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# Supreme Court of the State of Washington

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**Jerry Porter** and **Karen Zimmer,**

Respondents,

**v.**

**Pepper E. Kirkendoll** and **Clarice N. Kirkendoll,**

Petitioners.

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## Porter and Zimmer's Answer to Petition for Review

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## 1. Identity of Respondents

Jerry Porter and Karen Zimmer (collectively, "Porter"), plaintiffs in the trial court and appellants in the Court of Appeals, respectfully submit this Answer to Kirkendoll's Petition for Review. Porter requests this Court deny Kirkendoll's petition and instead grant review of the additional issue presented in this Answer.

## 2. Additional Issue Presented for Review

1. The waste statute, RCW 4.24.630, states that it applies to "every person who … removes timber" from land of another. The statute also states that it does not apply in any case where liability is provided under the timber trespass statute, RCW 64.12.030. Under the interpretation adopted by the Court of Appeals in this case, the statute's exception entirely swallows its rule. Did the Court of Appeals err in its interpretation of the waste statute?

## 3. Statement of the Case

### 3.1 Kirkendoll caused his loggers to cut and remove Porter's landscape trees.

Porter owns forested residential property served by a private access road. CP 2, 290. The road is located within a 60-foot easement on Porter's property, which follows the western property line. CP 290, 313. Kirkendoll owns the neighboring property west of the easement. CP 289, 313. There is a vegetated

strip on Porter's land, between the road and the property line, ranging from 10 to 40 feet wide. *See* CP 49, 51-52 (describing the location of corner monuments relative to the edge of the road).

Kirkendoll hired Kyle Peters of G&J Logging (collectively, "Peters") to harvest the trees from Kirkendoll's lot. CP 93, 290-91. Peters hired Boone's Mechanical Cutting ("Boone") to assist in cutting the trees. CP 94. Kirkendoll knew where the surveyed corner monuments were located, from 10 to 40 feet west of the edge of the road. CP 38, 49, 51-52. But Kirkendoll told Peters that all of the trees west of the road were his. CP 53, 186. Relying on Kirkendoll's description, Peters and Boone harvested all of the trees west of the road edge, including 51 trees on Porter's land. CP 139, 188, 332.

### 3.2 Porter sued Kirkendoll and the loggers for statutory waste and timber trespass/conversion.

Porter sued Kirkendoll and the loggers, alleging that they intentionally, recklessly, or negligently trespassed and destroyed Porter's landscape by cutting the trees, then carried off the resulting logs. CP 2-3. Porter sought relief under the waste statute, RCW 4.24.630, and/or the timber trespass statute, RCW 64.12.030. CP 3.

Kirkendoll's answer admitted that he "caused timber to be harvested" from Porter's property. CP 5. Peters also admitted cutting Porter's trees under Kirkendoll's direction. CP 9. Peters

raised cross-claims against Kirkendoll for indemnity. CP 11-12. Boone admitted to cutting the trees where instructed. CP 584. Boone raised cross-claims against Kirkendoll for indemnity. CP 587-88.

### 3.3 Porter settled with the loggers on the eve of trial, obtaining an assignment of the loggers' claims against Kirkendoll.

On the eve of trial, Porter settled with Peters and Boone in exchange for $125,000 and an assignment of the loggers' indemnity claims against Kirkendoll. CP 43, 65-71. After this settlement, Porter brought a summary judgment motion to resolve the indemnity claims and otherwise simplify the issues for trial. CP 27. Kirkendoll responded with a cross-motion asking the trial court to dismiss all of Porter's claims. CP 72.

Porter argued that he was entitled to judgment as a matter of law on the assigned indemnity claims. CP 30, 134, 591-93. Porter argued that Kirkendoll was liable under the waste statute because the destruction of his landscape was "wrongful waste or injury to the land," or, alternatively, because Kirkendoll "remove[d] timber." CP 30-32, 593-96. Porter argued that Kirkendoll was liable for triple damages as a matter of law, under either the waste statute or the timber trespass statute because his conduct was intentional or at least reckless. CP 32-33, 597-98.

Kirkendoll responded and made a counter-motion seeking dismissal of all of Porter's claims. CP 72-89.

### 3.4 The trial court erroneously dismissed all of Porter's claims on summary judgment.

The trial court dismissed all of Porter's claims. CP 236. The trial court reasoned that Tort Reform applied, and because there had been no reasonableness hearing, the loggers lost their contribution rights and had no claims to assign to Porter. RP 39. The trial court further reasoned that, under *Glover v. Tacoma Gen. Hosp.*, Porter obtained a full settlement from the loggers and thereby released Kirkendoll from the claims of waste and trespass. RP 39.

Porter moved for reconsideration. CP 241. Porter argued that *Glover* did not apply to dismiss the waste and trespass claims because Kirkendoll failed to prove that he had the requisite control over the manner of the loggers' performance to make them agents. CP 242-44. Porter argued that Kirkendoll's liability for waste and trespass was direct, not vicarious, because Kirkendoll directed the trespass. CP 245-46.

### 3.5 The Court of Appeals reversed in part, restoring Porter's timber trespass claim and the assigned indemnity claims.

The Court of Appeals agreed with Porter that Kirkendoll was not released from liability by the settlement with the

loggers because the loggers were not Kirkendoll's agents for purposes of vicarious liability. Slip op. at 11-12. The court also agreed with Porter that the indemnity claims should not have been dismissed, due to genuine issues of material fact. Slip op. at 12-14, 16-17. The Court of Appeals also held that Porter's claim under the waste statute was properly dismissed because liability was provided under the timber trespass statute. Slip op. at 14-16.

## 4. Argument

Under RAP 13.4(b), this Court will only accept a petition for review if the decision of the Court of Appeals is in conflict with other published decisions or if it otherwise involves an issue of substantial public interest. On the issues that Kirkendoll raises in his petition, the Court of Appeals decided correctly and in complete harmony with prior published opinions. This Court should deny Kirkendoll's petition for review.

However, the Court of Appeals' decision does conflict with other published opinions setting forth well-accepted rules of statutory interpretation. The Court of Appeals misinterpreted the waste statute by allowing the statute's exception to entirely swallow its general provisions, rendering portions of the statute meaningless. This Court should accept review of this issue and

should reverse and remand for further proceedings, including a trial on Porter's waste and other claims.

## 4.1 This Court should deny Kirkendoll's petition for review.

### 4.1.1 The Court of Appeals decision is consistent with other published decisions on the liability of a landowner who directs a contractor to commit timber trespass.

Kirkendoll is confused about the difference between direct and vicarious liability, as well as the level of control necessary to create vicarious liability through an agency relationship. Kirkendoll's failure to understand these differences causes him to perceive a conflict where none exists. The Court of Appeals decision in this case is entirely consistent with the cases cited by Kirkendoll.

Vicarious liability "is based on the conduct of one individual [the agent,] and the liability is imposed [on the principal] as a matter of public policy to ensure that the plaintiff has the maximum opportunity to be fully compensated." *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 723, 658 P.2d 1230 (1983). In vicarious liability, the principal, who had the right to control the manner of the agent's performance, is held liable for the agent's negligence, even though the principal was not directly at fault. *See* David K. DeWolf and Keller W. Allen, *Tort Law and*

*Practice*, 16 Wash. Prac. § 4:1 (2013). The *Glover* court held that when a plaintiff obtains a full release from a solvent agent, the vicarious liability of the principal is also released. *Glover*, 98 Wn.2d at 722-23.

In contrast to vicarious liability, claims of direct liability against a principal are not affected by release of an agent. *See Seattle W. Indus. v. David A. Mowat Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1988) (rejecting a *Glover* argument where there were direct claims against the alleged principal).

This distinction has been decisive in timber trespass cases, where a landowner who directs a trespass is universally held directly, not vicariously, liable for the trespass. As a rule, a person who hires loggers and directs them where to cut is personally liable for any resulting trespass. *E.g., Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495 (2002). The landowner's liability for the trespass arises from **his own culpable misfeasance** in directing the contractor to enter the land of another. *Ventoza v. Anderson*, 14 Wn. App. 882, 895-96, 545 P.2d 1219 (1976).

In *Ventoza*, Anderson was hired to log all timber on a property neighboring Ventoza's property. *Ventoza*, 14 Wn. App. at 886. Anderson's employee and Clark, an independent contractor, together removed trees from 16 acres of Ventoza's land. *Id.* The jury held Anderson personally liable for triple damages for the trespass. *Id.*

The appellate court approved of an instruction given by the trial court: "One who engages an independent contractor to perform logging operations is not liable to landowners for the trespass of the independent contractor or those employed by the independent contractor, whether as agents or independent contractors themselves, unless the trespass is the result of the advice or direction of the principal, or unless the principal has notice of the trespass and fails to interfere." *Ventoza*, 14 Wn. App. at 895. The court affirmed the jury verdict, finding there was evidence that supported Anderson's direct liability. *Id.* at 896.

The approved instruction illustrates the rule that a principal can be vicariously liable for the acts of an agent-employee, over whom the principal has control, but is not vicariously liable for the acts of an independent contractor, over whom the principal by definition does not have control.

However, as the appellate court noted, "where a trespass is committed on the property of another by the advice or direction of a defendant, the relationship between the immediate agent of the wrong and the person sought to be charged is unimportant. … [The principal] is not entitled to nonliability for the acts of an independent contractor in such circumstances. A trespass will have occurred because of the culpable misfeasance of the [principal]." *Ventoza*, 14 Wn. App. at 896.

The Court of Appeals decision in this case is consistent with *Ventoza*. The Court of Appeals correctly held, "Because Kirkendoll directed the trespass in this case by instructing [the loggers] on where to cut, Porter also had a timber trespass claim against Kirkendoll independent of any … agency theory." Slip op. at 12. The Court of Appeals understood that under *Hill* and *Ventoza*, Kirkendoll is directly, not vicariously, liable for the trespass. Slip op. at 12 n.6.

The Court of Appeals decision is also consistent with *Bloedel Timberlands Dev. v. Timber Indus.*, 28 Wn. App. 669, 626 P.2d 30 (1981). In *Bloedel*, Bloedel sold some of its standing timber to Timber Industries. *Bloedel*, 28 Wn. App. at 671. Timber Industries hired subcontractors to handle the actual logging operations. *Id.* at 672. Timber Industries had a field agent on site, but neither the loggers nor the field agent noticed the trespass until it was too late. *Id.* at 672-73. A jury found Timber Industries liable for triple damages for the trespass. *Id.* at 673.

Timber Industries appealed, arguing that it was not vicariously liable for the loggers' trespass because they were independent contractors, not agents. *Bloedel*, 28 Wn. App. at 673. The appellate court affirmed the jury verdict, holding that it was supported by evidence in the record. *Id.* at 675. The court explained, "The crucial factor is the right of control which must

exist to prove agency. Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. Instead, control establishes agency only if the principal controls the manner of performance." *Id.* at 674.

Going deeper, the court observed, "[The field agent] testified that he supervised the removal of the cut logs from the tract intermittently by making certain that they were properly tagged, branded and loaded for delivery to Mitsui. **This would only be control of performance to determine if it was in conformity with the contractual terms—to see if [the loggers were] cutting the proper amount of timber.** [The loggers] testified that [the field agent] supervised the entire logging operation nearly every day, including the cutting, branding and loading. This would show control of the manner of performance and support the agency finding." *Bloedel*, 28 Wn. App. at 675 (emphasis added).

Contrary to Kirkendoll's misinterpretation, the *Bloedel* court was emphatically **not** referring to the selection of which trees to cut when it affirmed the jury's agency finding. The court specifically noted that the field agent's testimony that he checked that the logs were properly tagged, branded, and loaded—a level of control much greater than simply telling the

loggers which trees to cut—was still insufficient to establish an agency relationship.

The Court of Appeals correctly held in this case, "Kirkendoll argues that an agency relationship existed because he controlled the location of the cutting. However, the manner of performance is how the cutting was to be done and no evidence was presented to show that aside from selecting the location, Kirkendoll had any control over the cutting of the trees. Thus, an agency relationship between Kirkendoll and the Loggers did not exist." Slip op. at 11. The Court of Appeals decision does not conflict with *Bloedel*, *Ventoza*, or any other published decisions on the liability of a landowner who directs a contractor to commit timber trespass. This Court should deny Kirkendoll's petition for review.

#### 4.1.2 The Court of Appeals decision is consistent with other published decisions on the effect of release of an agent on the vicarious liability of a principal.

As noted above, when there is vicarious liability, the principal, who had the right to control the manner of the agent's performance, is held liable for the agent's negligence, even though the principal was not directly at fault. *See* 16 Wash. Prac. § 4:1. When a plaintiff obtains a full release from a solvent agent, the vicarious liability of the principal is also released. *Glover*, 98 Wn.2d at 722-23. In contrast to vicarious liability,

claims of direct liability against a principal are not affected by release of an agent. *See Seattle W. Indus.*, 110 Wn.2d at 5 (rejecting a *Glover* argument where there were direct claims against the alleged principal).

This case was never a vicarious liability case. Porter's claims against Kirkendoll were for Kirkendoll's **direct** liability for directing the trespass, under *Hill* and *Ventoza*. Because Porter's claims are direct, not vicarious, his settlement with the loggers does not release Kirkendoll from direct liability for the trespass.

Kirkendoll and the loggers are jointly and severally liable for the trespass. At trial, the jury will determine the total amount of Porter's damages. Kirkendoll will be liable for 100% of that jury verdict. Kirkendoll will also be entitled to an offset for the amount of the loggers' settlement. But until the jury is given the opportunity to determine the total damages, Kirkendoll is not released.

This result does not conflict with *Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 756 P.2d 111 (1998). In *Vanderpool*, the court followed *Glover* in holding that "settlement with a solvent agent release[s] the **vicariously liable** principal." *Vanderpool*, 110 Wn.2d at 487 (emphasis added). The Court of Appeals correctly determined in this case that there was no agency relationship and Kirkendoll was directly, not vicariously,

liable for the trespass. Slip op. at 11. Consistent with *Vanderpool*, Kirkendoll was not released because his liability was not vicarious.

The Court of Appeals decision is also consistent with *Glover*. In *Glover*, the plaintiff asserted both direct and vicarious claims against the hospital. *Glover*, 98 Wn.2d at 710. The appellate court held that the vicarious claims were released by plaintiff's settlement with the agents, but the plaintiff's direct claims against the hospital remained for trial, where the hospital would receive an offset for the amount of the settlement. *Id.* at 711.

Here, because there were no vicarious liability claims, none were released. Slip op. at 11. Because Porter's claims against Kirkendoll were direct, they remain for trial, where Kirkendoll will be eligible for an offset against the jury verdict in the amount of the settlement.[1] This result is entirely consistent with *Glover*, *Vanderpool*, and other published decisions on the effect of release of an agent on the vicarious liability of a principal. This Court should deny Kirkendoll's petition for review.

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[1] It should not be lost on Kirkendoll, however, that he still faces liability for the settlement amount on the assigned indemnity claims from the loggers.

### 4.1.3 The Court of Appeals decision is consistent with other published decisions on the elements of the ABC Rule.

Kirkendoll misinterprets the Court of Appeals decision in this case in order to manufacture a conflict that does not exist. Kirkendoll correctly recognizes that a claim for equitable indemnification (the "ABC Rule") is a recognized ground in equity for an award of attorney's fees and other litigation expenses. Petition at 11-12.

Under the ABC rule, when A acts wrongfully toward B, causing B to become involved in litigation with C, and C was not privy to A's wrongful act, A is liable to B for B's attorney's fees and litigation costs incurred in defending C's claims. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123-24, 330 P.3d 190 (2014).

Porter argued that the required elements of the ABC Rule are all met. First, Kirkendoll admitted he told the loggers to cut everything up to the road. This was a misrepresentation of his property boundaries—a wrongful act by Kirkendoll (A) toward the loggers (B). Second, the loggers (B) relied on the misrepresentation, and thereby became involved in this litigation with Porter (C). Third, Porter (C) was not involved in Kirkendoll's wrongful act. Under the ABC rule, Kirkendoll is

liable for the fees and costs the loggers incurred in defending themselves against Porter.

Kirkendoll argues that the loggers' ABC Rule claim fails if their own conduct caused them to be exposed to Porter's claims. But, as Kirkendoll argued in the trial court, it is possible for a jury to conclude from the evidence that the loggers were not at fault. *E.g.,* RP 37:16-18 ("…they had an independent duty to verify what they were doing, but the jury finds that they didn't breach that duty…"). Viewed in a light favorable to Porter (the nonmoving party on this issue), the evidence could support the ABC Rule claim.

The Court of Appeals correctly held, "A genuine issue remained as to whether the Loggers were without personal fault here." Slip op. at 14. The ABC Rule claim must proceed to trial for a determination of this material issue of fact. The Court of Appeals decision is consistent with other published decisions on the elements of the ABC Rule. This Court should deny Kirkendoll's petition for review.

## 4.2 This Court should accept review of the issue under the waste statute, RCW 4.24.630, raised by Porter in this Answer.

### 4.2.1 The Court of Appeals decision conflicts with other published decisions when it misinterprets the waste statute's exception in a way that eviscerates the legislative intent behind the statute's general provisions, rendering them meaningless.

The waste statute provides, "Every person who goes onto the land of another and who removes timber, … or wrongfully causes waste or injury to the land … is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury." RCW 4.24.630(1). There is also an exception at the end of the statutory language: "This section does not apply in any case where liability for damages is provided under RCW 64.12.030," the timber trespass statute. RCW 4.24.630(2).

But these two provisions conflict with each other. A person is liable under for triple damages under the timber trespass statute when they "cut down, girdle, or otherwise injure, or carry off any tree … on the land of another person." RCW 64.12.030. Thus, every "person who goes onto the land of another and who removes timber" under the waste statute will also be liable for "carry[ing] off any tree" under the timber trespass statute. If blindly applied, the waste statute's exception

entirely swallows its general rule, rendering the "removes timber" language of the waste statute entirely meaningless.

A court's interpretation of a statute must give effect to every provision. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Statutory exceptions "are narrowly construed in order to give effect to legislative intent underlying the general provisions." *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013). Any doubt should be resolved in favor of the general provisions. *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974).

Contrary to these well-settled rules of statutory interpretation, in this case the Court of Appeals favored the exception over the general provisions. Slip op. at 14, 15-16. The Court of Appeals decision conflicts with these published opinions. This Court should accept review of this issue.

In order to give meaning to all of the statutory language, this Court should harmonize the provisions. This can be done by interpreting the exception narrowly to mean that the additional remedies of RCW 4.24.630 (*e.g.,* attorney's fees and expert costs) would apply generally to "[e]very person who goes onto the land of another and who removes timber," *except to the extent that the statute duplicates remedies already available under RCW 64.12.030.* Duplicated remedies (*e.g.,* triple damages) would remain available under RCW 64.12.030 and its existing body of

case law. Such an interpretation allows the exception to operate narrowly without rendering the general provisions meaningless.

In seeking this court's review, Porter must acknowledge the prior published decision of the Court of Appeals in *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015). In *Gunn*, the court held that the exception barred the plaintiff's waste claim in that case, where liability was available under timber trespass. However, the decision in *Gunn* is not dispositive here because *Gunn* dealt only with the second, "wrongful waste or injury to the land," prong of the waste statute; it did not address the first, "removes timber" prong or the conflict between that first prong and the waste statute's exception for timber trespass. *See* CP 221-22. Porter is unaware of any published decision that addresses the conflict in the statutory language. The correct resolution of this conflict remains an issue of substantial public interest affecting the rights of all litigants in cases involving removal of timber.

The legislature deliberately added the "removes timber" language. *See* CP 206-220, 595-96. The legislature intended the statute to apply to "every person who goes onto the land of another and removes timber." The exception in RCW 4.24.630(2) cannot be allowed to render those words meaningless. Instead, this Court should interpret the exception as preserving timber

trespass law, while also allowing for the additional remedies the legislature intended to provide under the waste statute.

Kirkendoll caused the loggers to go onto Porter's land and remove timber. Under a proper interpretation of the waste statute that gives effect to the legislative intent behind the "removes timber" language of the statute's general provisions, Porter's claim under the waste statute is not barred. This Court should accept review of this issue, reverse, and remand for trial on Porter's waste statute claim.

## 5. Conclusion

On the issues raised in Kirkendoll's petition, the Court of Appeals decided correctly and consistently with prior published decisions. However, the court erred on the additional issue raised by Porter in this Answer. This Court should deny Kirkendoll's petition and instead grant review on the proper interpretation of the waste statute, RCW 4.24.630.

Respectfully submitted this 14th day of November, 2018.

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## Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 14, 2018, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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