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Washington State Court of Appeals

Division One

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STATE OF WASHINGTON

Docket No. 71726-0-I

LESLIE PENDERGRAST,

Plaintiff-Appellant,

v.

ROBERT MATICHUK and JANE DOE MATICHUK, husband and wife, et al.,

Defendants-Respondents.

PETITION FOR REVIEW

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A. **IDENTITIES OF PETITIONERS.**

Petitioners in this case are Robert and Jane Doe Matichuk, husband and wife, and their company, Blaine Investments, LLC. Each of these petitioners was a defendant in the underlying action, *Pendergrast v. Matichuk, et al.*, Whatcom County Cause No. 10-2-00528-1. Each of them was also a respondent/cross appellant in the Court of Appeals, Division One, under Cause No. 71726-0-I.

B. **CITATION TO COURT OF APPEALS DECISION.**

Petitioners seek review of the Opinion of the Court of Appeals, Division One, in this matter, issued August 31, 2015. A copy of the decision is attached in the Appendix.

C. **ISSUES PRESENTED FOR REVIEW.**

This case presents the following issues for review:

1. Was the "boundary by common grantor doctrine" incorrectly applied in this case, when there is no evidence of any meeting of the minds between the grantor and the original grantees that the property line should be moved to align with a fence on the property, and when the parcel at issue was vacant at all times material to that determination?

2. Was the boundary by common grantor doctrine incorrectly applied in this case, when the deed for the property containing the disputed area provided specific measurements for the area being conveyed, provided no reference to the fence at issue, and when the use of the fence as a boundary would have reduced the specific dimensions conveyed by the deed?

3. Was the boundary by common grantor doctrine incorrectly applied in this case, when the facts underlying the application of the doctrine were disputed, and were based on the activities of the property owners *after* sale, and not based on a "meeting of the minds" with the original grantor at the

time of sale?

4. May a plaintiff recover treble damages for noneconomic harm under RCW 64.12.030, the timber trespass statute?

5. Should noneconomic damages be awarded based on a multiplier of the underlying economic damages upon which they are based?

D. STATEMENT OF THE CASE.

1. Basic Facts.

Plaintiff Pendergrast filed this action on February 26, 2010, against defendant Robert Matichuk and his wife, claiming title to a strip of land fully within the tract of land that Matichuk purchased in 2006. [CP 9] Two months later, plaintiff recorded on defendants' property a lis pendens, providing record notice of plaintiff's claim to the small strip of land. [CP 22]

Prior to acquisition by the parties to this suit, the Pendergrast and Matichuk parcels were each owned as separate parcels by Tali and Cyrus Conine. A home was located on the Pendergrast parcel; *the Matichuk parcel was vacant.*

The Matichuks acquired their parcel from the Conines on April 25, 2006. [CP 323-26] The legal description in the deed specifically provided that Conine conveyed to Matichuk the "south 75 feet of Lot 30, Block 5 of Perley's Replat" in the City of Blaine. [CP 331] Matichuks intended to develop a condominium project on the vacant lot. Prior to purchase, Bob Matichuk noted the dimensions of the lot as contained in its legal description, and paced those dimensions on the lot to confirm the lot's dimensions. [CP 53] Finding the parcel, as described in the legal description, suitable for their needs, the Matichuks went forward with the purchase. The conveyance documents

in no way mentioned the old, meandering wooden fence separating the Matichuk property from what would become the Pendergrast property. [CP 323-326]

On September 18, 2006, Pendergrast acquired her adjoining parcel from the Conines. [CP 319-322] The deed through which Pendergrast took title provided a legal description which made no reference to the fence along the boundary with Matichuk. [CP 319] Pendergrast had no discussion with Conine, the seller, during her purchase transaction. [CP 329-330]

At the time each party purchased its respective parcel, a fence existed between the two parcels, located entirely within the Matichuk property. [*See* Appendix 2] Near the fence, and within the disputed area, was a large tree with an old treehouse. Pendergrast used the fenced area as a yard space from her purchase in 2006 until 2009. [RP 41, ln. 21]

After acquiring their property, the Matichuks began their efforts to develop their condominium project. On September 11, 2008, the City of Blaine approved Matichuks' plans for a fourplex on the property. [Trial Exhibit 5] The Matichuks subsequently revised their site plan to create two duplex buildings. That revised site plan was approved by the City of Blaine on August 24, 2009. [Trial Exhibit 4]

When the time for construction of the condominium project was approaching, on January 29, 2009, Matichuk wrote to Pendergrast, informing her of his intention to remove the fence and install a new fence on the boundary line based upon the legal description. [Trial Exhibit 10] Several weeks later, on April 24, 2009, Pendergrast, through an attorney, wrote to seller Conine, informing the seller of the Matichuks' plans, and claiming misrepresentation in her sales transaction. [CP 329-330] The letter in no way referred to any "boundary" established at the fence line by Conine as common grantor.

On April 21, 2009, also wrote to Matichuk, asking him not to move the fence. [Trial Exhibit 9] Pendergrast took no other action to protect the rights she claimed to have. She did not seek any sort of injunction to stop relocation of the fence.

Thereafter, prior to the commencement of construction, Matichuk removed the old fence and replaced it with a new one along the property line as established by the legal description for the Matichuk lot. Matichuk also removed the old tree that was within his property based on the legal description. [*See* Trial Exhibit 20, p. 1]

On November 10, 2009, the City of Blaine issued a building permit for the southerly duplex building. [Trial Exhibit 2] Construction of the building foundation began a few days thereafter. Months later, on February 26, 2010, Pendergrast, through new counsel, filed this action. [CP 9] At no time in this litigation did Pendergrast seek any kind of injunction to stop construction of the condominium project. Final inspection of the southerly building occurred on March 30, 2011.

2. Procedural History.

Plaintiff Pendergrast filed this action on February 26, 2010. [CP 9] Two months later, plaintiff recorded against defendants' property a lis pendens, providing record notice of plaintiff's claim to the small strip of land. [CP 22]

On December 21, 2012, the Whatcom County Superior Court, Judge Steven J. Mura, considered cross-motions for summary judgment. The court dismissed plaintiff's claim to the disputed property under her boundary by agreement theory, and granted plaintiff summary judgment on her claim of boundary by common grantor. Written orders were entered by the court on January 4, 2013. [CP 81 (dismissing boundary by agreement claim; CP 84 (granting plaintiff summary judgment on boundary by common grantor)]

On July 5, 2013, plaintiff amended her complaint to add claims for trespass, timber trespass, unlawful detainer and ejectment. [CP 108] Plaintiff also added as a party Blaine Properties, LLC, an entity owned by the Matichuks to which the Matichuk property had been transferred. [Trial Exhibit 12]

Beginning on January 29, 2014, Judge Deborra Garrett presided over a jury trial related to plaintiff's claims of trespass, timber trespass, unlawful detainer and ejectment against the Matichuks, Blaine Properties, and others. The jury was asked to decide these issues from the premise that the court had already ruled in favor of Pendergrast on summary judgment on the boundary by common grantor doctrine, and therefore for purposes of plaintiff's monetary claims, the jury was to treat the disputed property at issue as belonging to Pendergrast. At the conclusion of the trial, the jury awarded Pendergrast damages against Matichuks and Blaine Properties LLC on her trespass claims, including $5200 for economic loss, and $75,000 (or more than fourteen times the economic verdict) for non-economic damages. As to timber trespass, for the removal of the single, old tree, the jury awarded plaintiff $3310 against defendants Matichuk for her economic damages, and $40,000 (or more than twelve times the economic verdict) for non-economic damages. [CP 203]

Findings of Fact, Conclusions of Law and Judgment were entered in favor of Pendergrast and against Matichuk and Blaine Properties, on February 27, 2014. [CP 221, 238] On March 10, 2014, Matichuk filed a motion for a new trial on the non-economic damages claims. [CP 370] On March 28, 2014, the court denied the motion. [CP 266]

On March 28, 2014, Pendergrast appealed the court's refusal to treble the non-economic damages claims under the timber trespass statute. [CP 268] Matichuk timely cross-appealed on

March 31, 2014, contesting the initial order granting Pendergrast summary judgment on liability, and contesting the damages awarded by the jury. [CP 376]

On August 31, 2015, Division One of the Court of Appeals reversed the trial court's decision relating to trebling of plaintiff's noneconomic damages under RCW 64.12.030, and affirmed the trial court's judgment in all other respects. Matichuk timely requests that the Supreme Court grant review of the case to reverse the decision of the Court of Appeals in all respects.

E. Argument.

This case decides the ownership of a disputed strip of land between two adjoining parcels in Blaine, Whatcom County, Washington. Division One concluded that plaintiff Pendergrast owned the disputed strip *by operation of law* under the "boundary by common grantor" doctrine. Division One then upheld the damages awarded by the jury, involving both the value of the strip of land and removal of a single tree. Division One then ordered plaintiff's recovery of noneconomic damages to be trebled under RCW 64.12.030, such that her recovery for defendant's removal of a single old, ornamental tree approaches $130,000.00.

The Supreme Court should accept review of this case for a number of reasons. First, the published opinion of Division One improperly applies the boundary by common grantor doctrine, as it changes established precedent concerning what actions of the parties are to be considered. As articulated in this case, the boundary by common grantor doctrine no longer requires evidence of a meeting of the minds with the original grantor at the time of sale.

Second, the Supreme Court should accept the case to consider whether noneconomic damages should be trebled under the timber trespass statute, RCW 64.12.030. The court is asked to

rule on the interpretation of the timber trespass statute, after declining to do so previously in Birchler v. Castello Land Co. Inc., 133 Wn. 106, 110 n.3, 942 P.2d 968 (1997).

Third, the court should consider whether a jury's noneconomic damages award should be limited in terms of its relationship to the underlying economic recovery.

1. **Standards on Summary Judgment.**

The trial court established, and the court of appeals affirmed, the liability issues in this case on summary judgment. The standards for entry of summary judgment are well settled: summary judgment is appropriate only when there is *no genuine issue* about any material fact. Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); CR 56(c). The court must review the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. Sedwick v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 258 (1994) quoting Marincovich, 114 Wn.2d at 274. Said differently, the court must examine the evidence *and all reasonable inferences therefrom* in the light most favorable to the non-moving party. Weatherbee v. Gustafson, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992).

Both the trial court and the court of appeals inappropriately adjudicated facts to enter judgment on liability before trial. As shown herein, there were no facts in the record from which the courts could conclude, as a matter of law, that plaintiff Pendergrast was entitled to the disputed strip of land on Matichuk's property. All inferences of fact were to be resolved in favor of the Matichuks, and not Pendergrast. Indeed, there were multiple factual issues resolved by the court of appeals in its decision which required resolution by trial. For that reason alone, the decision of the court of appeals should be reversed.

2. The Court of Appeals Opinion Incorrectly Applied the Boundary By Common Grantor Doctrine.

Conveyances of real property usually must be accomplished by proper conveyance of a deed. RCW 64.04.010. A bona fide purchaser of real property generally is entitled to rely on record title. Levien v. Fiala, 79 Wn. App. 294, 299-300, 902 P.2d 170 (1995). If the law were otherwise, it would impose an almost impossible burden upon a party in that each and every conveyance would have to be investigated beyond the auditor's records for possible error to avoid a claim of inquiry notice.

Washington courts have, in only very limited circumstances, carved exceptions to the statute of frauds to permit coterminous property owners to establish a common boundary other than by deed. The "boundary by common grantor" doctrine is one of those very limited exceptions. The Court of Appeals applied this limited exception to a strip of land that was wholly within the property owned by Matichuks, as provided by the legal description contained in the Matichuk deed, and as confirmed by survey.

The common grantor doctrine has been explained as follows:

> A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees *who take with reference to that boundary*. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, the conveyance in reference to it. *However, for a boundary line established by common grantor to become binding and conclusive on grantees it must plainly appear that the land was sold and purchased with reference to such line, and that there was a meeting of minds as to the identical tract of land to be transferred by the sale. (Emphasis supplied)*

Levien v. Fiala, 79 Wn. App. 294, 301 n.3, 902 P.2d 170 (1995).

Under this principle, a grantor who owns land on both sides of a line he or she has established as the common boundary is bound by that line. Fralick v. Clark County, 22 Wn. App.

156, 589 P.2d 273 (1978). The line is also binding on grantees if the land was sold and purchased with reference to the line, and there was a meeting of the minds as to the identical tract of land to be transferred by the sale. Kronawetter v. Tomoshan, Inc., 14 Wn. App. 820, 545 P.2d 1230 (1976).

In this case, there was no evidence in the record that *any* communication between Matichuk and his seller Conine established a boundary that was anything but that contained in the legal description. Matichuk and the seller never met, and the deed documents were based on the recorded legal description. There was nothing in the paperwork to suggest that the fence on the property – which was old and not even built in a straight line – was a manifestation of a boundary.

The court of appeals relied heavily on the fact that Matichuk paced his property before purchase, and left the fence intact for a period of time. Opinion, p. 9. In reviewing an order granting summary judgment, however, the court of appeals was required to resolve all inferences in Matichuk's favor. Clearly, they did not. There were multiple explanations for Matichuk's actions that the court did not even consider. For one, it was clear from the chain of events that Matichuk waited until it was time for construction to move the fence to the deed boundary. His failure to do so at the time of purchase cannot be considered *conclusive* proof of his belief that the fence somehow formed a boundary. Thus, there is absolutely no actual evidence of conduct *at the time of sale* which would indicate to anyone that the fence formed the property line, such that the boundary by common grantor doctrine would be applicable. *See* Fiala, 79 Wn. App. at 301; Strom v. Arcorace, 27 Wn. App. 478, 481, 178 P.2d 959 (1947).

The court of appeals also significantly deviated from the boundary by common grantor doctrine by consideration of actions *after* closing to find a "manifestation of ownership." Through interpretation of its opinion in Winans v. Ross, 35 Wn. App. 238, 666 P.2d 908 (1983), the court

reasoned that *post-purchase* actions can establish a meeting of the minds such that the boundary by common grantor doctrine should apply. In trial of the Winans case, however, the trial court *found as fact* that the properties were purchased with reference to the fence line. *Id.* at 240. Moreover, the Winans court found "substantial evidence" that an agreement existed between the grantor and the original grantee, based on the rebuilding of a fence in the exact location, and a tenant asking permission to use a pond on the other side of the fence line for irrigation. The court then enforced the boundary agreement on Ross, a subsequent purchaser.

Even if Winans can be read to allow after-the-fact activities to manifest an agreement with the original seller, the court of appeals here improperly affirmed summary judgment only after deciding disputed facts. First, *at best* Matichuks' failure to immediately remove the fence at purchase, with nothing more, creates only an *inference* of an agreement between Matichuk and Conine, and is not actual proof of one. The Matichuks are entitled to have all inferences of fact resolved in their favor. Weatherbee, 64 Wn. App. at 131. The court of appeals could not uphold summary judgment on an inference alone.

Nor is there any evidence that when Matichuk and Pendergrast subsequently owned the parcels, they acted in a way to suggest that they agreed that the fence was the boundary. To the contrary, Matichuk informed Pendergrast of his intention to remove the fence and move it to the deeded property line. In response, Pendergrast wrote to Conine, and demanded financial compensation. [CP 339-40] Pendergrast was certainly not acting under a belief of an agreement concerning the fence when she wrote that letter. Even her letter to Matichuk claiming rights to the disputed property merely establishes a factual dispute between the parties, long after they purchased their properties. Moreover, all the evidence demonstrates that the Matichuk property was vacant

during this time period, and Matichuk was working diligently on the planning and permitting for his condominium project, using the legal description of his parcel as the proper boundary. [Trial Exhibits 1-4]

Reduced to its essence, the ruling of the court of appeals contends that the mere existence of a fence, coupled with use of the fence line as the boundary for a short period (when one of the lots was undeveloped and vacant), is enough to create a boundary by the common grantor as a matter of law. This is error. Proof of a meeting of the minds – with no disputed facts – was required.

At best, these facts would suggest a boundary by acquiescence: a fence line may be established as a boundary when there is "sufficient acquiescence" in it to create a boundary, not a barrier. *See, e.g.*, Houplin v. Stoen, 72 Wn.2d 131, 135, 431 P.2d 998 (1967). However, plaintiff never pleaded acquiescence as a theory of recovery. Moreover she could not, as acquiescence must extend for the duration of the adverse possession period. Here, it did not.

. The Supreme Court should accept this case to confirm the basic requirements of boundary by common grantor, establishing the criteria for a "meeting of the minds" to move a boundary from the location contained in a deed. At the very least, the Supreme Court should reverse the case under CR 56, and require a trial of those issues.

3. The Court of Appeals Should Not Have Trebled Non-Economic Damages Under the Timber Trespass Statute.

The court of appeals reversed the trial court's determination that non-economic damages may be trebled under RCW 64.12.030. At trial, the jury awarded Pendergrast $3,310 for the value of a single old, ornamental tree. That amount was then trebled by the court pursuant to RCW 64.12.030. The jury also awarded Pendergrast an additional Forty Thousand Dollars for "emotional distress"

from the removal of the tree. Should those damages be trebled in this case, she would be awarded an additional Eighty Thousand Dollars, such that her total recovery for the loss of one tree will reach nearly One Hundred Thirty Thousand Dollars.

Plaintiff sought treble damages for the removal of her tree pursuant to RCW 64.12.030. This court previously declined to reach this question in Birchler v. Castello Land Company, Inc., 133 Wn.2d 106, 110 n.3, 942 P.2d 968 (1997). The Birchler court's analysis suggested that non-economic damages should not be trebled. First, Birchler recognized that the timber trespass statute is a penal statute. Thus, as befitting a penal statute, the court should interpret it narrowly. *Id.* at 110; Grays Harbor County v. Bay City Lumber Co., 47 Wn.2d 879, 886, 289 P.2d 975 (1955).

Further, the Birchler court noted that, historically, cases decided under the timber trespass statute have confined treble damages to the injury to the vegetation itself. *Id.* at 111; Sherrell v. Selfors, 73 Wn. App. 596, 602, 871 P.2d 168, *rev. denied,* 125 Wn.2d 1002 (1994). Indeed, from the time Birchler was issued until now, that remained the case.

The court of appeals erred in expanding treble damages in timber trespass cases beyond the damages for the vegetation itself. The result was an expansive reading of a penal statute, to extend damages in timber cases beyond what has been awarded for over one hundred years. This court should accept review to confirm that RCW 64.12.030 does not provide trebling of non-economic harms. To do otherwise would create a substantial windfall to the plaintiff: an award of $130,000 for a $3100 tree.

4. The Trial Court Should Have Granted Defendants A New Trial On The Excessive Non-Economic Damages Awarded By the Jury.

After summary judgment establishing Pendergrast's ownership of the disputed property, the trial court held a trial related to Pendergrast's claims of trespass on the disputed area, and timber trespass for removal of the tree. At the conclusion of that trial, the jury awarded Pendergrast damages against Matichuks and Blaine Properties LLC on her trespass claims, including $5200 for economic loss, and $75,000 (or more than fourteen times the economic verdict) for non-economic damages. As to timber trespass, for the removal of the single, old tree, the jury awarded plaintiff $3310 against defendants Matichuk for her economic damages, and $40,000 (or more than twelve times the economic verdict) for non-economic damages. [CP 203] The court of appeals then trebled the noneconomic timber trespass damages, bringing the total amount for timber trespass to nearly $130,000, and the total award of damages to $8300 for economic losses, and $155,000 for non-economic damages, all for moving a fence a short distance and removing a single tree.

After the trial, defendants moved for a new trial pursuant to RCW 4.76.030; CR 59(a)(5) and CR 59(a)(9). Defendants argued that the non-economic damages awarded by the jury were so excessive as to indicate unmistakably that the verdict was the result of passion and prejudice, and that substantial justice had not been done. The court denied the motion, and the court of appeals affirmed.

Matichuk should have been granted a new trial. Although the standard to set aside the jury's verdict is a difficult one, it was met in this case. Ms. Pendergrast's proof of non-economic damages as presented to the jury was limited. Essentially, Pendergrast argued that the actions of Matichuk in removing the fence and tree made her "sick." [RP 61, ln. 12] She testified that the "whole

experience" of the dispute and subsequent litigation made it hard for her to "remain optimistic." [RP 70, ln. 11] Nothing in her testimony suggested that she ever consulted a healthcare professional. No one close to her testified about her claimed anxiety – in fact, no one else testified on this subject at all.

Moreover, the record was replete with evidence that the "stress" Ms. Pendergrast endured was from other causes. Pendergrast testified extensively about the pressures she felt in caring and providing for her adult children. [RP 9; 53]. She testified that she had other properties in foreclosure. [RP 88, lns.6-7]. She testified she "didn't know what pressure was" until she had to deal with an insurance company in regard to a plumbing malfunction in the property. [RP 32, ln. 6]

The bulk of plaintiff's evidence for her "non-economic" damages was focused on the alleged loss of her "dream" of creating a bed and breakfast on her property. [RP 19, ln. 11] She testified that she lost some $100,000 relating to the alleged bed and breakfast project. [RP 28, ln. 1; RP 30, ln. 4] Pendergrast attributed the "loss" of this "dream" to defendants, even though she admitted to many other factors which frustrated that dream. For example, she testified to a plumbing problem (which occurred before Matichuk's removal of the fence and tree) that set the project back considerably. [*See, e.g.*, RP 27, ln. 9; RP 31, ln. 24]

Most importantly, however, it was clear from Pendergrast's testimony that the "bed and breakfast" truly was nothing more than a dream. Even though she claims to have started on the project as soon as she acquired the property in 2006 (years before the tree and fence were removed), she admitted that she had never filed a building permit for her desired swimming pool. [RP 76, ln. 14] She never applied for a building permit for the renovation of the garage. [RP 76, ln. 21] The

only tangible evidence of a business plan was a handwritten outline produced the morning of trial. There was nothing introduced at trial about the bed and breakfast except the ideas in plaintiff's head.

Indeed, based on her testimony it is unlikely that Pendergrast could ever have operated such a business. She testified that she had a concussion disorder from a prior automobile accident, she would have for life. [RP 59, ln. 20] That pre-existing concussion condition prevented her from interacting with others when it was prevalent. She testified that "the fact that I had to sell my other house and move in there to have people coming and going as a bed and breakfast, which is a 24-7 job, I couldn't do it." [RP 59, ln. 9-13]

In other words, Pendergrast's tears replaced solid evidence for the jury to consider. Apparently due to the "loss" of this "dream," the jury awarded Pendergrast over $100,000 in "non-economic" damages, matching the "over $100,000" Pendergrast attributed to her bed and breakfast losses. Those damages are many multiples over the damages the jury awarded Pendergrast for her actual economic loss.

Assuming for the sake of argument that these lost profits can be attributed as a non-economic loss, the amounts awarded were clearly excessive. Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 856 P.2d 746 (1993), is illustrative. The Hill plaintiff sued for sex discrimination. In support of her claim for non-economic damages, she testified she was constantly under heavy pressure to perform her work, and felt inadequate and frustrated because she felt insufficiently trained. She testified she consulted her doctor, who thought her problem was stress related. He referred her to another doctor, who prescribed medication to settle her nerves and calm her. Based on that testimony alone, the jury awarded Hill $198 in stipulated medical expenses, $40,000 in lost income (which was reduced by the trial court) and $410,000 (ten times the economic damages) in

non-economic damages. The trial court reduced the non-economic damages by more than two-thirds, finding the jury verdict shocking to its conscience because there was insufficient credible evidence of emotional distress, mental anguish, pain and suffering, or humiliation severe enough to justify the award. The court of appeals agreed, finding that the award "clearly indicates passion or prejudice, or an attempt to award punitive damages." Hill, 71 Wn. App. at 134.

The evidence of passion and prejudice in this case is apparent. First, the jury chose to award damages only against defendants Matichuk and their corporate entity, even though the limited liability company was in the same position as other defendants whom were found not responsible. The jury inquired whether it could add attorney's fees onto its verdict, indicating further its passion to punish the defendants: the jury wanted to go further than it was instructed it could do. [Sub. 152] Finally, the jury actually awarded more in non-economic damages than the $100,000 plaintiff sought. Taken together, with the amounts awarded being many multiples above the economic damages suffered, indicates that the jury award was improper.

The court of appeals declined to adopt the "multiplier" analysis in Hill, ruling that the ratio between the economic damages and non-economic damages is irrelevant. However, some standard is necessary to ensure that passion and prejudice do not interfere. This court should consider whether to tie non-economic damages awards to some ratio to the underlying economic losses, to ensure that the damages are reasonable and supported by evidence.

On remand, Matichuk is entitled to a new trial. The non-economic damages awarded by the jury were grossly disproportionate to the economic damages awarded. The trial court abused its discretion in not reducing those damages to an amount supported by the evidence, and the court of appeals erred in not requiring it.

F. Conclusion

The Supreme Court should accept review of this case for a number of reasons. First, the underlying published opinion of Division One improperly applies the boundary by common grantor doctrine, as it changes established precedent concerning what actions of the parties are to be considered. As articulated in this case, the boundary by common grantor doctrine no longer requires evidence of a meeting of the minds with the original grantor at the time of sale.

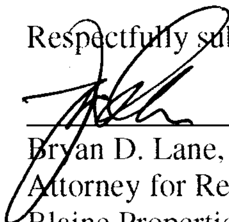
This court should clarify what evidence is necessary to establish a "meeting of the minds" between the common grantor seller and the buyer. Absent clear and convincing evidence of a meeting of the minds, the common grantor doctrine circumvents the basic elements of a real estate transaction: that there is an agreement of what is being bought and sold.

Second, the Supreme Court should accept the case to consider whether noneconomic damages should be trebled under the timber trespass statute, RCW 64.12.030. The court is asked to rule on the interpretation of the timber trespass statute, after declining to do so previously in Birchler v. Castello Land Co. Inc., 133 Wn. 106, 110 n.3, 942 P.2d 968 (1997). As a penal statute, the timber trespass statute should be applied narrowly, without trebling of non-economic harm. To allow the court of appeals decision to stand would result in a windfall not only in this case, but future cases as well.

Finally, the court should consider whether to establish some sort of relationship between a jury's economic award and its noneconomic damages award. This court should decide that emotional distress damages should be limited to a reasonable amount in comparison to the underlying economic recovery.

Dated this 29th day of September, 2015.

Respectfully submitted,

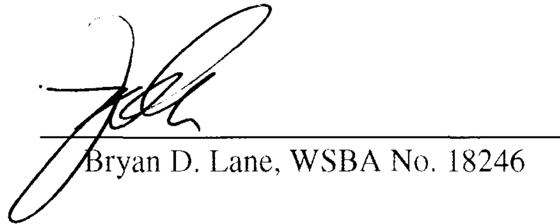


Bryan D. Lane, WSBA No. 18246
Attorney for Respondents/Cross-Appellants Matichuk and Blaine Properties, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 29, 2015, I caused a true and correct copy of the foregoing, to be served upon the following person by hand delivery to his office provided below:

Mark Lee
Brownlie Evans Wolf & Lee
230 East Champion Street
Bellingham, Washington 98225



Bryan D. Lane, WSBA No. 18246

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LESLIE M. PENDERGRAST, as an individual,	)	No. 71726-0-I
Appellant,	)	DIVISION ONE
v.	)	
ROBERT MATICHUK and JANE DOE MATICHUK, as individuals and in their marital capacity; BANK OF THE PACIFIC, a Washington State corporation; BLAINE PROPERTIES L.L.C., a Washington State limited liability company; MARK R. and CYNTHIA A. SANFORD, as individuals and in their marital capacity; and GINA M. LINGENFELTER and JOHN DOE LINGENFELTER, as individuals and in their marital capacity,	)	PUBLISHED OPINION FILED: August 31, 2015
Respondents.	)	

LEACH, J. — In his poem "Mending Wall," Robert Frost observed, "Before I built a wall I'd ask to know / What I was walling in or walling out, / And to whom I was like to give offense."[1] This case illustrates the wisdom of Frost's observation in the context of an existing fence. Robert Matichuk moved a fence and cut down a tree over the objection of adjacent property owner, Leslie Pendergrast.

[1] THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED, 33 (Edward Connery Lathem ed., Henry Holt & Co. 1969).

The trial court ruled on summary judgment that Pendergrast established ownership of the disputed land through boundary by common grantor, and a jury later awarded her damages for trespass and timber trespass.

Pendergrast appeals the trial court's refusal to treble the noneconomic damages portion of the jury's timber trespass award. Matichuk cross appeals. First, he challenges the summary judgment order, claiming that he and the common grantor had no agreement that a fence and not the deed description defined the common boundary. He also requests attorney fees and costs for defending against the lis pendens Pendergrast filed. And he argues that the trial court erred by denying his motion for a new trial or reduction of noneconomic damages.

Because both Matichuk's and Pendergrast's "manifestations of ownership" showed they recognized the fence as the true boundary, we hold that no genuine issue of material fact prevented the trial court from ruling as a matter of law that Pendergrast established boundary by common grantor. We deny Matichuk's request for attorney fees and costs under the lis pendens statute. We also conclude that the trial court did not abuse its discretion by denying Matichuk's motion for a new trial or reduction of noneconomic damages. Finally, the plain language of former RCW 64.12.030 (1881) entitles Pendergrast to treble the

amount of both the economic and noneconomic damages awarded for timber trespass. We remand for further proceedings consistent with this opinion.

FACTS

Tali and Cyrus Conine (collectively Conine) owned property in Blaine, Washington, which they divided into separate parcels. In April 2006, Conine sold Robert Matichuk and his wife the vacant western parcel, described in the deed as "the south 75 feet of Lot 30, Block 5, Perley's Replat." Matichuk planned to develop condominiums on the property. A six-foot wooden board fence ran along a portion of the east boundary, separating Matichuk's parcel from property Conine retained. Before purchase, Matichuk paced the dimensions of the property. He concluded from his site visit that he "didn't know where the fence was in relation to the property line" but did nothing further to investigate the parcel's boundaries.

In September 2006, Conine sold Leslie Pendergrast the eastern parcel, which the fence separated from the Matichuk property. The deed described the parcel as "LOT 5 & 6, BLOCK 5 PLAT OF PERLEY'S SUBDIV." The fence ran the length of the western boundary of Pendergrast's property, which had a house on it. A large tree with a tree house stood near the fence, on Pendergrast's side. Pendergrast maintained and used the entire fenced area as her backyard from

2006 until 2009. She had plans to renovate the property to create a unique maritime-themed bed-and-breakfast.

Neither Matichuk's nor Pendergrast's deed mentions the fence. The real estate listing Pendergrast reviewed before purchasing her property described the parcel as "fenced-partially." On the seller disclosure statement, Conine answered "No" to the question of whether any encroachments or boundary disputes existed related to the property.

In June 2008, Matichuk commissioned a survey of his property for his building permit application. The survey, which used the deed description, showed the fence and tree located entirely on Matichuk's property.[2] On September 11, 2008, the city of Blaine conditionally approved Matichuk's plans for a fourplex on the property.[3]

In January 2009, Matichuk told Pendergrast in a letter that the fence was "6-8 feet" onto his property and that he intended to move it "in the near future" to the "common property line." On April 21, 2009, Pendergrast responded through counsel, demanding that Matichuk not move the fence and claiming ownership of the property "encompassed by the fence." Pendergrast contended that "this fence was located in its existing location by the common owner of your

[2] Pendergrast's own survey later confirmed Matichuk's findings.

[3] The Matichuks later submitted a revised site plan to develop two duplex buildings, which the city approved in November 2009.

respective properties and effectively becomes the agreed boundary, taking precedence over any boundary that may have been located by a surveyor." In an April 24, 2009, letter, Pendergrast's counsel warned Conine that Conine was "liable for damages for misrepresenting the condition of the property" as subject to no encroachments or boundary disputes.

Despite Pendergrast's demand, Matichuk moved the fence to the deed line. Matichuk also cut down and removed the tree and tree house.

On February 26, 2010, Pendergrast filed suit to quiet title and for ejectment, trespass, and unlawful detainer. Pendergrast also recorded a lis pendens against Matichuk's property.

On October 31, 2012, Matichuk filed a motion for summary judgment, seeking to dismiss Pendergrast's quiet title claim because Pendergrast could not establish any right to the disputed property, either by boundary by agreement or boundary by common grantor. On November 21, 2012, Pendergrast filed a response and cross motion for summary judgment.

On January 4, 2013, the trial court granted Matichuk's motion to dismiss Pendergrast's boundary by agreement claim but denied Matichuk's motion to dismiss Pendergrast's common grantor claim. The court granted Pendergrast's cross motion to quiet title based on boundary by common grantor. The court denied Matichuk's motion for reconsideration.

On July 5, 2013, Pendergrast amended her complaint to add claims for abatement. She also added as a party Blaine Properties LLC, the entity to which Matichuk had transferred the property.

At trial, the jury considered Pendergrast's claims for trespass, timber trespass, unlawful detainer, ejectment, and abatement in light of the trial court's earlier summary judgment ruling that the disputed property belonged to Pendergrast. The jury found Matichuk and Blaine Properties LLC liable for trespass, awarding economic damages of $5,200 and noneconomic damages of $75,000. The jury also found Matichuk liable for timber trespass and awarded Pendergrast $3,310 in economic damages and $40,000 in noneconomic damages. The trial court trebled the economic damages for timber trespass under former RCW 64.12.030. However, the court denied Pendergrast's request to treble the noneconomic damages under the timber trespass statute "because such a trebling is not specifically provided in [former] RCW 64.12.030, which, as a penal or punitive statute, should be interpreted and applied literally and narrowly." The court denied Matichuk's motion for a new trial or reduction of noneconomic damages.

Pendergrast appeals the trial court's refusal to treble her noneconomic timber trespass damages. Matichuk cross appeals the trial court's order granting Pendergrast's cross motion for summary judgment. Matichuk also cross appeals

the court's findings of fact and conclusions of law and order denying Matichuk's motion for a new trial or reduction of noneconomic damages. Matichuk requests attorney fees and costs on remand under RCW 4.28.328(3) for defending against the lis pendens.

ANALYSIS

Matichuk's Cross Appeal

As a threshold matter, we address Matichuk's claim that the trial court erred by granting Pendergrast's cross motion for summary judgment based on the common grantor doctrine. We review a trial court order granting summary judgment de novo, engaging in the same inquiry as the trial court.[4] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[5] We view the facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party.[6]

[4] Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998).
[5] CR 56(c).
[6] Fed. Way Sch. Dist. No. 210 v. State, 167 Wn.2d 514, 523, 219 P.3d 941 (2009).

Common Grantor Doctrine

An action to quiet title is an equitable proceeding "'designed to resolve competing claims of ownership.'"[7] Generally, a bona fide purchaser of an interest in real property is entitled to rely on record title.[8] The common grantor doctrine protects an original grantee acquiring property in "good faith reliance on the boundary description provided by the common grantor who originally owned both lots in their entirety" and thus had power to determine the location of the boundary.[9]

A common boundary established by a grantor who owns land on both sides of the line binds that grantor.[10] Even absent formal agreement, this boundary binds grantees if the land was sold and purchased with reference to the line and the parties agreed about the identical tract of land transferred by the sale.[11]

Application of the common grantor doctrine presents two questions: (1) was there an agreed boundary established between the common grantor and

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[7] Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 322, 308 P.3d 716 (2013) (quoting Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d 621 (2001)).

[8] Levien v. Fiala, 79 Wn. App. 294, 299, 902 P.2d 170 (1995).

[9] Levien, 79 Wn. App. at 302; Thompson v. Bain, 28 Wn.2d 590, 592-93, 183 P.2d 785 (1947).

[10] Winans v. Ross, 35 Wn. App. 238, 240, 666 P.2d 908 (1983) (citing Fralick v. Clark County, 22 Wn. App. 156, 159, 589 P.2d 273 (1978)).

[11] Winans, 35 Wn. App. at 240; Kronawetter v. Tamoshan, Inc., 14 Wn. App. 820, 826, 545 P.2d 1230 (1976); Thompson, 28 Wn.2d at 592.

original grantee, and (2) if so, would a visual examination of the property show subsequent purchasers that the deed line no longer functioned as the true boundary?[12] The parties' manifestations of ownership after the sale can establish an agreement.[13] The party asserting boundary by common grantor has the burden of proof.[14]

Here, both Matichuk and Pendergrast are grantees of Conine, the original grantor. Pendergrast, who acquired her property after Matichuk, maintains that she and Conine had the necessary meeting of the minds that Pendergrast's parcel extended to the fence. To support this, she points to the listing agreement and seller disclosure form she relied on, as well as her three years of use of the property up to and including the fence. Matichuk asserts that he had no such agreement with Conine—that he purchased based solely on the legal description.

The parties do not dispute that Conine, as their common grantor, conveyed their respective parcels as separate properties divided by a six-foot fence. They also do not dispute that the real estate listing Pendergrast received before purchasing her parcel described it as "fenced-partially" and that on the seller disclosure form Conine answered "No" to the question of whether any encroachments or boundary disputes existed related to the property.

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[12] Fralick, 22 Wn. App. at 160.
[13] Winans, 35 Wn. App. at 241.
[14] See Martin v. Hobbs, 44 Wn.2d 787, 791, 270 P.2d 1067 (1954).

Pendergrast testified, and Matichuk does not dispute, that Pendergrast occupied and cared for the property up to the fence line from 2006 to 2009. Pendergrast also testified that she observed Matichuk walking and working on his property. Matichuk disputes he was "using" his vacant property, claiming that he was working on building permits based on the legal description in the deed. But when deposed, he conceded that when he paced off the property's dimensions before his purchase, he "came to the conclusion the fence was not on the property line. Actually, let me rephrase that, I came to the conclusion I didn't know where the fence was in relation to the property line." He also acknowledged that the fence "appeared to relate to" the adjacent property, but he did not inquire further about the true boundary. And he conceded that when he moved the fence and cut the tree, he knew that Pendergrast was asserting ownership of the disputed property.

Matichuk does not dispute that he made no attempt to use any of the property on Pendergrast's side of the fence before moving it in 2009, roughly a year after commissioning his survey and three years after purchasing the lot. But he argues that at best, his failure to assert ownership immediately and remove the fence at the time of purchase, "with nothing more, creates only an *inference* of an agreement between Matichuk and Conine, and is not actual proof of one."

We disagree. Both parties' conduct, from before they purchased until Matichuk announced he intended to move the fence, showed an understanding

that they owned adjacent parcels separated by the fence. And a visual examination of the property gave notice that the fence functioned as the true boundary. The realty listing agreement and seller disclosure form further support the conclusion that Conine intended to sell the parcels in relation to the fence.

Matichuk emphasizes that he testified that "the purchase was made based on the property dimensions described in the deed" and that he never discussed the purchase with Conine. "There is nothing in the record to suggest that the Matichuks were informed that there was an agreement establishing a boundary at the fence line." But in Winans v. Ross,[15] Division Two of this court rejected this argument: "A formal, or specific, or separate contract as to the boundary line between the parties is not necessary." The court also rejected the argument that because the parties purchased their lots by legal description only, there was no agreement between them as grantees that the fence was the boundary.[16] The court held that as long as "substantial evidence supports the conclusion that the fence provided notice to subsequent purchasers that it was the boundary," this boundary would bind those purchasers.[17]

Here, Matichuk's deposition testimony shows that before he purchased his property, he had notice of a discrepancy between the deed description and the

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[15] 35 Wn. App. 238, 241, 666 P.2d 908 (1983) (citing Thompson, 28 Wn.2d at 592).
[16] Winans, 35 Wn. App. at 241-42.
[17] Winans, 35 Wn. App. at 242.

property he measured by pacing to the fence and that the fence "appeared to relate to" the adjoining property, which Conine retained for five months before selling it to Pendergrast. Presumably Conine did not intend to sell the disputed property to both Matichuk and Pendergrast, as would have occurred if Conine had sold Matichuk the property described in the deed and then, five month later, sold Pendergrast an adjacent lot described as "fenced-partially." Conine sold two adjacent properties separated by an unambiguous visual boundary, the six-foot board fence.

Unlike some cases where a court has not found a well-defined boundary line for purposes of boundary by common grantor or other doctrines, such as mutual recognition and acquiescence,[18] here the record discloses no reason for the existence of the fence other than to function as a boundary between the properties. Matichuk and Pendergrast manifested ownership of their separate

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[18] See, e.g., Merriman v. Cokeley, 168 Wn.2d 627, 631-32, 230 P.3d 162 (2010) (three survey markers overgrown with blackberry bushes and weeds not a clear and well-defined line); Waldorf v. Cole, 61 Wn.2d 251, 255, 377 P.2d 862 (1963) (rockery against a dirt bank was an insufficient boundary marker); Scott v. Slater, 42 Wn.2d 366, 368-69, 255 P.2d 377 (1953) (row of pear trees of varying shapes and sizes, which did not terminate at a well-defined point, not a clear and well-defined line), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 861 n.2, 676 P.2d 431 (1984); Skov v. MacKenzie-Richardson, Inc., 48 Wn.2d 710, 716, 296 P.2d 521 (1956) ("occasional grazing" insufficient to establish boundary line); Green v. Hooper, 149 Wn. App. 627, 642, 205 P.3d 134 (2009) (short retaining wall extending only partially into beach area, with no other physical designations, insufficient to establish boundary line); Fralick, 22 Wn. App. at 160 ("lower falls" designation, without fence or other marking, insufficient to give visual notice of boundary).

properties in relation to the fence. Matichuk does not show any genuine issue of material fact that would preclude summary judgment. The trial court did not err in granting Pendergrast's cross motion and quieting title in her based on boundary by common grantor.

Attorney Fees under RCW 4.28.328(3)

In his cross appeal, Matichuk also argues that the lis pendens statute entitles him to an award of attorney fees and costs. RCW 4.28.320 allows a party to an action affecting title to real property to file with the county auditor a notice of the pendency of the action, or lis pendens. A lis pendens clouds title to the property. RCW 4.28.328(3) imposes liability for actual damages upon a claimant who files one without "substantial justification" and, in the court's discretion, for reasonable attorney fees and costs incurred in defending the action. Here, Pendergrast had substantial justification for filing the lis pendens. We deny Matichuk's request.

Noneconomic Damages

Next, Matichuk contends that even if this court affirms the trial court's summary judgment order, it should still reverse the trial court's denial of Matichuk's motion for a new trial or reduction of noneconomic damages. CR 59 authorizes the trial court to vacate a verdict and order a new trial when, among other circumstances, an award of damages was "so excessive or inadequate as

unmistakably to indicate that the verdict must have been the result of passion or prejudice" or where "substantial justice has not been done."[19] Alternatively, the trial court may increase or reduce a damages award.[20]

The amount of damages presents a question of fact.[21] "'An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.'"[22] A damages award "'shocks the conscience'" if it is "'flagrantly outrageous and extravagant.'"[23] And passion and prejudice must be "'unmistakable'" for the reviewing court to disturb the jury's award.[24]

Substantial evidence exists if it is "'sufficient to persuade a fair-minded, rational person of the truth of the finding.'"[25] A plaintiff is not required to prove that his or her distress was severe, but an award must be in proportion to the

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[19] CR 59(a)(5), (9).

[20] RCW 4.76.030.

[21] Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

[22] Bunch, 155 Wn.2d at 179 (quoting Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)).

[23] Bunch, 155 Wn.2d at 179 (quoting Bingaman, 103 Wn.2d at 836-37).

[24] Bunch, 155 Wn.2d at 179 (quoting Bingaman, 103 Wn.2d at 836); RCW 4.76.030.

[25] State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

injury suffered.[26] And while damages "need not be proved with mathematical certainty," they "must be supported by competent evidence."[27]

We review a trial court's denial of a motion for a new trial or for reduction of damages for abuse of discretion.[28] A court abuses its discretion when it makes a "'manifestly unreasonable'" decision, rests the decision on facts unsupported by the record, or applies an incorrect legal standard.[29] The reviewing court strongly presumes the jury's verdict is correct, and a trial court's denial of a reduction of damages strengthens the verdict.[30]

Matichuk argues that Pendergrast's proof of noneconomic damages, which the court's instructions defined as "[m]ental anguish, emotional distress, and inconvenience experienced by the Plaintiff as a result of the trespass or timber trespass," was "limited." He emphasizes that there was no evidence that she consulted a health care professional and that no one testified on her behalf

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[26] Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 483-85, 805 P.2d 800 (1991); Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 139-40, 856 P.2d 746 (1993).

[27] Hill, 71 Wn. App. at 140 (citing Rasor v. Retail Credit Co., 87 Wn.2d 516, 530-31, 554 P.2d 1041 (1976)).

[28] Bunch, 155 Wn.2d at 180; Cox v. Gen. Motors Corp., 64 Wn. App. 823, 826, 827 P.2d 1052 (1992).

[29] State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting State v. Rohrich, 175 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[30] Bunch, 155 Wn.2d at 179-80 (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989); Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 330, 858 P.2d 1054 (1993)).

about her anxiety and distress. Our Supreme Court has held, however, that "such evidence is not strictly required; our cases require evidence of anguish and distress, and this can be provided by the plaintiff's own testimony."[31]

Matichuk cites Hill v. GTE Directories Sales Corp.[32] to support his argument that "insufficient credible evidence" supported the jury's verdict of a total of $115,000 in noneconomic damages. But we distinguish Hill. In that case, Division Three of this court affirmed a trial court's order reducing a damages award after finding that the jury erred by awarding economic damages "clearly outside the range of the evidence" and basing a large noneconomic damages award on only "meager" evidence.[33] Here, the trial court denied Matichuk's motion for reduction of damages, which strengthens the jury's verdict. As in Hill, here "[t]he trial court was in the better position to make that determination and is to be accorded room for the exercise of its sound discretion."[34]

Matichuk also attributes Pendergrast's stress to several other factors besides the boundary dispute: insurance issues arising from a plumbing emergency in the house, other properties in foreclosure, and the pressures of providing for her adult children. He points out that although Pendergrast blamed

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[31] Bunch, 155 Wn.2d at 181 (citing Nord, 116 Wn.2d at 487).
[32] 71 Wn. App. 132, 856 P.2d 746 (1993).
[33] Hill, 71 Wn. App. at 139-40.
[34] Hill, 71 Wn. App. at 140 (citing Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 279, 840 P.2d 860 (1992); Bingaman, 103 Wn.2d at 835).

the loss of her dream of a bed-and-breakfast on Matichuk, she did not file a building permit for a planned swimming pool or garage renovation. And he questions whether the health problems she testified about would even allow her to operate such a business.

Contrary to Matichuk's contentions, Pendergrast presented evidence sufficient to support the award of noneconomic damages. Pendergrast testified that she planned to build a swimming pool in the backyard and construct a unique deck in the tree as a vista point for Drayton Harbor and White Rock, Canada. She believed that these features, together with renovations to convert the detached garage into a honeymoon cottage, would make her bed-and-breakfast unique among local establishments. She testified that by January 2009, she had finished remodeling the interior of the house and was preparing to begin work on the backyard. She said that when she received Matichuk's letter, she "felt like somebody had slugged [her] in the stomach" and was "in tears." She testified further that she felt "violated, trespassed upon. . . . I was devastated. . . . [P]utting that fence into this new location stopped everything because now I didn't have the proper setback that I needed to continue with the uniqueness of the bed and breakfast." She testified that the stress made her feel "almost catatonic" and that when Matichuk cut down the tree, she had "an overwhelming feeling of a point of no return." She stated that the conflict had

affected her health "[v]ery negatively" and that after the project stalled, "I was sick, I was sick over it. And I still am because it's five years down the road." Pendergrast presented sufficient evidence to convince a fair-minded, rational person that she suffered "mental anguish, emotional distress, or inconvenience," which sufficiently supports an award for damages.[35]

Matichuk also emphasizes that the jury's awards of noneconomic damages for trespass and timber trespass were "more than fourteen times the economic verdict" and "more than twelve times the economic verdict," respectively. But the jury uses the evidence presented for an award of noneconomic damages, not the economic damages award. And a court may not overturn a jury verdict merely because of its size.[36] Matichuk fails to show that the jury's award of noneconomic damages here falls outside the range of evidence or is so excessive as to be "'flagrantly outrageous and extravagant,'" particularly in light of the trial court's denial of a reduction and this court's presumption that a jury verdict is correct.[37]

Matichuk also contends that "the jury wanted to go further than it was instructed it could do" and demonstrated "its passion to punish the defendants" when it asked the court if it should award attorney fees. But this question from

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[35] Bunch, 155 Wn.2d at 181.

[36] Thompson v. Berta Enter., Inc., 72 Wn. App. 531, 543, 864 P.2d 983 (1994).

[37] See Bunch, 155 Wn.2d at 182.

the jury, without more, does not demonstrate passion and prejudice, which must be "of such manifest clarity as to make it unmistakable" before it will justify reduction of a jury verdict.[38] Nor does the fact that the jury found Matichuk and Matichuk's corporate entity, but not the three other defendants, liable for trespass prove passion and prejudice. Matichuk's contentions do not establish "anything untoward in the proceedings that justifies setting the verdict aside based on passion and prejudice."[39] The trial court did not abuse its discretion by denying Matichuk's motion for a new trial or reduction of noneconomic damages.

Treble Damages

Pendergrast raises one issue on appeal, contending that the trial court erred when it refused to treble the jury's award of noneconomic damages. We hold that the unambiguous language of former RCW 64.12.030 required the trial court treble the jury's noneconomic damages award.

The meaning of a statute presents a question of law we review de novo.[40] When construing a statute, our primary objective is to ascertain and carry out the legislature's intent.[41] Statutory interpretation begins with the statute's plain meaning, which we discern from the ordinary meaning of its language in the

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[38] Bingaman, 103 Wn.2d at 836 (citing James v. Robeck, 79 Wn.2d 864, 870, 490 P.2d 878 (1971)).

[39] Bunch, 155 Wn.2d at 183.

[40] Broughton Lumber Co. v. BNSF Ry., 174 Wn.2d 619, 624, 278 P.3d 173 (2012).

[41] State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012).

context of the statute, related statutory provisions, and the statutory scheme as a whole.[42] If the statute's meaning is unambiguous, the inquiry ends.[43] Our system of government does not allocate to the judicial branch the function of improving or changing the law by inserting an exception into a statute's text that the legislature did not provide.

"Washington, unlike other states, employs a very restrictive approach to punitive damages [and] prohibits the recovery of punitive damages as a violation of public policy unless expressly authorized by statute."[44] Former RCW 64.12.030 provides a specific punitive remedy for an intentional timber trespass:

> Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, . . . if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

The timber trespass statute has three purposes: (1) to punish a voluntary offender, (2) "to provide, by trebling the actual present damages, a rough measure for future damages," and (3) "[t]o discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred."[45] Timber

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[42] Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

[43] Lake, 169 Wn.2d at 526.

[44] Broughton Lumber, 174 Wn.2d at 638 n.14 (citing Barr v. Interbay Citizens Bank, 96 Wn.2d 692, 697, 635 P.2d 441, 649 P.2d 827 (1982)).

[45] Guay v. Wash. Nat. Gas Co., 62 Wn.2d 473, 476, 383 P.2d 296 (1963).

trespass damages must be reasonable in relation to the value of the property.[46] The legislature mandated the punitive aspect of the trebling provision and did not leave it to the discretion of the courts.[47] Because the timber trespass statute is penal and not merely remedial, courts strictly construe it.[48] The statute makes the remedy available in the case of a "willful" trespass only; the court cannot impose treble damages for a "casual or involuntary" trespass or one based on a mistaken belief of ownership of the land.[49]

Former RCW 64.12.030 contains no limitation on the type of damages subject to trebling. Pendergrast argues, "The legislative mandate could not be clearer and that is to simply treble any damages assessed for a timber trespass." She cites Birchler v. Castello Land Co.,[50] in which our Supreme Court held that a prevailing plaintiff may recover noneconomic damages in a timber trespass action. Matichuk counters that "historically cases have confined treble damages to the injury to the vegetation itself." He argues that even after Birchler, "[t]he addition of emotional distress damages to the remedies available does not, in

[46] Allyn v. Boe, 87 Wn. App. 722, 734-35, 943 P.2d 364 (1997).

[47] Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 96, 173 P.3d 959 (2007) (citing Pearce v. G.R. Kirk Co., 92 Wn.2d 869, 875, 602 P.2d 357 (1979)).

[48] Broughton Lumber, 174 Wn.2d at 633 (quoting Bailey v. Hayden, 65 Wash. 57, 61, 117 P. 720 (1911)); Birchler v. Castello Land Co., 133 Wn.2d 106, 110, 942 P.2d 968 (1997).

[49] Former RCW 64.12.040 (1881); Birchler, 133 Wn.2d at 109-10.

[50] 133 Wn.2d 106, 116, 942 P.2d 968 (1997).

and of itself, require that those additional damages be trebled," noting that the Birchler court expressly declined to address this question.[51] But Matichuk cites no authority approving a court's limitation or contraction of a statute's plain language.

Certain other Washington statutes with similar provisions explicitly limit treble damages to actual, economic damages. The Insurance Fair Conduct Act, chapter 48.30 RCW, provides that the superior court may increase an award to "an amount not to exceed three times the actual damages."[52] The Consumer Protection Act, chapter 19.86 RCW, allows the court to increase an award "to an amount not to exceed three times the actual damages sustained," but not to exceed $25,000.[53]

By contrast, in the 18 years since our Supreme Court decided Birchler, the legislature has not amended the timber trespass statute to limit the types of damages subject to trebling. If the legislature meant only "actual damages" or "economic damages only" by its use of the word "damages" in former RCW 64.12.030, then the legislature's use of the word "actual" and "economic" in the statutes described above is superfluous. Wherever possible, courts construe

[51] The court's stated reason was the plaintiff's failure to raise the issue at any time before oral argument. Birchler, 133 Wn.2d at 110 n.3.

[52] RCW 48.30.015(2).

[53] RCW 19.86.090.

statutes so that no portion is superfluous, and "[s]tatutes should be interpreted so as to not leave one statute mere surplusage."[54]

Moreover, RCW 4.24.630, a separate statute that applies to liability for damage to land and property in situations not covered by former RCW 64.12.030, does not expressly exclude noneconomic damages from those subject to trebling under the statute. It provides that one who "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."[55] Recoverable damages "include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration," as well as reimbursement of reasonable costs, "including but not limited to" reasonable attorney fees and costs related to investigation and litigation.[56]

"It is clear that treble damages will be imposed upon trespassers cutting timber under [former] RCW 64.12.030, unless those trespassing exculpate themselves under the provisions of [former] RCW 64.12.040."[57] The jury found that the mitigating circumstances of former RCW 64.12.040 did not apply to Matichuk's cutting of the tree. Former RCW 64.12.030 unambiguously requires

[54] Sim v. Wash. State Parks & Recreation Comm'n, 90 Wn.2d 378, 383, 583 P.2d 1193 (1978); Schrempp v. Munro, 116 Wn.2d 929, 934, 809 P.2d 1381 (1991).

[55] RCW 4.24.630(1).

[56] RCW 4.24.630(1) (emphasis added).

[57] Smith v. Shiflett, 66 Wn.2d 462, 464-65, 403 P.2d 364 (1965).

that the court award "treble the amount of damages claimed or assessed" for a timber trespass. Under Birchler, "damages claimed or assessed" may include noneconomic damages. And in the years since our Supreme Court decided Birchler, the legislature has not limited the types of damages subject to trebling. We hold that Pendergrast is entitled to treble the amount of all timber trespass damages.

CONCLUSION

We affirm the trial court's order on summary judgment quieting title to the disputed property in Pendergrast based on boundary by common grantor. We deny Matichuk's request for attorney fees under the lis pendens statute and affirm the trial court's denial of Matichuk's motion for a new trial or reduction of noneconomic damages. We hold that the plain language of former RCW 64.12.030 entitles Pendergrast to treble the amount of all damages awarded for timber trespass. We remand for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Trickey, J

Dwyer, J.

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