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NO. 688189-I

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

CAREY WILLIAM MEIRE, an individual,

Plaintiff-Appellant,

v.

BRADLEY AND MONICA GALVIN, a married couple,

Defendants-Appellees.

REPLY BRIEF OF APPELLANT

J. Will Eidson, WSBA No. 45040
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 386-7697
Facsimile: (206) 386-7500

Attorney for Appellant Carey William Meire

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I. INTRODUCTION

Meire's opening brief established that the trial court committed reversible error when it awarded the Galvins damages plainly not recoverable under RCW 4.24.630.¹ RCW 4.24.630 does not provide a claimant with relief for a trespass on a third-party's land. The opinion in *Colwell v. Etzell*, 119 Wn. App. 432, 81 P.3d 895 (2003), which the Galvins cited in their response brief, confirms this. Accordingly, the trial court's award of \$10,000 in damages to the Galvins for Meire's alleged trespass on the county's land, not the land of the Galvins', should be reversed and vacated. The trial court's Order trebling such damages should similarly be reversed and vacated.

Additionally, Meire's opening brief demonstrated that the trial court committed reversible error when, under RCW 4.24.630, it awarded the Galvins \$14,265 in damages that are not supported by sufficient evidence or proven to a reasonable certainty. In response, the Galvins merely pointed to the same insufficient evidence. Because the Galvins failed to produce evidence of their damages to a reasonable certainty, this Court should reverse and vacate the trial court's award of \$14,265, as well as the trial court's award trebling such damages.

¹ Defined terms (such as Meire, the Galvins, and the like) have the same meaning as in Meire's opening brief. In addition, "AB" refers to Appellees' Brief.

Meire's opening brief lastly established that the trial court committed reversible error when it awarded the Galvins all of their costs of suit, attorneys' fees, and investigative costs pursuant to RCW 4.24.630 and CR 11. In response, rather than address Meire's argument regarding RCW 4.24.630, the Galvins argue, for the first time, that the trial court acted under its "inherent authority." By raising this argument for the first time in their response brief, the Galvins have waived this argument. Even had the Galvins not waived this argument, the trial court's Order failed to make the required findings and allocations to support an award of costs and fees. As such, this new argument fails. Moreover, the Galvins' failure to respond to Meire's other arguments regarding RCW 4.24.630 and the trial court's failure to properly allocate the Galvins' fees and costs under CR 11, constitutes an implicit concession that such awards were in error.

II. ARGUMENT

A. **The Trial Court Erred In Awarding the Galvins Damages Clearly Not Recoverable Under RCW 4.24.630.**

As provided above, and in Meire's opening brief (at 8-10), the trial court improperly awarded the Galvins \$10,000 in damages under RCW 4.24.630 for Meire's alleged trespass on the county's land, not the land of the Galvins'. *See* CP 0021. RCW 4.24.630(1) provides a claim to a landowner whose land has been damaged as a result of some person going

onto the land of the claimant. Contrary to the Galvins' contention, RCW 4.24.630 does not provide a cause of action to a landowner, such as the Galvins, when that person's land was never entered.

To support their argument that RCW 4.24.630 permits a claimant to recover where there was no trespass on the claimant's land, the Galvins rely on three cases. AB at 20-21. The Galvins first rely on *Standing Rock Homeowners Association v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001), for the proposition that a RCW 4.24.630(1) claimant may recover for damage to another's land. AB at 20. In *Standing Rock*, an association of property owners installed and maintained a gate on the property of a non-party. *Standing Rock Homeowners Ass'n*, 23 P.3d at 529. The association also frequently repaired the gate, at its expense, when the gate was damaged. *Id.*

Because the association installed, maintained, and replaced the gate at its expense, the Court of Appeals allowed it to recover damages under RCW 4.24.630, even though the gate at issue, according to the court, was located on a non-party's land. But, as the Court of Appeals in *Colwell v. Ezzell*, 119 Wn. App. 432, 81 P.3d 895 (2003), noted "[a] careful reading" of *Standing Rock* makes clear that the gates were "located on Standing Rock's property and not located on another's land." As such, *Standing Rock* does not support the Galvins' argument.

Moreover, even assuming the gate was on a non-party's land, the facts in *Standing Rock* are plainly distinguishable. Indeed, in contrast to the association, the Galvins produced no evidence that they maintained or incurred any expense for maintaining the county's right-of-way. And the damaged property at issue was not located on the county's right-of-way; rather, the damaged land was purportedly the Galvins' own land. As such, *Standing Rock* is easily distinguishable from the facts of this case.

The Galvins also rely on *Saddle Mountain Minerals, LLC v. Joshi*, 152 Wn.2d 242, 95 P.3d 1236 (2004). AB at 21. Contrary to the Galvins' contention, the court in *Joshi* did not hold that "the holder of a non-possessory interest in real property can be damaged per RCW 4.24.630." *See id.* In fact, the Supreme Court in *Joshi* did not discuss RCW 4.24.630, other than to state that the plaintiff there was seeking damages under it, as well as under two separate theories. *Joshi*, 95 P.3d at 1240. Furthermore, *Joshi* is plainly distinguishable because the land that was allegedly trespassed on (a mineral estate) was owned by the claimant. *Id.* at 1237. Accordingly, *Joshi* is inapposite.

The Galvins lastly rely on *Colwell v. Ezzell*, 119 Wn. App. 432, 81 P.3d 895 (2003). AB at 21. Critically, the opinion in *Colwell* supports Meire's argument and refutes the reasoning of the court in *Standing Rock*. To this end, the court in *Colwell* explained:

In the current case, the trial court reasoned that *Standing Rock* “supports the idea that it is not so much the ‘trespass’ or ‘entry upon the land of another,’ but the (wrongful) invasion of a right in land that is protected by RCW 4[.]24[.]630.” CP at 72. The trial court’s analysis was supported by its determination that the decision in *Standing Rock* did not turn upon the entry upon the land of another, but instead “upon the wrongful invasion of the real property interest held by the plaintiffs [*Standing Rock*] in not having the easement leading to their [whose?] property overburdened, which easement happened to be located on others’ land.” CP at 72 (emphasis added). A careful reading of the facts in *Standing Rock* refutes this reasoning. The easement was not leading to *Standing Rock*’s property; it was located on *Standing Rock*’s property and not located on another’s land. The defendant wrongfully invaded *Standing Rock*’s property (trespass) and repeatedly destroyed *Standing Rock*’s gates on the easement he held, because he felt the gates were overburdening the easement leading to his land. *The statute’s premise is that the defendant physically trespasses on the plaintiff’s land.* There was no physical trespass in the present case.

Id. at 899 (emphasis added). Thus, the Court of Appeals in *Colwell* made clear that in order to recover under RCW 4.24.630, the defendant must have trespassed on the plaintiff’s land. *Id.* Here, applying *Colwell*’s holding, the Galvins’ claim under RCW 4.24.630 fails as a matter of law because their land was not trespassed on. *See id.* Therefore, this Court should reverse and vacate the trial court’s Order with respect to the award of \$10,000.

B. The Galvins Did Not Produce Sufficient Evidence Of Their Alleged Damages For Trespass.

Meire's opening brief (at 10-16) further established that the Galvins' other claims for damages under RCW 4.24.630(1) fail as a matter of law because the Galvins failed to produce sufficient evidence of their damages. The Galvins, in response, failed to refute this argument. *See* AB at 13-19. Rather, the Galvins' response merely repeats the insufficient evidence it produced at trial. *Id.*

The Galvins' brief also attempts to explain away conflicting evidence. *Id.* Starting with the Galvins' argument regarding the PDS Notice of Violation, they argue that "the Notice of Violation was issued long after the dumping of the Meire waste and debris." AB at 15. This argument, however, begs the question of whether Meire, as the Galvins contend, disposed of waste on the Galvins' property. To this end, the Galvins produced insufficient evidence at trial that Meire disposed of any waste on the Galvins' property.

Additionally, the photographs the Galvins direct this Court to review do nothing to prove that *Meire* (as opposed to the Galvins themselves) disposed of waste on the Galvins' property. *See* AB at 15. Rather, the photographs, at best, merely illustrate that waste is located on the Galvins' property, which is consistent with the Notice of Violation and

the Galvins' testimony. Exs. 71 & 72; RP (March 20, 2012) at 894 & 896. Indeed, at trial the Galvins testified that the fill material used to construct a road on his property "came from a structural demolition on Point Roberts." *Id.* at 894. Similarly, the Galvins admitted that this "fill material" consisted of "broken-up sidewalk and other chunks of concrete." *Id.* at 896. Thus, this testimony evidences the Galvins, themselves, disposed of the waste they complain of.

Furthermore, the Galvins' argument regarding Brian Calder's testimony is insufficient to support the amount of waste disposal damages awarded by the Court. *See* AB at 17. Indeed, Mr. Calder never testified as to the amount of such damages, nor the fact that any waste was "toxic." *See* RP (March 19, 2012) at 637-651. Also, Mr. Calder never testified as to what material was placed on the Galvins' property by Meire or the Galvins (through their agent Mr. Calder). *See id.*; *see also* RP (March 20, 2012) at 896-897. Bob Jewell's testimony was similarly insufficient and did not establish the amount of such damages to a reasonable certainty. RP (March 19, 2012) at 653-666. Accordingly, the Galvins' response to Meire's insufficiency argument fails, and this Court should therefore

reverse and vacate the Court's Order awarding the Galvins damages under RCW 4.24.630.²

C. The Trial Court's Order Awarding The Galvins All Of Their Costs and Attorneys' Fees Should Be Vacated.

As noted in Meire's opening brief (at 16-25), the trial court awarded the Galvins all of their "costs of suit, investigative costs, and attorney fees, pursuant to RCW 4.24.630 and CR 11." CP 0022. In awarding the Galvins all of their costs and fees, the trial court failed to allocate the award between those costs and fees properly recoverable under RCW 4.24.630 and those costs and fees recoverable, if at all, under CR 11. *See* CP 0016-0024. Instead, the trial court lumped all of the Galvins' fees and costs together, and then purported to award them to the Galvins, "pursuant to RCW 4.24.630 and CR 11." CP 0022. This alone requires a remand to the trial court so that it can make a proper allocation of costs and fees. But regardless of how a court would allocate the Galvins' costs and fees, for the reasons discussed below, the costs and fees awarded in the trial court's Order cannot stand under either RCW 4.24.630 or CR 11, and this Court should reverse and vacate those awards.

² In their brief, the Galvins clarify that Ryan Bradley and Ryan Long are separate individuals. AB at 12. This distinction is insignificant though because the Galvins' testimony makes clear that Messrs. Bradley and Long were both hired to defend against Meire's claims. And, as stated in Meire's opening brief (and implicitly conceded in the Galvins' brief), costs of defense are not recoverable under RCW 4.24.630.

Similarly, the Court's award cannot stand on grounds that it acted under its "inherent authority."

Starting with the award under RCW 4.24.630, the Galvins' response brief does not argue that the trial court correctly awarded the Galvins all of their costs and fees under RCW 4.24.630. *See* AB at 21-25. Thus, the Galvins implicitly concede that the trial court erred to the extent it awarded the Galvins all of their costs and fees under RCW 4.24.630. More specifically, the Galvins concede that the trial court erred when it awarded the Galvins their defense costs and fees under RCW 4.24.630. As such, this Court should vacate the trial court's Order awarding the Galvins their "costs of suit, investigative costs, and attorney fees, pursuant to RCW 4.24.630"

The Galvins' argument that the trial court's award of sanctions under CR 11 was proper also fails. *See* AB at 23-25. As provided in Meire's opening brief (at 16-21), under Washington law, to properly award sanctions under CR 11, a "court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (emphases omitted). More specifically, "the court must make explicit findings as to which pleadings violated CR 11 and as to how such

pleadings constituted a violation of CR 11. *Id.* The court must specify the sanctionable conduct in its order.” *N. Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 649, 151 P.3d 211 (2007) (footnote omitted).

Additionally, any award of sanctions under CR 11 must be limited to the amount the movant reasonably expended in responding to any possible sanctionable conduct. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 418, 157 P.3d 431 (2007). And “[i]f the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision.” *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (1996) (internal quotation marks and citation omitted).

Here, as provided in Meire’s opening brief (at 16-21), the trial court’s Order completely fails to make the required findings. *See* CP 0016-0025. Indeed, the trial court’s findings failed to articulate how Meire acted in bad faith or how his pleadings violated CR 11. *Id.* Rather, the trial court’s judgment made the following findings only with respect to CR 11 sanctions:

6. Plaintiff’s claims, especially as originally filed, were grossly exaggerated and this Court finds them to have been made willfully, maliciously and in bad faith.

8. The plaintiff's bad faith, from the time of the initial pleadings up through the time of trial, are striking, and plaintiff's claims were largely unsupported by the facts presented at trial. Though some of the claims were abandoned or resolved by summary judgment, the Court cites paragraphs 2.5, 2.6, 2.7, 2.9, 2.10, 2.11, and 2.12 of the complaint to be examples of such unfounded claims.

CP 0019. Thus, the court's only findings regarding CR 11 were merely conclusory and unsupported by any specific findings. Indeed, the trial court failed to make findings that Meire's claims were not grounded in fact or law, that Meire failed to make a reasonable inquiry into the law or facts, or that the complaint was filed for an improper purpose. *See* CP 0016-0025.

Furthermore, the trial court's Order made no findings with respect to how paragraphs 2.5, 2.6, 2.7, 2.9, 2.10, 2.11, and 2.12 violated CR 11. *See* CP 0016-0024. In short, nowhere did the trial court specify the sanctionable conduct. Rather, the court's award served solely as an impermissible fee-shifting provision, and not as a deterrent from future violations of CR 11. Moreover, the trial court's award of sanctions failed to consider that Meire prevailed, at least in part, on one of his claims. *See* CP 0019. The Galvins, in fact, confirmed this point in their response brief by noting that there was an "encroachment" by the Galvins, albeit

temporary and de minimus. AB at 11. This fact alone precludes imposing CR 11 sanctions on Meire. As such, this Court should vacate the trial court's award of Rule 11 sanctions.³

Turning to the Galvins' new argument that the trial court's award of fees and costs was proper pursuant to its "inherent authority," this is the first time this argument has been raised. *See* AB at 21-22. Under RAP 2.5(a), a party's failure to raise an issue at trial generally waives the issue on appeal. RAP 2.5(a); *see also State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (same). Accordingly, the Galvins have waived this argument and this Court should not consider the argument for the first time on appeal.

Moreover, the trial court's Order was silent in this respect. *See* CP 0016-0025. Indeed, nowhere in its Order did the trial court provide that it was awarding the Galvins their fees and costs pursuant to its "inherent authority." *See* CP 0016-0024. Rather, the trial court purported to award the Galvins all of their "costs of suit, investigative costs, and attorney fees, pursuant to RCW 4.24.630 and CR 11." CP 0022. As such, the Galvins'

³ Alternatively, if this Court concludes CR 11 sanctions were appropriate, it should, as Meire argued in his opening brief (at 21 n.1) refer the case to the Commissioner for a determination of what fees and costs are attributable to the CR 11 violation.

new argument that the trial court acted pursuant to its inherent authority fails.

D. The Galvins Are Not Entitled To Recover Their Attorneys' Fees and Costs Associated With This Appeal.

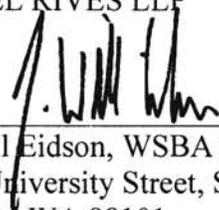
In their response brief, the Galvins request their attorneys' fees and costs associated with this appeal pursuant to RAP 18.1 and RCW 4.24.60. AB at 26. The Galvins, however, as made clear above, and in Meire's opening brief (at 8-16), are not entitled to recover their fees and costs under RCW 4.24.630. As such, this Court should not award the Galvins any fees or costs associated with this appeal.

III. CONCLUSION

For the foregoing reasons, and the reasons asserted in Meire's opening brief, this Court should (a) vacate the trial court's award of \$72,795 in damages not recoverable under RCW 4.24.630; (b) vacate the trial court's award of costs and fees that the Galvins incurred in defending Meire's claims or that were otherwise not supported by substantial evidence; (c) vacate the trial court's award of the Galvins' fees and costs under CR 11; and (d) deny the Galvins' request for attorneys' fees and costs pursuant to RAP 18.1 and RCW 4.24.630.

DATED this 16th day of January, 2013.

STOEL RIVES LLP

By  _____

J. Will Eidson, WSBA No. 45040
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 386-7697

Attorneys for Plaintiff-Appellant Carey
William Meire

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the foregoing REPLY BRIEF OF APPELLANT was caused to be served on opposing counsel below as set forth:

Roger L. Ellingson
Law Offices of Roger L. Ellingson, P.S.
289 H Street
PO Box 1258
Blaine, WA 98231-1258
Attorneys for Respondents/Cross-Appellants Bradley and Monica Galvin

**via email: roger@northwhatcomlaw.com
and via U. S. Mail**

The original and one copy are being filed with the Court **via Hand-Delivery/Legal Messenger:**

Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101

STOEL RIVES



Teresa Bitseff, Legal Secretary

DATED: January 16, 2013, @ Seattle, WA