition testimony of Mr. Wilmovsky that would indicate that he based his damage assessment upon the proper standard. CP at 549. Rather than identifying any supporting deposition testimony, Pope/Stacey attempted to supplement the record with a new declaration of Mr. Wilmovsky. CP at 243-53. On March 10, 2014, the trial court struck the supplemental declaration as nonresponsive, but nevertheless denied the Gardners' motion for CR 11 sanctions. CP at 549-50. The Gardners' have cross-appealed the

denial of their CR 11 motion. Supp. Clerk's Papers, filed September 16, 2014.

#### **IV. RESTATEMENT OF THE ISSUES**

1. As a matter of law, did the trial court properly dismiss Pope/Stacey's claims for trespass damages when the type of damages sought are not recognized under Washington law and are for a time period that exceeds the statute of limitations for a continuing trespass claim?

2. As a matter of law, did the trial court properly dismiss Pope/Stacey's claim for attorney fees under RCW 4.24.630 because the Gardners' encroachments were the result of an innocent error and not intentionally wrongful conduct?

3. Did the trial court properly award attorney fees to the Gardners as the prevailing party on the Appellants' easement claim?

#### **V. ARGUMENT**

##### **A. Standard of review**

An appellate court engages in de novo review of a trial court's grant of summary judgment and may affirm on any basis the record supports. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 802, 54 P.3d 1266 (2002). Summary judgment shall be granted if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Doherty v. Metro. Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996). The initial burden under CR 56(c) is on the moving party to prove that no issue is genuinely in dispute. *Young v. Key Pharm., Inc.*,

112 Wn.2d 216, 225, 770 P.2d 182 (1989). Thereafter, the burden shifts to the non-moving party to establish that a triable issue exists. *Schaff v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate if reasonable persons could reach only one conclusion from all of the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

For an award of attorney fees, an appellate court “applies a dual standard of review.” *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (Div. II 2014). The trial court’s initial determination of the legal basis for an award of attorney fees is reviewed de novo. *Id.* The decision to award or deny attorney fees and the reasonableness of any award is reviewed for an abuse of discretion. *Id.* A court “abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons.” *Id.* (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997)).

Here, the trial court initially dismissed Pope/Stacey’s easement claim on October 7, 2011, concluding that this claim was prohibited by an express agreement. CP 69-70, 232. Pope/Stacey have *not* appealed the October 7, 2011 order. *See* Pope/Stacey’s Notice of Appeal, CP at 235-42. Because the trial court’s initial determination of the legal basis for an award of attorney fees has not been appealed, the only remaining issue is whether the trial court abused its discretion in awarding attorney fees and the reasonableness of the award.

**B. A continuing trespass claim requires actual and substantial damages measured by loss of use accruing within three years before the suit is filed.**

To establish trespass, “a 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 Washington Supreme Court has held that the failure to show actual and substantial damages warrants the summary judgment dismissal of a trespass claim:

The elements that we have adopted for an action in trespass . . . require that a plaintiff has suffered actual and substantial damages. Since this is an element of the action, the plaintiff who cannot show that actual and substantial damages have been suffered should be subject to dismissal of his cause upon a motion for summary judgment.

*Bradley v. Am. Smelting & Ref. Co.*, 104 Wn. 2d 677, 692, 709 P.2d 782 (1985).

The standard for calculating damages and the time period for measuring these damages depends upon whether the trespass is a “permanent” or “continuing” trespass. The following sections discuss these standards and the applicable time period in greater detail and establish why Pope/Stacey cannot show the actual and substantial damages necessary to overcome summary judgment.

**1. The permanent versus continuing trespass distinction affects the statute of limitations and the standard for measuring damages for a trespass claim.**

Washington recognizes both permanent and continuing trespass claims. D.K. DeWolf, K.W. Allen, 16 Wash. Prac.: *Tort Law And Practice* § 10:13 (4th ed. 2013) (hereinafter “DeWolf”). What distinguishes a permanent trespass from a continuing trespass is the “reasonable abatability of an intrusive condition.” See *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 125, 977 P.2d 1265 (1999). If the trespass can be reasonably cured, then it is deemed a continuing trespass:

A trespass is abatable, irrespective of the permanency of any structure involved, so long as the defendant can take curative action to stop the continuing damages. The condition must be one that can be removed “without unreasonable hardship and expense.” If an encroachment is abatable, the law does not presume that such an encroachment will be permanently maintained. The trespasser is under a continuing duty to remove the intrusive substance or condition.

*Fradkin.*, 96 Wn. App. at 125. See also DeWolf, 16 Wash. Prac. at § 10.13 (“A continuing trespass . . . is identifiable by the fact that a continuing trespass is reasonably abatable. A trespass is abatable . . . so long as the defendant can take curative action to stop the continuing damages.”)

Here, the Encroachments were removed in 2012. CP at 97. Because the Encroachments were abatable, the continuing trespass doctrine applies to this case.

**a) The statute of limitations for a continuing trespass claim limits recovery to three years before the suit is filed.**

If the trespass is a *permanent* trespass, then the statute of limitations in RCW 4.16.080(1) requires that the claim be brought within three years of the trespass. *See Fradkin*, 96 Wn. App. at 124. A permanent trespass claim brought more than three years after the initial trespass is time barred. *Id.* (“Because Fradkin sued more than six years after the initial injury, his trespass claim is barred by the statute of limitations unless it may properly be characterized as a continuing trespass.”)

If, however, the trespass is a *continuing* trespass, then “the statute of limitations excludes recovery for any trespass occurring more than three years before the date of filing.” *Woldson v. Woodhead*, 159 Wn.2d 215, 219, 149 P.3d 361 (2006). As the *Woldson* court stated: “damages are recoverable from three years before filing until the trespass is abated or, if not abated, until the time of trial.” *Woldson*, 159 Wn.2d at 223. *See also Crystal Lotus Enterprises Ltd. v. City of Shoreline*, 167 Wn. App. 501, 506, 274 P.3d 1054 (2012) (“The remedies for a continuing trespass are limited to injunctive relief and damages for injury incurred during the three years prior to filing the action.”).

**b) Damages for a continuing trespass claim are limited to loss of use rather than diminution in value of the land.**

The nature of the trespass—permanent or continuing—determines how damages are calculated:

Where a trespass has resulted in permanent or irreparable injury, the proper measure of damages is the difference between the value of the land before the trespass and immediately after. But, where the injury is not permanent and the premises may be restored to their original condition, a different rule prevails. In the latter case, the measure of damages is the reasonable expense of restoring the land and the loss of income pending such restoration within a reasonable time.

*Messenger v. Frye*, 176 Wash. 291, 298-99, 28 P.2d 1023 (1934) (citations omitted). *See also Keesling v. City of Seattle*, 52 Wn.2d 247, 253, 324 P.2d 806 (1958) (“if the invasion was permanent, the damages would be the reduction in market value due to its presence, and if it was temporary, the damages would be the cost of restoration and the loss of use.”); *Olympic Pipe Line Co. v. Thoeny*, 124 Wn. App. 381, 393-94, 101 P.3d 430 (2004) (“Damages for a temporary invasion or trespass are the cost of restoration and the loss of use.”).

Applying the wrong standard for determining trespass damages warrants summary judgment dismissal. *Wallace*, 134 Wn. App. at 17. In *Wallace*, the plaintiff claimed that its property values decreased as a result of the county’s continuing trespass. *Id.* Noting that this is the wrong standard for a continuing trespass, the *Wallace* court held that the plaintiff had failed to establish the required element of actual and substantial damages:

Gee Cee also failed to show actual and substantial damages, necessary to avoid summary judgment. *See Bradley* 104 Wash.2d at 692, 709 P.2d 782 (failure to show actual and substantial damages suffered is subject to dismissal). Gee Cee asserts only that its property values

have diminished by 20 percent as a result of the County's trespass.

Property value depreciation is the measure of damages from *permanent* trespass, not from *continuing* trespass of the type Gee Cee alleges here. [citations omitted] Thus, Gee Cee failed to allege and to show any actionable damage resulting from intentional continuing trespass by the County.

*Wallace*, 134 Wn. App. at 17.

In addition, the plaintiff in *Wallace* improperly failed to limit its damages to the three years preceding the suit. *Id.* For these reasons, the *Wallace* court affirmed the summary judgment dismissal of the plaintiff's trespass claim. *Id.* at 17-18 ("Because Gee Cee failed to show, not only damages attributable to the preceding three years, but also any actual damages for continuing trespass, we affirm the trial courts' dismissal of its intentional trespass claims against the County.")

**2. Hypothetical or nominal damages do not satisfy the actual and substantial damages required in a trespass claim.**

In 1985, the Supreme Court in *Bradley* overruled prior case law and held that a trespass claim requires actual and substantial damages. *Bradley*, 104 Wn. 2d at 692-93. Subsequent decisions confirm that nominal or hypothetical damages will not suffice. See *Hedlund v. White*, 67 Wn. App. 409, 413 n.3, 836 P.2d 250 (1992) (citing *Bradley* and stating "the Supreme Court has eliminated [nominal] damages from Washington's law of trespass). See also *Exxon Mobil Corp. v. Freeman Holdings of Washington, LLC*, 779 F. Supp.2d 1171, 1183 (E.D. Wash. 2011), where the court applied Washington law and dismissed a trespass counterclaim because

“There is no evidence that FHW lost customers, was unable to service customers or sell fuel, or otherwise actually damaged by Exxon's [trespass].”

**C. The trial court properly granted summary judgment because Pope/Stacey did not establish actual and substantial damages accruing within three years of their suit.**

In their opening brief, Pope/Stacey acknowledge that loss of use is the standard for measuring damages for a continuing trespass claim. App. Br. at 10-11. Pope/Stacey also recognize that the limitations period for a continuing trespass claim is three years before the suit is filed. App. Br. at 8.

Pope/Stacey, however, do not explain how the evidence they presented to the trial court satisfied these standards. Appellants' brief, for example, does not claim that Pope/Stacey limited their damages to the three years prior to the suit being filed. *See* App. Br. at 9. Nor do they cite to any evidence that would indicate that Pope/Stacey limited their damages to the appropriate time period.

Regarding loss of use, Pope/Stacey claim that their expert based his damages upon loss of use. App. Br. at 10. Pope/Stacey, however, do not cite to the record to support this claim. As the following sections illustrate, the record below establishes that Pope/Stacey's expert used the wrong standard over an improper period of time to calculate damages. As a result, Pope/Stacey failed to present evidence of actual and substantial damages sufficient to overcome the Gardners' summary judgment motion.

**1. Pope/Stacey claim damages beyond the period allowed by law.**

Since this suit was filed on October 12, 2010, Pope/Stacey are limited to claiming damages, if any, for loss of use accruing after October 12, 2007. Pope/Stacey based their damages claim upon the report of their expert, Mr. Wilmovsky. CP 91-95. Mr. Wilmovsky, however, improperly used 2005 as the starting point for calculating damages: “The dates of damages began in 2005 and ran through 2012.” CP at 94. Because Pope/Stacey claimed damages for *five* years before their suit was filed, the trial court properly granted summary judgment dismissal. *See Wallace*, 134 Wn. App. at 17. (affirming summary judgment in part because plaintiff “failed to show the amount of actual property damage incurred within the three years preceding the filing of its lawsuits.”)

**2. Plaintiffs claim damages that are not allowed by law.**

Pope/Stacey compound their time period error by claiming damages not allowed by law. Under *Keesling*, *Messenger*, *Wallace* and *Olympic Pipe Line*, Pope/Stacey’s damages are limited to loss of use and cost of restoration, which is not an issue here because the Gardners restored the Pope/Stacey Property by removing the Encroachments in 2012. CP at 97. Applying the wrong standard merits the summary judgment dismissal of a trespass claim. *Wallace*, 134 Wn. App. at 17.

Instead of claiming damages for loss of use, Pope/Stacey claim damages for loss of value of their property over a seven-year period. CP at 94-5. Had the Encroachments not existed, Mr. Wilmovsky surmises that: (1) Pope/Stacey might have been able to develop their property in 2005 by

building a hypothetical 1000-1200 square foot house; (2) this hypothetically developed property would have increased in value from 2005 to 2012 by some \$56,000, and (3) the difference between 2005 and 2012 is a loss of value and the measure of Pope/Stacey's damage. CP at 94-5.

Even assuming they used the correct time period, Pope/Stacey are claiming damages (loss of value) not allowed for a continuing trespass claim. Under *Wallace* and the other authorities cited above, the trial court properly granted summary judgment dismissal.

**3. Plaintiffs' alleged damages are hypothetical.**

Furthermore, Pope/Stacey claim damages which are hypothetical. Pope/Stacey's claim of damages and the report of Mr. Wilmovsky share the same flawed assumption—that Pope/Stacey would have developed their property in 2005 but for the existence of the Encroachments. That assumption is unsupported because: (a) the Plaintiffs were never denied development of their property, (b) Plaintiffs never applied to develop their property, and (c) the Thurston County Planning Department indicated that had Plaintiffs filed an application, the existence of the Encroachments would not have precluded approval of a development application for the Pope/Stacey property. CP at 100-01.

With no evidence of actual and substantial damages, the trial court properly granted the summary judgment dismissal of the trespass claim

**D. Attorney fees under RCW 4.24.630 require intent to wrongfully trespass and injure property.**

Pope/Stacey also asserted a claim for attorney fees under RCW 4.24.630. CP at 8, 401. This statute allows treble damages and attorney's fees whenever a person intentionally goes onto the land of another and causes injury to the land, while knowing, or having reason to know that "he or she lacks authorization to so act." RCW 4.24.630(1). Case law establishes, however, that RCW 4.24.630 requires a level of knowledge and wrongful intent lacking in this case. In *Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 225 P.3d 492 (2010), for example, the court stated:

Given the context of related statutes, legislative history, and the statute's interpretation by other courts, we hold that RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts *and* knew or had reason to know that he or she lacked authorization.

*Clipse* at 575. *See also Grundy v. Brack Family Trust*, 151 Wn. App. 557, 571, 213 P.3d 619 (2009) ("[A]ttorney fees are appropriate in trespass actions when the trespass was wrongful.").

Here, the Gardners hired Sound Surveyors to assist them in locating the corners of the Gardner Property. Only after the surveyors had located the corners of their property did the Gardners construct a residence and other improvements on their property. There is no evidence that the Gardners intentionally encroached or had any reason to know that they were encroaching at the time of construction. The Gardners' inadvertent

encroachment fails to satisfy the requirement of RCW 4.24.630 that a defendant intentionally act to injure the plaintiff's property without authorization.

In addition, Appellants' brief does not assign error to the dismissal of their claim for attorney fees under RCW 4.24.630. *See* App. Br. at 2. Furthermore, Pope/Stacey do not cite to any case law or articulate a legally cognizable reason for asserting that the trial court should have waited until after trial before addressing "the issue of attorney fees under RCW 4.24.630." App. Br. at 11.

For these reasons, the trial court properly dismissed Pope/Stacey's claim for attorney fees under RCW 4.24.630.

**E. The trial court's award of attorney fees should be affirmed because the Gardners were the prevailing party in the prescriptive easement claim.**

In their Complaint, Pope/Stacey sought a prescriptive easement for a driveway across the Gardners' property. CP at 8. The Gardner Property and Pope/Stacey Property used to share a driveway that crossed both their properties. CP at 7, 30. In 1980, this driveway was the subject of an express easement agreement between the prior owners of both the Pope/Stacey and Gardner Properties. CP at 24-31. The easement agreement provides:

Both parties herein, their successors, heirs and/or assigns agree to allow the other to use a temporary driveway easement over and across Lots 201 and 202, Summit Lake No. 2. Each party has the right to terminate this agreement upon 60 days written notice to the other party in the event either party begins construction upon their respective lots which would impair the use of said easement.

CP at 30. The 1980 easement agreement was recorded under Thurston County Auditor's File No. 1122668. CP at 24-5, 30.

The 1980 agreement contains two attorney fee provisions in the event of litigation over the driveway easement.

Upon seller's election to bring *suit to enforce any covenant of this contract* ... the purchaser agrees to pay a reasonable sum as attorney's fees and all costs and expenses in connection with such suit...

If seller shall bring suit to secure an adjudication of the termination of purchaser's rights hereunder, and judgment is so entered, the purchaser agrees to pay a reasonable sum as attorney fees and all costs and expenses in connection with such suit...

CP at 28 (Section 11 of the 1980 Agreement). By statute these provisions are enforceable by both parties. *See* RCW 4.84.030.

Under Washington law, a party cannot obtain a prescriptive easement when there is an enforceable easement agreement in place. *See, e.g., Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001) ("Under the doctrines of both prescriptive easement and adverse possession, a use is not adverse if it is permissive."); *Anderson v. Secret Harbor Farms*, 47 Wn.2d 490, 494, 288 P.2d 252 (1955) ("If express permission is given to use the right of way, user does not ripen into a prescriptive right simply by lapse of time"). Thus, to succeed on their prescriptive easement claim, Pope/Stacey had to prove that the 1980 agreement was unenforceable.

On October 7, 2011, the trial court dismissed plaintiffs' prescriptive easement claim, correctly finding that the 1980 Agreement was enforceable and that it precluded any claim for prescriptive easement. CP 69-70. Pope/Stacey have *not* appealed the dismissal of their prescriptive easement claim. *See* CP at 235.<sup>1</sup>

On January 27, 2014, the Gardners moved for an award of attorney fees for successfully defeating Appellants' prescriptive easement claim. CP at 156-63. On February 14, 2014, the trial court awarded the Gardners \$6,643.75 for attorney fees under the 1980 agreement. CP at 231-34. Because the Gardners were the prevailing party under the 1980 agreement and because the amount of the attorney fees was reasonable, the trial court did not abuse its discretion.

**F. The Gardners' Cross-Appeal: the trial court erred in denying Gardners' CR 11 Motion for attorney fees.**

Under CR 11, an award of attorney fees and costs is appropriate when a party pursues baseless litigation without a factual or legal basis, or a good faith argument for an expansion of existing law:

CR 11 deals with two types of filings: those lacking factual or legal basis (baseless filings), and those made for improper purposes. [citations omitted] This case concerns a baseless filing. A filing is "baseless" when it is "(a) not well

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<sup>1</sup> Although not entirely clear, it appears that counsel for Pope/Stacey mistakenly believes that the trial court awarded attorney fees to the Gardners stemming from the dismissal of Pope/Stacey's trespass claim. App. Br. at 11. That is not case; the attorney fees were awarded because the Gardners were the prevailing party under the 1980 agreement. CP at 231-34.

grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.” [citation omitted]

*MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996).

The purpose of CR 11 is to deter baseless litigation. *Id.* at 885. The party seeking CR 11 sanctions should give notice to the offending party that it intends to seek CR 11 sanctions. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). The decision to award attorney fees under CR 11 “is left to the trial court's discretion and will not be disturbed in the absence of a clear showing of abuse.” *Tiger Oil Corp. v. Dep't of Licensing, State of Wash.*, 88 Wn. App. 925, 937-38, 946 P.2d 1235 (1997).

In October 2013, after the Encroachments had been removed, counsel for the Gardners notified Pope/Stacey's counsel that the trespass claim was meritless and that he would file a CR 11 motion if Pope/Stacey continued to pursue trespass damages. CP at 197, 199. When Pope/Stacey did not withdraw their trespass claim, the trial court dismissed the claim on summary judgment and the Gardners moved for CR 11 sanctions. CP at 154-55, 156-63.

Here, the trial court abused its discretion when it denied the Gardners' CR 11 motion. The following is a summary of why the Gardners are entitled to CR 11 sanctions. In this litigation, Pope/Stacey has:

- filed suit seeking a driveway easement even though access over the driveway was controlled by an existing agreement which precluded a claim for a prescriptive easement;

- filed suit seeking to enforce setback violations even though there is no private right of action to enforce these regulations;
- filed suit seeking their attorney fees under RCW 4.24.630 even though this statute requires intentionally wrongful conduct and the encroachments here were the result of an innocent mistake;
- pursued trespass damages even after the Gardners voluntarily removed the encroachments;
- pursued trespass damages even though they had no evidence of actual and substantial damages;
- pursued trespass damages even though their expert based his damages on the wrong legal standard applied over an incorrect period of time;
- pursued trespass damages claim even after counsel for the Gardners informed Pope/Stacey's counsel that the trespass damages claim was in violation of CR 11;
- disregarded the trial court's instruction to submit deposition testimony of their expert, Mr. Wilmovsky, by submitting a new declaration instead, which resulted in the court striking the new declaration of Mr. Wilmovsky. CP at 549-50.

Of these actions, the pursuit of trespass damages unrecognized in Washington, over a time period beyond that allowed under the applicable *statute of limitations*, is the most egregious. There was no legal theory supporting Pope/Stacey's claim and no argument to extend the law. Having

engaged in such conduct, an award of CR 11 sanctions was justified. Thus, the trial court abused its discretion in denying the CR 11 motion.<sup>2</sup>

**G. The Gardners request their attorneys fees on appeal.**

The Rules of Appellate Procedure provide:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before . . . the Court of Appeals . . ., the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RAP 18.1(a). The rules add that a party seeking fees “must devote a section of its opening brief to the request for the fees or expenses.” RAP 18.1(b).

An award of reasonable attorney fees must be based on a contract, statute, or recognized ground of equity. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 401, 932 P.2d 139 (1997). Here, the award would be based upon the 1980 agreement, which provides that the prevailing party is entitled to its attorney fees. *See* Section V.E on page 20. Because the Gardners are the prevailing party, they are entitled to their attorney fees on appeal incurred in enforcing the 1980 agreement.

In addition, where an appeal is frivolous, RAP 18.9(a) provides that the court may award an appropriate sanction, including the attorney fees incurred in defending the frivolous appeal. Here, Popc/Stacey have challenged the trial court’s dismissal of their trespass claim, but they have failed to cite to any evidence in the record to indicate that they limited their

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<sup>2</sup> Although the trial court denied the Gardners’ CR 11 motion, it did award them their fees incurred in responding to the new, supplemental declaration of Mr. Wilmovsky. CP at 550.

damages to the correct time period, namely the three years prior to the suit being filed. *See* App. Br. at 9. Nor do they cite to the record to support their assertion, on page 10 of their appellate brief, that their expert based his damages upon the correct standard, namely loss of use.

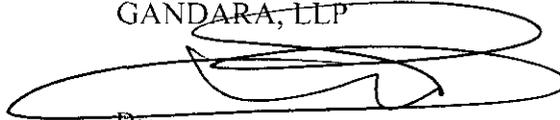
In addition, Pope/Stacey claim that the trial court erred in awarding attorney fees to the Gardners. App. Br. at 2, 11. Pope/Stacey, however, do not cite to the record or to any case law to support their assertion. Indeed, Appellants' brief fails to even mention the 1980 agreement that was the basis for the trial court's award of attorney fees to the Gardners. Because this appeal has articulated no viable grounds for reversing the trial court, the appeal is frivolous.

## VI. CONCLUSION

For the above reasons, the Gardners request this Court: (1) affirm the trial court's dismissal of Pope/Stacey's trespass claim; (2) affirm the trial court's award of attorney fees to the Gardners as the prevailing part under the 1980 agreement; (3) reverse the trial court's denial of Gardners' CR 11 motion; and (4) award the Gardners their attorney fees on appeal.

RESPECTFULLY SUBMITTED this 18 day of September, 2014.

VANDEBERG JOHNSON &  
GANDARA, LLP



By \_\_\_\_\_  
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Attorneys for Respondents/  
Cross-Appellants

**CERTIFICATE OF SERVICE**

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara, LLP. On the 18<sup>th</sup> day of September, 2014, in the manner indicated below, I caused a copy of:

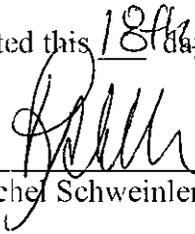
**BRIEF OF RESPONDENTS/CROSS-APPELLANTS**

to be served, via Legal Messenger, on Counsel for the Appellants:

Desiree S. Hosannah  
Hosannah Law Group, PLLC  
7403 Lakewood Drive, Suite 5  
Lakewood, WA 98499

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 18<sup>th</sup> day of September, 2014.

  
\_\_\_\_\_  
Rachel Schweinler