No. 45177 8 II

**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

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**ROBERT GUNN, a single man,**

**Respondent,**

**v.**

**TERRY L. RIELY and PETRA E. RIELY,**
**husband and wife,**

**Appellants.**

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# BRIEF OF RESPONDENT ROBERT GUNN (CORRECTED)

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## I. INTRODUCTION

Appellants claimed an access easement over Respondent's property. In spite of clear warnings that they did not and to stay off Respondent's land, Appellants intentionally trespassed, opened an access route and damaged the property.

Respondent sued for declaratory and injunctive relief and damages using alternate theories under RCW 4.24.630 and RCW 64.12.030. After a one day bench trial the court found that Appellants had no easement. (CP 26, Finding of Fact 1.42). The court awarded damages under RCW 4.24.630 rather than RCW 64.12.030. The award was for waste to the property including cutting of saplings and their cleanup, investigative costs, and attorney's fees.

## II STATEMENT OF CASE

Prior to December 1995, Donald F. Goralski, Dorothy A. Goralski, Joel R. Sisson, and Melissa L. Sisson (together referred to as "Grantors") purchased approximately 86.16 acres, of a former 800 acre dairy farm. (CP 20, Findings of Fact 1.8). They developed their land into an 8 lot subdivision, known as Storm King Ranch ("Storm King"). (Ex. 5 (all lots referred to are located in Storm King)). Storm King was approved by

Clallam County and its survey recorded in February 1, 1996[1]. (CP 19, Findings of Fact 1.2, Ex. 5).

In 1997 the Trerises purchased lot 3 (CP 20; Ex. 10). Their deed contained an easement grant:

> Together with an Easement for Ingress, Egress and Utilities over, under and across the existing driveway across Lot 1 of said "Storm King" Large Lot Subdivision from the North Line of above described Lot 3 North to its intersection with the existing private road commonly known as Sponberg Lane[2] **(emphasis added)**

In 1999, Gunn purchased Lot 1. His deed contained numerous title exceptions regarding easements for ingress and egress. (Ex. 6). The Grantors did not reserve any right over a "grassy path" through Respondent's property. (Ex. 6).

In 2000, Rielys purchased Lot 2 from the same Grantors. (CP 20, Findings of Fact 1.5; Ex. 11). Their deed contained the same exceptions as Gunn's. (Ex.s. 5, 6, 11).

[1] The Auditor's Certificate indicates a filing date of February 1, 1995, however, all other notary jurats indicate that Goralski and Sisson signed on December 29, 1995, and the County "Approvals" were given in January 1996. It is assumed the documents were filed February 1, 1996.

[2] Although Rielys believe this easement is over the grassy path, there is no finding that that is the case.

Rielys' deed even references Gunn's deed (Ex. 11, last reservation on exhibit "A".). Rielys deed does not contain the easement granted to Trerise. (CP 24; CP 25, Findings of Fact 1.38).

Riely's Lot 2 was vacant land that had been used for pasture and or a hay field. (CP 21, Findings of Fact 1.12). The property line between the two Lots 1 & 2 was clear. (CP 21, Findings of Fact 1.13).

The alleged access route, the "grassy path", was almost completely obscured by vegetation at the time Rielys trespassed, (CP 21, Findings of Fact 1.10); it was not suitable for vehicular transportation, (CP 21, Findings of Fact 1.11), and was completely within Gunn's proprietary boundary, (CP 21, Findings of Fact 1.12).

Between 2000 and 2009, Gunn repeatedly told Rielys that they had no easement through his property. (CP 21-23). Rielys, like others within the subdivision, had dedicated easement of ingress and egress to their respective lots. (CP 20, Findings of Fact 1.7; Ex. 5).

In spite of this, Rielys waited until Gunn was out of town in 2009 and directed their well driller to trespass onto Gunn's property and open the grassy path. (CP 46). The contractor cut down approximately 107 saplings and cleared off other vegetation that covered their intended route.

(CP 23, Findings of Fact 1.24). This work damaged Gunn's property, including depriving him of the privacy provided by the trees, loss of future income had the trees grown, damage to the land and cleanup costs. (CP 22, Findings of Fact 1.16; CP 31, Findings of Fact 2.24, 2.25, 2.28; CP 46-47).

Gunn was also forced to hire a surveyor to investigate and accurately mark the boundaries between Lots 1 and 2 as described in the approved subdivision and to deal with the easement claim. (CP 24, Findings of Fact 1.28). This was a substantial cost.

Based on the type of trespass action and damages before him, the trial court found that RCW 4.24.630 applied and entered judgment accordingly. This was an intentional and wrongful trespass that caused property damage. (CP 30; CP 46-47). It reviewed ***Clipse v. Michels Construction, Inc.,*** 154 Wn. App. 573, 225 P.3d 492 (2010) and although that case involved substantially different facts, found its reasoning applicable. Rielys' intentional and unreasonable trespass caused damage and waste to Gunn's property (CP 21, Conclusion of Law 2.24; CP 26-31).

On reconsideration, Rielys cited ***JDFJ Corp. v. International Raceway, Inc.,*** 97 Wn. App. 1, 970 P.2d 343 (1999) for the proposition that the exclusion under RCW 4.24.630 applied barring recovery. (CP 84-85; Br. of Appellant at 21).

In denying reconsideration the trial court reviewed his concerns regarding the two statutes pled in the alternative, and their interplay. (CP 44-47). He concluded, in this case, the intentional waste and damage to Gunn's property, rather than the cutting of trees with de minimis value, controlled which law applied. He determined that for the action before it the appropriate remedy was provided under RCW 4.24.630 (CP 46-47).

The trial court followed ***JDFJ Corp.'s*** reasoning which had concluded that RCW 64.12.030 provided the "appropriate" measure of damages for the acts that occurred. (CP 46). ***JDFJ Corp. v. International Raceway, Inc., 970*** P.2d at 347. In the case before the trial court concluded, that RCW 4.24.630 rather than RCW 64.12.030, provided the more adequate remedy given what happened.[3]

## III. ARGUMENT

**A. Standard of Review.** A trial court's findings of fact will be accepted as verities by the reviewing court so long as they are supported by substantial evidence. Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted. ***Katare v.***

[3] JDJF is further distinguishable because that Plaintiff had already prevailed under RCW 64.12.030 and sought post judgment to plead a new cause of action. The trial court denied their motion which ruling was affirmed. ***JDJF Corp. v. International Raceway, Inc.*** 970 P.2d at 346-347.

***Katare,*** 175 Wn.2d 23, 283 P.3d 546 (2012). [W]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports that challenged findings. ***In re Estate of Lint,*** 135 Wn.2d 518, 532 957 P.2d 755 (1998). Appellate courts defer to the trial court's assessment of witness credibility and evidence weight. ***In re Welfare of Sego,*** 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). It will not substitute its judgment for that of the trial court, even if it might have resolved the factual dispute differently. ***Sunnyside Valley Irrigation Dist. v. Dickie***, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Evidentiary rulings are viewed under the abuse of discretion standard. ***Havens v. C&D Plastics, Inc.,*** 124 Wn.2d 158, 168, 876 P.2d 435 (1994). Challenges to a trial court's conclusions of law are reviewed de novo. ***Robel v. Roundup Corp.,*** 148 Wn.2d 35, 59 P.3d 611 (2002).

Unchallenged findings are verities on appeal. ***In re the Estate of Jones,*** 152 Wn.2d 1, 8, 93 P.3d 147 (2004). RAP 10.3(g). Unchallenged conclusions of law become the law of the case. ***King Aircraft Sales, Inc. v. Lane,*** 68 Wn. App. 706, 716, 846 P.2d 550 (1993).

An appellate court can decide a case on any legal theory established by the pleadings and supported by the proof, regardless of the theory applied below. ***Deep Water Brewing v. Fairway Resources Ltd,***

152 Wn. App. 229, 215 P.3d 990, 1005 (2009); ***Barber v. Peringer***, 75 Wn. App. 248, 254, 877 P.2d 223 (1994).

## B. The Trial Court Correctly Applied RCW 4.24.630 Rather Than RCW 64.12.030.

The two statutes read as follows:

> **RCW 4.24.630: Liability for damage to land and property –Damages—Costs—Attorney's Fees— Exceptions.**
>
> (1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for the injury to the land, including costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorney's fees and other litigation costs.
>
> (2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

**RCW 64.12.030: Injury to or removing trees, etc. - Damages.**

> Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including Christmas tree as defined in *RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city, or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city or town against the person committing the trespass or any of them, any judgment for the plaintiff shall be for the treble of the amount of damages claimed or assessed.

RCW 64.12.030 was first enacted in 1869. 1869 p 143 § 556. RCW 4.24.630 was enacted in 1994. 1994 c 280 § 1.

The question on appeal is which statute applies when both are pled as alternate forms of relief.[4] This requires applying principals of statutory construction. ***Chemical Bank v. Washington Public Power Supply System,*** 99 Wn.2d 772, 782, 666 P.2d 329 (1983) ("Language within a statute must be read in context with the entire statute and construed in a manner consistent with the general purposes of the statute"), ***citing Nationwide Papers, Inc. v. Northwest Egg Sales, Inc.,*** 69 Wn.2d 72, 416 P.2d 687 (1966). "Similarly [s]tatutes pertaining to the same subject matter must be harmonized, if possible"

[4] Rielys concede no Washington Appellate Court has squarely addressed how these two statutes apply as alternative forms of relief. Br. of Appellants at 21.

***Chemical Bank v. Washington Public Power Supply System,*** 99 Wn.2d at 782, ***citing Snohomish Cy. PUD 1 v. Broadview Television Co.,*** 91 Wn.2d 3, 8, 586 P.2d 851 (1978). "Related statutory provisions are interpreted in relation to each other and all provisions harmonized". ***State v. S.P.,*** 110 Wn.2d 886, 890, 756 P.2d 1315 (1988). Where two statutes apparently conflict (or are concurrent general and special acts), courts generally give preference to the more specific and more recently enacted statute, ***Tunstall v. Bergeson,*** 141 Wn.2d 201, 211, 5 P.3d 691, ***cert. denied,*** 121 S.Ct. 1356 (2001), unless it appears the legislature intended to make the general act controlling. ***Wark v. Wash. Nat'l Guard,*** 87 Wn.2d 864, 867, 557 P.2d 844 (1976); ***Estate of Kerr,*** 134 Wn.2d 328, 343, 949 P.2d 810 (1998).

The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to the plain meaning as an expression of legislative intent. ***Dept. of Ecology v. Campbell,*** 146 Wn.2d 1, 43 P.3d 4 (2002). However, application of this "plain meaning" rule has not been uniform. ***Id.***

Rielys contend that because trees were cut, and damages sought for them, that the plain meaning of the statutes requires only RCW 64.12.030

apply even though Gunn sought other relief. (CP 83; Br. of Appellant at 23-25).

However, the Washington Supreme Court has questioned whether interpretation of the timber trespass statute, RCW 64.12.030, is subject to the "plain meaning" rule. ***Broughton Lumber Co. BNSF Ry. Co.,*** Wn.2d 619, 278 P.3d 173 (2012) (former version required using other rules of construction outside of the plain meaning rule). It has found RCW 64.12.030 is not an exclusive remedy and does not bar recovery not already encompassed by the statutory liability. ***Birchler v. Castello Land Co.,*** 133 Wn.2d 106, 942 P.2d 968 (1997)(although it bars duplicative recovery).

It should be noted that ***Birchler,*** and the cases it sites, involved matters that predate enactment of RCW 4.24.630. Rielys site its language as proof that only RCW 64.12.030 applies and limits damages to those "that are the normal consequence of the logging operation". (Br. of Appellant at 18-19). That is an important distinguishing factor.

What then are the damages then covered under RCW 64.12.030? According to ***Birchler*** it is those incurred in a normal commercial logging or other commercial forest, Christmas tree, or fruit bearing tree commercial ventures. ***Birchier v. Castello Land Co., Inc,*** 113 Wn.2d at 111. Further, in pre RCW 4.24.630 cases involving injury to or

destruction of residential/ornamental trees or shrubs, damages included the restoration or replacement costs for the vegetation. ***Sherrell v. Selfors,*** 73 Wn. App. 596, 603, 871 P.2d 168, ***review denied,*** 125 Wn.2d 1002, 886 P.2d 1134 (1994).

This case involved neither a commercial logging operation nor destruction of residential/ornamental trees but focused on Defendants' intentional trespass to open an access route for a well driller over private residential property which resulted in property damages that included a small amount for cutting saplings. The damages awarded here, for cleanup and survey costs, and attorney's fees are not duplicative nor covered under RCW 64.12.030.

What is the purpose of each statute and how can they be read so neither is made meaningless?[5] Each refers to trees or timber. So when is the cutting of trees or timber compensable under either statute? Rielys' interpretation would make the term "timber" in RCW 4.24.630 superfluous. Any tree cut, no matter the value, would limit an injured party to just three times its value. As such, any tree blocking the neighbor's million dollar view is at risk. The neighbor would simply value the tree, cut it without permission and pay treble damages knowing the

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[5] The legislative history for these two statutes is limited.

victim would not be entitled to any other damages or attorney fees.(Br. of Appellants at 28 ("[c]ontrary to the trial court's opinion, the value of the trees cut are not a determinative factor of what statute should be applied when a trespass has occurred")).

Secondly, it would ignore the real basis for this case, to bar Rielys' use of Gunn's property. (CP 150, Paragraphs 7.1, 7.2, 7.6, 7.7, and 7.8). After listening to the evidence the court found that Appellants' intentional act was not to cut trees, or timber trespass, but to open up a roadway that Appellants had no right to use. This was the focus of the suit, not the cutting of the saplings. (CP 31, Conclusion of Law 2.25; CP 46-47). The damages for the intentional trespass were of minimal value, with the majority being the survey costs to help disprove the easement claim.

The trial court ruled that adopting Appellants' interpretation would not provide an adequate remedy. (CP 31, Conclusions of Laws 2.24-26; CP 46-47).

The exception set out in RCW 4.24.630(2) only precludes an award for damages to timber if that is provided under RCW 64.12.030 that are generally associated with commercial forestry or other tree related for profit operations. This exception has no application to this case which deals with and intentional trespass and the associated damages to land and

property. The tree cutting was incidental and of little consequence to the actual damage to Gunn.

Rielys' arguments regarding resolving the admitted ambiguity between the statutes forgets the rule of construction that "where two statutes apparently conflict, courts generally give preference to the more specific and more recently enacted statute." ***Tunstall v. Bergeson,*** 141 Wn.2d 201, 211, 5 P.3d 691, ***cert. denied,*** 121 S.Ct. 1356 (2001). The trial court found that RCW 4.24.630 was enacted to fill a void left by RCW 64.12.030 in that the latter statute left landowners like Gunn inadequately compensated. (CP 46). In this case where the trees cut were of minimal value and cut for reasons other than traditional commercial harvesting, RCW 4.24.630 applied and provided the just compensation. CP 46-47.

There is discussion about these two statutes being punitive or remedial or restorative. However, the later enacted RCW 4.24.630 is clearly meant to fill a void left by RCW 64.12.030. Why then the exception under RCW 4.24.630(2). A remedial statute is one that relates to practice, procedure, or remedies and does not affect a substantive or vested right. ***Marine Power Equipment Co. v. Washington State Human Rights Com'n Hearing Tribunal,*** 39 Wn. App. 609 694, P.2d 697 (1985). RCW 4.24.630 added remedies for damage to property even where timber is cut. But RCW 4.24.630(2) appears to say that if you have any tree

damages you cannot seek redress under RCW 4.24.630(1). However, it uses the term "timber" which, as defined by ***Birchier v. Castello Land Co., Inc,*** 133 Wn.2d 106, 942 P.2d 968 (1997), means timber of merchantable quality, ready for sale. It is admitted here the trees cut were merely saplings worth $153.00. The real injury by the cutting was the waste and damage to the property that is compensated under the second prong of RCW 4.24.630(1). Therefore if the damaged timber is not merchantable it is not compensable under RCW 64.12.030.

Civil statutory remedies, in part, are designed to place the injured person in the same position as before and to stop further bad acts of the offending party. Actual damages encompass all elements of compensatory awards. ***Sing v. John L. Scott, Inc.,*** 83 Wn. App. 55, 70, 920 P.2d 589 (1996), ***rev'd on other grounds,*** 134 Wn.2d 24, 948, P.2d 816 (1997). The damages provided under RCW 64.12.030, in this case, would simply not make Gunn, or anyone in his same position, whole nor thwart future trespass.

The trial court correctly determined that in applying these two statutes together the best remedy that fulfills the purpose of justly compensating Gunn was to apply RCW 4.24.630(1). Applying only RCW 64.12.030 would lead to neighbors' trees falling with impunity and unauthorized roads opened. That is what RCW 4.24.630(1) is meant in

part to avoid. It is one thing cut down a commercial forest where treble stumpage value adequately compensates for the wrong; it's another matter when ingress and egress rights are involved. Far more than a tree is being damaged.

### C. The Trial Court Correctly Ruled There Was No Implied Easement.

Rielys' affirmative defenses vaguely refer to an easement right. (CP 142, Affirmative Defense No. 5). It does not say what type. At trial the court granted Gunn's motion in limine restricting testimony regarding the implied easement, and denied Rielys' motion for continuance, because it had not been a focus of the case before trial. (CP 89).

However, contrary to Rielys' assertion on appeal, the trial court did not assume them trespassers without any right to use of the grassy path. The majority of the court's ruling is review of property records to determine if Rielys had an easement. This included by default a review of Rielys' assertion of an implied easement. The court heard testimony from one of the Grantor's a Mr. Joel Sisson. (RP 145 – 160; CP 91).

Substantial evidence supports the findings and conclusions that Rielys had no easement either actual or implied. It is admitted that no recorded easement over the grassy path was granted or reserved to Rielys. (CP 24, Findings of Fact 1.30). Rielys' implied easement claim focuses on

their discussions with only one of their Grantors, Sisson, and the fact the grassy path had been used when the entire acreage was part of the old farm and before the subdivion.

However, this lone piece of evidence is insufficient to create an implied easement. First, Rielys ignore the fact that four (4) Grantors formed a new eight (8) lot subdivision (with new homeowners association), out of only a small portion of the farm, which subdivision was approved by Clallam County. Each new lot differed in acreage. Lots 1-3 were provided access through a new ingress and egress route over Sponberg Lane. (Ex. 5, and the Declaration of Easement and Road Maintenance Agreement of Sponberg Lane). Sisson was the only Grantor who testified at trial regarding the implied easement. (CP 91, entries between 2:34:34 – 2:59:39).

Second, Storm King did not reserve an easement over the grassy path (Ex. 5 and its notes). This alone removes the common law implied easement theory from consideration. A subdivision provided notice of boundaries and property rights. ***Gold Creek North, v. Gold Creek Umbrella,*** 143 Wn. App. 191, 177 P.3d 201 (2008), ***See also, Jones v. Berg,*** 105 Wash. 69, 177 P. 712 (1919), ***Wetzler v. Nichols***, 53 Wash. 285, 101 P. 867 (1909). The common grantors removed the grassy path as a common pathway for all parties by creating the subdivision. It is not

shown on the county approved recorded subdivision survey map. It is disingenuous to argue that the common grantors, the subdivision creators, intended to keep that route when they spent all the time and trouble creating a detailed subdivision and not including it. Storm King simply does not show a reserved easement or the equitable implied easement as part of its common plan.[6]

Easements by implication arise by intent of the parties, which is shown by facts and circumstances surrounding conveyance. ***Roberts v. Smith,*** 41 Wn. App. 861, 864, 707 P.2d 143 (1985). Three factors must be shown: (1) former unity if title and subsequent separation; (2) prior apparent and continuous quasi easement for the benefit of one part of the estate to the detriment of another; and (3) a certain degree of necessity for the continuation of the easement. ***Adams v. Cullen***, 44 Wn.2d 502, 505, 268, P.2d 451 (1954); ***MacMeekin v. Low Income Hous. Inst., Inc.,*** 111 Wn. App. 188, 195, 45 P.3d 570 (2002). Unity of title and subsequent separation is the only absolute requirement. ***Roberts v. Smith,*** 41 Wn. App. at 865. The other factors are merely aids to construction in determining the presumed intention of the parties as disclosed by the

[6] Exhibit 5 contains a route through lot 1 drawn in by Defendants that is not in the documents filed with Clallam County, See Ex. 1, Request for Production No. 6.

extent and character of the user, the nature of the property, and the relation of the separated parts to each other. ***Adams v. Cullen,*** 44 Wn.2d at 505-06.

The implied easement theory fails. First, who was the common grantor from whom the easement was created? The record only shows that Sisson and Goralski purchased a small portion of the farm. It does not appear that they owned the entire farm and or received the implied easement.

Second, the grassy path had been used for farming and logging, there is no proof that the grassy path was used for any adjoining lots after the subdivision was created. Finally, there is no showing the grassy path was necessary for any lots after the subdivision.. It is unlikely necessity can be shown as it is admitted Rielys already have access to, and have been using, their property.

Additionally, even if Sisson and Goralski acquired the implied easement that ran through Lot 1 to Lot 2, any claim they intended to grant it merged into the subdivision plan they created and was approved by the county and then the deeds given both Rielys and Gunn. Storm King became the common owner. It owned both the benefitted and burdened land. The implied easement was extinguished by merger. ***See, Schlager v. Bellport,*** 118 Wn. App. 536, 539, 76 P.3d 778 (2003). After merger the

easement can only be revived by express language in a subsequent conveyance. ***Radovich v. Nuzhat,*** 104 Wn. App. 800, 805, 16 P.3d 687 (2001). No documents between the Grantors and either Rielys or Gunn reserve, or grant anything in, the grassy path.

Any discussion about the grant of an easement to Lot 3 as proof the same grant was left out for Lot 2 is questionable. First, the easement location is too vague to conclude it goes over the grassy path. It refers to an existing driveway which was never proved up at trial. It's likely unenforceable as a matter of law. ***Berg v. Ting,*** 125 Wn.2d 544, 886, P.2d 564 (1995), ***Howell v. Inland Empire Paper Co.,*** 28 Wn. App. 494, 495, 624, P.2d 739 (1981). Second, the fact that the grassy path right of way was not reserved in the deed to Lot 1 nor granted to Lot 2 shows it was just as likely intentionally left out.

Rielys, who purchased after Gunn, and were granted the same access route as Gunn, in no way could say they relied upon oral statements that they had an easement through Gunn's property over the grassy path. There was no need for them to access their property over the path. This was an afterthought when they decided to sink a new well.

### D. Court did Not Commit Reversible Error by Granting Plaintiff's Motion in Limine or to Deny Continuance.

Concerning the issues involving Gunn's motion in limine (implied easement) and denial of Riely's motion to continue, there is sufficient basis for each ruling. Generally, those decisions are reviewed for abuse of discretion. ***Burnet v. Spokane Ambulance,*** 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); ***Martonik v. Durkan,*** 23 Wn. App. 47, 50, 596 P.2d 1054 (1979), ***review denied***, 93 Wn.2d 1008 (1980).

The motions were tied together. They were made on the date of trial. There was much discussion about the timing of new issues and newly disclosed theories and parties. (RP 5 – 20). Rielys just disagree with the court's rulings. Regardless of the cited cases, this matter came on for trial over three years after it was filed. The court was well within its discretion to deny amendments proposed on the date of trial.

Additionally, it appears the trial court considered what evidence was provided as it applies to each issue. The court, after listening to the evidence, found no implied easement, (CP 24-26) and no non-party liability. (CP 26, Findings of Fact 1.40-41). Substantial evidence supports each ruling. There is no proof of abuse of discretion.

**E. Trial Court Correctly Ruled Rielys' Waived Defense of Non-Party Fault Under CR 12(i).**

At the start of trial, the Court denied Rielys' attempt to shift blame for damages to a non-party. Rielys' admitted they had not specifically

pled, as an affirmative defense, that Oasis Well Drilling was the liable third party. (RP 19 –20). However, they offered their discovery responses and argued Oasis Well Drilling was disclosed in them and that was sufficient. (RP 12-17; Ex. 1). They were not offered into evidence. (***See*** CP 93. No. 1).

CR 8(c) or CR 12(i) requires affirmative pleadings. The latter civil rule states in part: "The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded." (CR 12(i)). Answers in discovery are not an affirmative pleading. ***Pierson v. Hernandez,*** 149 Wn. App. 297, 202 P.3d 1014, 1018 (2009) (An interrogatory is not a pleading); ***See also, Farmers Ins., Co. of Wash. v. Miller,*** 87 Wn 2d 70, 76, 549 P.2d 9 (1976). The Affirmative defense should have been amended long before trial.

The trial court ruled that the affirmative defense did not adequately identify the offending party to satisfy CR 8(c) or CR 12(i). (RP 19, lines 18-24).

In spite of this ruling, the trial court considered this defense but saw through Rielys' attempt to place blame on a non-party. He noted:

> The Defendants have raised the issue that the trees were cut on Mr. Gunn's property, but it was done by the well driller, and we had no idea the driller was going to do that –they were an independent contractor."

> That is not credible in this case for a lot of reasons, but primarily because the well drilling contract was fill-in-the-blank standard form contract, and it had added to it very specifically in handwriting an additional job the well-driller was to do called "tree removal". According to the trial evidence, it is absolutely certain that removal of the trees was contemplated by the Rielys, and that by Oasis well-drillers, when that contract was entered into and that the Rielys knew that those trees were on Mr. Gunns' property.

(CP 26 Findings of Fact 1.40 and 1.41).

There was no abuse of discretion and the appellate court should not substitute its judgment. ***Sunnyside Valley Irrigation Dist. v. Dickie,*** 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

**F. Appellants Not Entitled To Fees Under RCW 4.84.250.**

If RCW 64.12.030 applies, Appellants assert the right to an award of fees under RCW 4.84.250. First, this argument is contrary to their argument throughout this case that RCW 64.12.030, being the more specific statute, is the exclusive remedy for cutting of trees which limits the prevailing party to statutory fees and costs. (Br. of Appellants at 26-27 ("A specific statute such as the RCW 64.12.030 timber trespass statute, will supersede a more general statute...")[7] Nowhere in RCW 64.12.010-060 does it mention the award of any reasonable attorney's fees.

If applicable, RCW 64.12.030-040 provides the exclusive remedy

[7] ***But cf., Kingston Lumber Supply Co., v. High Tech Development Inc.,*** 52 Wn. App. 864, 765, P.2d 27 (1988) (RCW 4.84.250 applied to mechanic lien action under RCW 60.04.130).

between the parties. This is true because RCW 64.12.040 allows for mitigation to single damages if the trespass is inadvertent. In this case you would have an unfair ruling with an intentional trespass that little damage yet allow the wrongdoer to prevail.

RCW 4.84.250 does not apply as its purpose, to encourage settlement of small claims, would not be served. ***Williams v. Tilaye,*** 174 Wn.2d 57, 272 P.3d 235 (2012). Although RCW 4.84.250 applies to small monetary claims where other relief is sought, ***Hanson v. Estell,*** 100 Wn. App. 281, 997 P.2d 426 (2000), it cannot apply to suits seeking equitable relief. The primary basis for this suit sought equitable relief, including quiet title and injunctive relief. (CP 150-151). Gunn litigated and prevailed on these issues. (CP 16-18). The settlement offer did not, and could not, address these matters. Thus, even if the damage award is reduced under RCW 64.12.030, but the other portions of the judgment affirmed, RCW 4.84.250 does not apply. The settlement offer would not have avoided the suit as it did not resolve the major focus of the case, that being the trespass. The parties had stipulated pre-trial to the tree damages. The only thing litigated was the trespass. If the only reversal is the monetary award, Gunn is still the prevailing party which denies Rielys any attorney's fees.

## G. Respondent Entitled to Award of Attorney's Fees and Costs on Appeal.

Gunn requests an award of attorney's fees and costs for this appeal. RAP 18.1(a) provides:

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

RCW 4.24.630(1) provides for recovery of attorney's fees and costs. This is applicable law entitling Gunn to recover attorney's fees and costs on appeal. ***Sherwood Assisted Living, Inc., v. Finn ( In re the Guardianship of Matthews),*** 156 Wn. App. 201, 232 P.3d 1140 (2010). Gunn has been forced to expend substantial sums to defend his property and should be awarded fees and costs on this appeal.

## IV. CONCLUSION

This Court should affirm the trial court's ruling and award Respondent attorney's fees and costs on appeal.

DATED this 2nd day of April, 2014.

BELL & DAVIS PLLC

W. JEFF DAVIS, WSBA#12246
Attorney for Robert Gunn, Respondent

No. 45177 8 II

**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

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**ROBERT GUNN, a single man,**

**Respondent,**

**v.**

**TERRY L. RIELY and PETRA E. RIELY, husband and wife,**

**Appellants.**

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# PROOF OF SERVICE

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I certify that on the 3rd day of April, 2014, I served the original and one copy of the Brief of Respondent Robert Gunn via US First Class Priority mail to:

David C. Ponzoha, Court Clerk
Washington State Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402-4454

A copy by US First Class Mail to:

Curtis G. Johnson
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230 E. 5th Street
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and Dated in Sequim, WA this 3rd day of April, 2014.

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