IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TRISHA SHOBLOM, Appellant, v. E. E. PICHLER and KRISTINA DYER, husband and wife, Respondents.	)	No. 66648-7-I DIVISION ONE UNPUBLISHED OPINION FILED: May 16, 2011

Spearman, J. —Trisha Shoblom sued her neighbors E.E. Pichler and Kristina Dyer, alleging numerous acts of trespass and other claims. The trial court dismissed the claims in two summary judgment proceedings and awarded attorney fees to Pichler and Dyer under RCW 4.84.250–.300. Shoblom appeals the dismissal of certain claims and the attorney fee award. We hold that summary judgment was properly granted because Shoblom's evidence did not create a genuine issue of material fact and affirm. We also affirm the trial court's award of attorney fees and award attorney fees on appeal to Pichler and Dyer.

FACTS

Shoblom purchased and moved into her house in 2003. Pichler and Dyer, a married couple, had lived in the house next door since 2000. After moving in,

Shoblom notified Pichler and Dyer that she would be installing a six-foot cedar fence to replace a lower fence that ran between their properties. Pichler offered to install the fence and Shoblom accepted. Relations between the neighbors deteriorated, and Shoblom filed a lawsuit against Pichler and Dyer on April 30, 2008. In an amended complaint, she alleged that they committed a number of acts constituting intentional trespass, such as painting their side of the fence and causing paint to seep through. She also claimed that Pichler and Dyer removed stakes installed by a surveyor she hired, in violation of RCW 58.04.015. She sought relief in an amount to be proven at trial, but known to be less than $50,000; requested that restoration damages be tripled pursuant to RCW 4.24.630; and sought interest, costs, and fees under RCW 4.24.630. She also claimed that her "per occurrence" damages were each less than $10,000 and that she might therefore be entitled to attorney fees under RCW 4.84.250–.300.

Pichler and Dyer answered and counterclaimed, seeking to quiet title to the property on their side of the fence based on adverse possession. They denied the majority of Shoblom's allegations. They admitted to applying a wood stain to the side of the fence facing their property but denied that this caused any damage to Shoblom. On September 12, 2008, they moved for summary judgment. They argued that Shoblom's trespass claims were based on a survey she commissioned that established the boundary of her property as extending two feet beyond the current fence, into their property. They argued that even if the survey was correct, they had title to the land on their side of the fence

through adverse possession.

At the October 2008 hearing, the trial court granted partial summary judgment, ruling that the fence line was the true boundary line and dismissing all claims based on the location of the boundary line as well as the claim for removal of survey stakes. The court ruled that the fence sat equally on both parties' properties, was "co-owned" by them, and was to be "co-maintained" by them. It denied summary judgment on the remaining trespass claims, and the parties conducted discovery. Pichler and Dyer then moved to dismiss Shoblom's trespass claims, which were based on her allegations that the defendants (1) painted the side of the fence that faced their property, causing paint to bleed through to her side of the fence and ruining its appearance, (2) put branches into and scratched Shoblom's truck bed, (3) allowed their young son to run across her back yard, (4) caused sprinklers to spray water onto her and her property, (5) sprayed her driveway with herbicide, and (6) landscaped and planted on land that allegedly belonged to her. Shoblom filed a response and submitted her declaration in support. She contended that she disclosed claims for battery and harassment during discovery, and that those claims should survive even if her trespass claims were dismissed. She also stated that she was seeking injunctive relief. On November 5, 2009, one day before the second summary judgment hearing, Shoblom filed a motion to amend her complaint to add claims for equitable relief, trespass to chattel, battery, and harassment.

At the hearing on November 6, 2009, the trial court granted summary

judgment on the remaining claims and dismissed Shoblom's lawsuit with prejudice.[1] Pichler and Dyer moved for attorney fees in the amount of $40,000, arguing that they were entitled to fees because Shoblom had originally pleaded a claim for attorney fees under RCW 4.84.250–.300 if she elected to litigate her claims on a "per occurrence" basis. They contended that Shoblom did not allege more than $10,000 in damages in her answers to interrogatories or in her deposition testimony. Shoblom argued that those figures did not account for emotional distress. The trial court granted fees in the amount of $25,000 and entered judgment.

Shoblom appeals both of the trial court's orders on summary judgment and its order awarding attorney fees.

DISCUSSION

Shoblom argues that genuine issues of material fact preclude summary judgment on her trespass and statutory claims, and that her trespass claims meet the four-part test under Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d

[1] The court's oral ruling indicated why it dismissed each claim: (1) there was no evidence of damages for the incident of Pichler and Dyer's child entering her property, (2) the claim of branches being put into Shoblom's truck was not actionable because of Shoblom's admissions that there was no damage and that she did not know who put them into her truck, (3) the claim of Pichler and Dyer landscaping on the berm was dismissed because the berm was located on their property, (4) the claim regarding water being sprayed from sprinklers onto Shoblom and her property was dismissed because the height of the sprinkler heads had since been lowered and the timer changed to go off at 4 a.m. instead of on a motion sensor, (5) there was no showing that Pichler and Dyer had intentionally sprayed herbicide on Shoblom's property, (6) the deposition testimony indicated that there was no offensive touching of Shoblom by the hose or water, and (7) there was insufficient evidence to support a harassment claim.

677, 709 P.2d 782 (1985).[2] Shoblom also argues that the trial court failed to recognize her claims for battery and harassment. We hold that summary judgment was properly granted because the evidence did not create a genuine issue of material fact as to each element of Shoblom's claims. We do not review her claims for battery, harassment, or injunctive relief, or her claim regarding trespass on the boundary berm.[3]

Standard of Review

We review summary judgment decisions de novo, engaging in the same

[2] The parties agree that the four-part Bradley test applies and do not dispute that intentional trespass claims require proof of actual and substantial damages. Based on the parties' briefing, the issue presented in this case is whether alleged emotional distress damages may be included in determining whether the element of actual and substantial damages has been met.

[3] We do not consider her battery and harassment claims because they were not pleaded in Shoblom's amended complaint. Although the trial court made an oral ruling regarding the harassment and battery claims and the allegations regarding landscaping in the boundary berm, its written order stated, "Plaintiff's pled claims are hereby dismissed with prejudice." A complaint "must identify the legal theories upon which the plaintiff seeks recovery." Camp Finance, LLC v. Brazington, 133 Wn. App. 156, 162, 135 P.3d 946 (2006) (citing Kirby v. City of Tacoma, 124 Wn. App. 454, 469–70, 98 P.3d 827 (2004)). To assert new legal theories, a complaint must be amended under CR 15(a). Kirby, 124 Wn. App. at 470. Shoblom filed a motion to amend her complaint to add claims for battery, harassment, and equitable relief one day before the summary judgment hearing, but the motion was not heard following the dismissal of her lawsuit. Her argument, in essence, is that referring to facts that could be relevant to a certain cause of action during discovery is sufficient to plead that cause of action and make it part of a lawsuit. But "[a] party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." Dewey v. Tacoma School Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).

We also do not consider Shoblom's claim regarding Pichler and Dyer cutting plants that she planted in the "boundary berm" area. Shoblom did not identify this claim in her complaint, discovery responses, or during her deposition. Pichler and Dyer asked Shoblom to identify all incidents of trespass during discovery, and she did not identify any incident in which they cut plants in the boundary berm. She does not appear to have identified this incident until she filed a declaration in opposition to Pichler and Dyer's second motion for summary judgment.

Finally, we do not consider her request for injunctive relief, which she did not seek in her amended complaint. She does not explain why she meets the requirements for injunctive relief. She must show that: (1) she had a clear legal or equitable right, (2) she had a well-grounded fear of immediate invasion of that right, and (3) the acts complained of were resulting in or would result in actual and substantial injury to her. See Kucera v. Dep't of Transp., 140 Wn.2d 200, 209–10, 995 P.2d 63 (2000).

inquiry as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party." Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000) (citing Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994)).

Intentional Trespass Claims

To prove intentional trespass under the Bradley test, Shoblom 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. Bradley, 104 Wn.2d at 692–93. Regarding the alleged incidents of trespass, Shoblom contends that her significant emotional distress constitutes actual and substantial damages.

We disagree. No cases have explicitly addressed whether emotional distress alone may satisfy Bradley's requirement of actual and substantial damages, but the cases she cites do not support such a proposition. The Washington Supreme Court "has liberally construed damages for emotional distress as being available merely upon proof of 'an intentional tort.'" Cagle v.

Burns and Roe, Inc., 106 Wn.2d 911, 916, 726 P.2d 434 (1986) (quoting Cherberg v. Peoples Nat'l Bank, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977) (emphasis added)).[4] This language indicates that a plaintiff must first prove an intentional tort, and then may recover damages for emotional distress in connection with that cause of action. In other words, emotional distress goes not to liability but to damages.

Accordingly, we affirm the dismissal of Shoblom's claims regarding the following incidents: Pichler and Dyer's son going into her backyard, their applying herbicide to her property, and their spraying her and her property with water. As to all of these incidents, Shoblom either testified that she did not suffer any damage or failed to present any evidence of actual and substantial damages.[5]

The remaining trespass claims involve Shoblom's allegations that Pichler and Dyer painted the fence and put branches into her truck. We affirm the

---

[4] The Cagle court held "that, having once established liability for the tort of wrongful termination of employment in violation of public policy, an employee is entitled to recover damages for emotional distress upon a showing of actual anguish or emotional distress." 106 Wn.2d at 912 (emphasis added). See also Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 116–17, 942 P.2d 968 (1997) (damages recoverable in a statutory timber trespass action under RCW 64.12.030 could include emotional distress damages, where interference is intentional).

[5] Moreover, regarding her herbicide claim, Shoblom admitted that she was not certain that the substance the defendants allegedly caused to go onto her property was herbicide. She also stated, during discovery, "I did not see [either defendant] spray my driveway, but it is clear that my driveway was sprayed with some type of herbicide." Regarding her trespass by water claim, Shoblom did not specify any damages in her interrogatory answers when asked to set forth the amounts of any special damages and general damages she sought. Under Grundy v. Brack Family Trust, 151 Wn. App. 557, 567–68, 213 P.3d 619 (2009), rev. denied, 168 Wn.2d 1007, 226 P.3d 781 (2010), a trespass by water case was dismissed on the basis that minor water intrusion and the deposit of occasional debris and plant material did not rise to "actual and substantial damage" to the plaintiff's property. Id. at 568. Where Shoblom does not allege even the minimal kind of damage alleged by the Grundy plaintiff, she does not show actual and substantial damages.

dismissal of the fence claim because, following the trial court's ruling that the fence was co-owned by the parties and to be co-maintained by them, Shoblom cannot meet the first element of a trespass claim: an invasion of property affecting an interest in exclusive possession. Bradley, 104 Wn.2d at 692–93. She does not assign error to the trial court's ruling that the fence was co-owned.

Shoblom's trespass to chattel claim regarding branches in her truck was properly dismissed because her evidence did not create a genuine issue of fact that Pichler or Dyer intentionally interfered with her personal property.[6] She alleged that after a windstorm in December 2006, she went to her truck and saw branches in the truck bed and that Pichler and Dyer's yard had been cleared of branches. She alleged that she removed them but later saw branches again in her truck. But she did not witness Pichler or Dyer putting any limbs into her truck, and was unaware of any witnesses who did. And she also admitted that she did not know whether the limbs were from her own yard, the street, or Pichler and Dyer's yard. A nonmoving party may not rely on speculation to defeat summary judgment. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Furthermore, at her deposition, Shoblom stated that she was not claiming damages to her truck as part of her lawsuit.

Statutory Claim for Removal of Survey Stake

We also affirm summary judgment on Shoblom's statutory claim. While

[6] Trespass to chattel is the intentional interference with a party's personal property without justification that deprives the owner of possession or use. Restatement of Torts (Second) § 217 (1965).

she argues that the trial court erred in dismissing this claim on the ground that its ruling on adverse possession rendered the claim moot (as the survey stake no longer marked a purported boundary line), we affirm on the ground that Shoblom's evidence does not create an issue of material fact that Pichler and Dyer removed the survey stake.[7] As evidence to support her claim, Shoblom stated in her declaration:

> [W]hile the monument may still be located in the ground, the stake which was located near that monument was in fact removed. Further, it would have taken significant and deliberate action to remove the stake, since, according to my Surveyor, it was inserted into the ground with rebar to depth of about 2 feet deep.

The evidence is not sufficient for a reasonable trier of fact to find, without resorting to speculation, that the stake was removed by Pichler and Dyer as opposed to some other person.

Trial Court's Award of Attorney Fees

We review the legal basis for an award of attorney fees de novo and the reasonableness of the amount of an award for abuse of discretion. Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993); Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). A court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable

[7] Furthermore, as Pichler and Dyer point out, RCW 58.04.015 is a criminal statute that does not provide a private cause of action. Generally, criminal statutes do not provide private causes of action absent evidence of legislative intent to create such a remedy. See Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 38 (Iowa 1982); Torbeck v. Chamberlain, 138 Or. App. 446, 450–51, 910 P.2d 389 (1996). RCW 58.04.015 states, "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." The statute makes the disturbance of a survey monument a gross misdemeanor but says nothing about permitting a private party to sue thereunder. Shoblom did not name a cause of action for conversion.

grounds, or exercised for untenable reasons. Council House, Inc. v. Hawk, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

Here, the trial court awarded attorney fees under RCW 4.84.250, which provides that in an action for damages where the amount pleaded by the prevailing party is $10,000 or less, the prevailing party is entitled to an award of attorney fees.[8] The plaintiff is the prevailing party when the recovery, exclusive of costs, is equal to or more than the amount of the plaintiff's settlement offer. RCW 4.84.260. But the defendant is the prevailing party if the plaintiff recovers nothing or if the recovery, exclusive of costs, is equal to or less than the defendant's settlement offer. RCW 4.84.270. The purposes of RCW 4.84.250–.300 are to encourage out-of-court settlements, penalize parties who unjustifiably bring or resist small claims, and enable plaintiffs to pursue meritorious small claims without having an award diminished by legal fees. Beckmann v. Spokane Transit Authority, 107 Wn.2d 785, 788, 733 P.2d 960 (1987).

Shoblom argues that the trial court erred in awarding attorney fees under RCW 4.84.250–.300. She contends that she had "clearly elected to pursue her claim as a unified claim, rather than on a 'per occurrence' basis," when she

[8] The statute provides:

> Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [ten thousand dollars] or less, there shall be taxed and 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.

stated her damages as $30,000 in discovery and as over $50,000 during settlement negotiations.[9]

Pichler and Dyer point out that because Shoblom was the party to assert an entitlement to fees under that statute, she had actual notice of the potential of an adverse fee award, under Public Utilities Dist. No. 1 of Grays Harbor, 88 Wn. App. 390, 393–94, 945 P.2d 722 (1997).[10] They made several settlement offers, all of which Shoblom rejected: (1) before the first summary judgment hearing, to pay half the cost of extending the fence and to replace fence boards that Shoblom claimed they damaged, (2) after the first summary judgment hearing, they made a similar offer and also offered to pay $500, and (3) in October 2009, they made an offer for $3,213.42.

We conclude that, under the facts presented here, the trial court did not err in its basis for awarding fees or in the amount of fees. First, fees were properly based on RCW 4.84.250–.300. The notice requirement was met because Shoblom herself cited the statute. However, the case law cited by the parties does not clarify whether the amount "pleaded" by Shoblom was $10,000

[9] She also concedes, however, that although she had to elect her remedy before trial, she had not yet done so at the time of summary judgment.

[10] In Grays Harbor, a county public utilities district appealed an award of attorney fees against it under the statute, where it unsuccessfully sued Timothy Crea for $6,570 for striking a utility pole with his car. 88 Wn. App. at 391–92. It argued that fees were not authorized under the statute because Crea did not give notice of his intent to seek such fees. Id. The court held that the common law's notice requirement was met because the PUD, having itself recited the statute in an offer of settlement, had actual notice of the statute. Id. at 394–95. It upheld the trial court's application of the statute to award fees. Id. at 396.

or less. Shoblom claimed, in her amended complaint, that her "per-occurrence" damages totaled less than $10,000 per occurrence and claimed to be seeking judgment "in an amount to be proven at trial, but known to be less than $50,000." In her answer to Pichler and Dyer's interrogatory question "Pursuant to RCW 4.28.360, please set forth separately the amounts of any special damages and general damages sought from the defendant(s) in this lawsuit," Shoblom wrote:

> The fence cost Trisha Shoblom $1,954.80 in materials and labor, and will cost at least that much to replace it. In addition, due to the earlier acts of defendants' trespass, investigation of the property boundary, by way of a survey was necessary. The survey cost $1,150 and to replace the stakes will cost $300. Any expert fees, as well as attorneys fees and litigation-related costs are also recoverable under RCW 4.24.630. No medical bills can be reliably associated with the trespass, however, treble damages, under RCW 4.24.630 are expected to exceed $30,000.

It was not clear by the time of summary judgment whether she would be litigating her lawsuit on a claim-by-claim basis or as a single unified claim.

Given the sum of the circumstances, we hold that the trial court did not err in applying the statute. Shoblom's figures for the damages to her property totaled less than $10,000; she herself cited the statute in claiming a possible entitlement to attorney fees; and the defendants attempted to settle the case.

Second, we find that the trial court did not abuse its discretion in the amount of fees it awarded. Shoblom argues that the award was improper because neither the trial court nor defendants' counsel analyzed work for wasted time, duplication, difficulty, or otherwise performed any lodestar analysis[11] in the

[11] The lodestar method of calculating attorney fees requires the trial court to determine "the

attorney fee request. She argues that there is no reviewable analysis supporting the fee award.

In their motion seeking attorney fees, Pichler and Dyer requested $40,000. In support of their request for fees, they attached invoices from counsel with contemporaneous time records. At the hearing, the trial court awarded $25,000, stating:

> I've reviewed the court files. I've considered the complexity of the issues; the relative rates charged by [the attorneys] and staff; the amount of attorney time put into this case, and I believe that reasonable attorneys' fees and costs inclusive is $25,000.

The trial court thus deducted $15,000 from the amount of fees requested. Shoblom does not explain how the trial court abused its discretion in arriving at this figure. She claims that the trial court did not analyze work for wasted time, duplication, or difficulty, but the trial court stated on the record that it had considered several factors in determining the amount of attorney fees. "The determination of the fee award should not become an unduly burdensome proceeding for the court or the parties." Absher Const. Co. v. Kent School Dist. No. 415, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995). "An 'explicit hour-by-hour analysis of each lawyer's time sheets' is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded." Id. There was no abuse of discretion

---

reasonable number of hours incurred in obtaining the successful result multiplied by the reasonable hourly rate." Bloor v. Fritz, 143 Wn. App. 718, 750, 180 P.3d 805 (2008).

in the amount of fees.

Attorney Fees on Appeal

Pichler and Dyer request fees, citing RAP 18.1, RCW 4.84.010, and RCW 4.84.250–.300. RCW 4.84.290 provides:

> If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.
>
> In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

Pichler and Dyer are the prevailing party on appeal and are entitled to an award of fees under the statute, subject to compliance with RAP 18.1.

Affirmed.

Spearman, J.

WE CONCUR:

Leach, A.C.J.

Cox, J.