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No. 63677-4-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

R. GARY WOOD, Appellant,

vs.

JAMES C. BRUMMOND and CAROL D. BRUMMOND, and
ROGER B. CLARK and KATHRYN CLARK, Respondents.

ORIGINAL

REPLY BRIEF OF APPELLANT R. GARY WOOD

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I. INTRODUCTION

In this timber trespass case, it is essential not to miss the forest for the individual trees. The big picture view of this case demonstrates that the victim, Mr. Wood, did not receive the benefit of Washington law. The trial court misconstrued and misapplied Washington law on the major issues from the start—on restoration or replacement cost damages, on timber trespass mitigation, on emotional distress damages, and on boundary line tree ownership. The trial court repeated these errors through every stage of the case—summary judgment, evidence both admitted and rejected at trial, motions for directed verdict, jury instructions, and post-trial motions. The end result was a jury verdict built upon a foundation of legal error and inadmissible evidence.

Washington law provides that a party whose property is damaged through the fault of another is entitled to recover damages which put him in the same position he was in before the damage was done. In an auto accident case, this means paying the costs of fixing the damaged automobile. When it is beyond restoration—cannot be fixed—the damages are the cost to replace the damaged vehicle with a like vehicle. Thus, a high-end Mercedes is not "replaced" with a Ford Pinto.

Here, Mr. Wood planted two baby trees in 1982 on a barren moonscape of a steep slope. He carried water up the hill to establish the trees and to help them flourish. As they grew, they stabilized the steep slope, created conditions in which ground cover could grow, prevented invasion of noxious plants such as blackberry vines, and provided shade and screening. By 2005, the trees had grown from 8-10 feet tall when planted to 47 feet and 38 feet tall. The majesty and beauty of the trees grew in like proportion over the years. Then these trees were cut down by the defendants.

In Washington, the measure of damages in residential timber trespass cases is restoration or replacement cost. Like Humpty-Dumpty, these trees were destroyed when they were cut down—they could not be put back together again. So, like a car that cannot be fixed, "restoration" was not an option. Thus, the measure of damages is the replacement cost. But the replacement must replace like with like. Just as a high-end Mercedes is replaced with a high-end Mercedes rather than with a Pinto, these tall, mature trees must be replaced with tall, mature trees. The trial court erred because its application of the restoration or replacement cost measure of damages in this case allowed the

defense to argue and the jury to find that tall, mature, 23 year old trees are "replaced" by planting 8-10 foot baby trees. Since 8-10 foot baby trees are what Mr. Wood first planted in 1982, the end result is that Mr. Wood is not put in the same position he was in before the trespass occurred, he is instead put back to the position he was in when he first planted baby trees in 1982. Because this result does not repair the damage done by defendants' trespass, it is not a "restoration." Because this result does not put the property back the way it was, it is not a "replacement." For the simple reason that Mr. Wood is entitled to restoration or replacement, and he got neither, the result in this case cannot stand.

Another illustration of how this case was not resolved according to Washington law and how substantial justice was not done is to analogize to a case involving tortious loss of one's retirement account. Consider the case of a financial tort victim who started a small retirement account in 1982 with \$3,500, and through hard work, wise investing, and time grew that retirement account to \$100,000 by 2005, when it was then completely lost through the fault of a third party. In such a case, damages are fixed to restore the loss—\$100,000. Damages are not set in such a way that all the victim can do is start over in 2005 by re-investing

the \$3,500 he started with in 1982. If Mr. Wood was that financial tort victim, and his case was handled the same way as his timber trespass case, his damages recovery would be \$3,500—only enough to start re-building his retirement savings all over again 23 years later.

II. TRIAL COURT ERRORS ON SUMMARY JUDGMENT JUSTIFY APPELLATE REVIEW EVEN AFTER TRIAL

Respondents argue that the trial court's summary judgment rulings should not be reviewed on appeal because the foundation of the trial court's rulings was that there were material issues of fact. To the contrary, appellate review is appropriate here because the only reason the trial court thought there were material issues of fact is because the trial court misunderstood and misapplied the law to each major issue presented in this case. Correct application of Washington law to the facts in this case results in summary judgment being granted to Mr. Wood as he requested. For that reason, and because the same legal errors were made by the trial court at every stage of the proceedings below and therefore really only need to be reviewed once, appellate review of the trial court's summary judgment rulings is appropriate.

A. The Trial Court Erred on Summary Judgment by Misapplying Washington Law on Restoration or

Replacement Cost Damages

The trial court misunderstood the measure of damages on summary judgment—restoration or replacement cost—and misapplied that legal standard to the facts. Mr. Wood's trees having been cut down and destroyed, there could be no "restoration"—no repair or fixing or bringing back of the cut trees. Thus, the restoration or replacement cost measure of damages in this case really boils down to replacement cost. In applying this measure of damages, the trial court failed to appreciate that under Washington law the purpose of residential timber trespass damages is to "return an injured party as nearly as possible to the condition in which it would have been had the wrong not occurred." Tatum v. R R Cable Co., 30 Wn. App. 580, 584 n.2, 636 P.2d 508 (1981); Aker Verdal A/S v. Neil F. Lampson, Inc., 65 Wn. App. 177, 183, 828 P.2d 610 (1992) (tort law's guiding principle is to make the injured party as whole as possible through monetary damages); DeNike v. Mowery, 69 Wn.2d 357, 371, 422 P.2d 328 (1966).

As a result, the trial court found that the defendant's proposed measure of damages—the Trunk Formula Method of appraisal based on the cost of planting baby trees to "replace" tall mature trees—created an issue of fact. The trial court erred in

applying Washington law because the law requires replacement of like for like—it does not allow damages for replacement of a high end Mercedes to cover only the cost of a used Pinto. Nor does it allow a \$100,000 retirement account to be "replaced" with the \$3,500 in seed money from 23 years ago which grew into that \$100,000. Because the baby trees do not as a matter of law "replace" the tall, mature, 23 year old trees that were trespassed, *i.e.*, do not "return an injured party as nearly as possible to the condition in which it would have been had the wrong not occurred," they do not comport with Washington law on timber trespass damages and therefore cannot create a material issue of fact.

B. The Trial Court Erred on Summary Judgment by Misapplying Washington Law on Boundary Line Trees

The trial court also misapplied Washington law on tree ownership in this case. The trial court ruled, and the defense argues on appeal, that because the trunk of Tree 596 emerges from the ground on the Brummond side of the property line, then Tree 596 is not a boundary line tree and the rule of Happy Bunch, LLC v. Grandview North LLC, 142 Wn. App. 81, 93-94, 173 P.3d 959 (2007) does not apply.

This is error because Happy Bunch by its own terms applies

here. The Happy Bunch court held that when the "[boundary] line passes through [the tree], [the tree] is the common property of both parties." Id. at 93. All arborists, including the defendants', define the "trunk" of a tree to be "all the tree, bottom to the top." CP 342. Thus, when the trunk of the tree straddles the boundary line, ownership is in proportion to the percentage of tree trunk on each side of the property line, from the ground to the top of the tree. Id. at 93 ("[the parties] had an interest in the tree proportionate to the percentage of their trunks growing on [each party's] property").

Even if this court holds that what the Happy Bunch court *meant* to say was that a tree is a boundary line tree when the trunk straddles the boundary line upon emergence from the ground, the facts of this case should bring Tree 596 within the scope of the Happy Bunch rule. That is because Tree 596 was a boundary line tree by any definition when planted, and its trunk continues to straddle the boundary line today even though at its base it grows toward the Brummond property and then grows back over the boundary line into the Wood property halfway up its trunk.

Tree 596 was planted by Mr. Wood in 1982 on the boundary line between the now-Brummond and Wood property. CP 32-35, 65-66, 322. Mr. Wood obtained permission from the then owner of

the now-Brummond property to plant Tree 596 on the boundary line. CP 33-35, 322. Tree 596 was planted in a critical area, meaning that no one could cut it down so long as it was healthy. CP 57-58. Due to the steep, sandy slope, Tree 596 was planted at a sharp uphill angle and grew at an uphill angle toward the Brummond property. CP 151, 196, 322-23. Over the years, slope movement sloughing soil down the hill gathered around the Tree 596, raising the ground level around Tree 596. CP 322-23. By 2005, due to its uphill angle of growth, Tree 596 emerged from the ground uphill from where it was planted—on the Brummond side of the property line. CP 40-42, 192, 323-24. Part way up its trunk, Tree 596 bends back toward sunlight and thus back toward the Wood property. CP 323. Given all this, at least 50% of the trunk of Tree 596 is on the Wood side of the boundary line. CP 196.

In sum, Tree 596 was a boundary line tree under any interpretation of Happy Bunch when it was planted; Tree 596 was planted in a critical area which precluded cutting it down while it lived, substantially altering the rights of ownership in any event; and, when cut down by defendants the entirety of its trunk straddles the boundary line such that it was 50% on the Wood side and 50% on the Brummond side.

Washington law should account for these unique factual circumstances. The only fair and reasonable way to determine ownership of Tree 596 under these circumstances is to apportion according to the Happy Bunch rule—by proportion of its trunk. Doing otherwise would result in changing ownership over time. In fact, under the defendants' interpretation of the Happy Bunch rule, if Mr. Wood had removed soil accumulation around the trunk of Tree 596 down to the level it was when the tree was planted, that act would transform Tree 596 from 100% Brummond property to equally owned property. Washington law should not be so frivolous as to create such transitory, changeable property rights. The only reasonable result in these circumstances is to hold, as a matter of law, that Tree 596 is at all times what it was when planted—an equally owned boundary line tree.

C. The Trial Court Erred on Summary Judgment by Ruling That There Is Always a Material Issue of Fact Regarding the Reasonableness of Restoration or Replacement Costs Incurred

The trial court also misapplied Washington law when it held on summary judgment that whether Mr. Wood's restoration or replacement was "reasonable" was an issue exclusively for the jury. The trial court could only find there was a material issue of

fact on reasonableness by misconstruing Washington law.

Washington law provides that timber trespass restoration or replacement is not unreasonable even if it exceeds the value of the underlying property. Allyn v. Boe, 87 Wn. App. 722, 735, 943 P.2d 364 (1997). See also Pepper v. J.J. Welcome Constr. Co., 73 Wn. App. 523, 543-44, 871 P.2d 603, review denied, 124 Wn.2d 1029 (1994):

[Damage to property] may be corrected with a reasonable expenditure even though the expenditure exceeds the amount the land has diminished in value. In the latter case, the full repair cost will come much closer to restoring what was actually lost . . . the plaintiff may recover cost of repairs in excess of the diminished value of the property, so long as the repair costs are less than the total preinjury value of the property.

Thus, barring evidence that the replacement project actually undertaken and paid for by Mr. Wood could have been done for a lower cost, of which there was none, the issue of reasonableness boils down to whether the costs approach the total value of the property. There was no such evidence produced at trial, and for good reason. The \$100,000 cost of Mr. Wood's replacement project comes nowhere near the value of his water view Burien property with a large lot.

The only contest to the reasonableness of Mr. Wood's

replacement project made by the defendants was through a comparison of the costs of a true replacement (returning the property as near as feasible to its pre-trespass condition) with the costs of returning the property to its 1982 condition just after he had planted baby trees, *i.e.*, planting baby trees that will take 23 years to reach their 2005 pre-trespass condition. Since returning Mr. Wood's property to its 1982 condition is neither restoration nor replacement that puts the property as nearly as is feasible to its pre-trespass condition, which under Washington law Mr. Wood is entitled to, this evidence is immaterial. It is nothing more than a red herring based on a false equivalency. The fact that the much lower cost of a "replacement" that does not satisfy Washington law cannot, as a matter of law, raise an issue of fact regarding the reasonableness of Mr. Wood's actual replacement costs.¹

Holding that an issue of fact is created by the defendants' evidence that planting baby trees and waiting 23 years for the property to return to its pre-trespass condition costs less than an

¹ Respondents also argued that because one of the large replacement trees died and Mr. Wood replaced that tree with baby trees, this proves that replacement with baby trees meets the standard set by Washington law. This argument is misleading because it ignores the fact that the large healthy replacement tree blocked any chance of moving another large tree up the hillside, so there was no choice but to put baby trees in the spot formerly occupied by the initial large replacement tree. RP 3/12 28-29.

actual replacement, is akin to holding that the plaintiff who in 2005 loses a \$100,000 retirement account begun in 1982 with \$3,500 is, under Washington law, entitled only to whatever damages the jury determines so long as the amount is between the \$3,500 he started with and the \$100,000 he actually lost. Such is not the law.

D. The Trial Court Erred on Summary Judgment by Misconstruing Washington Law on Timber Trespass Mitigation

The trial court also misunderstood and misapplied Washington law on timber trespass mitigation. As the trial transcripts demonstrate, the trial court equated timber trespass mitigation under RCW 64.12.040 with proving that the trespass was not "willful." RP 3/13 3:22-23; 3/17 15-22. The defendants at trial made the same arguments to the jury. RP 3/17 61-62.

But this is contrary to Washington law. As numerous courts have held, mere "good faith" is insufficient proof of mitigation as a matter of law. Sherrell v. Selfors, 73 Wn. App. 596, 604, 871 P.2d 168 (1994) ("It is not a mitigating factor for the trespasser to be acting in good faith"); Happy Bunch at 96 ("A mere subjective belief in the right to cut trees is not sufficient for mitigation pursuant to RCW 64.12.040"); Trotzer v. Vig, 149 Wn. App. 594, 611, 203 P.3d 1056 (2009) (affirming the trial court's finding of fact that mitigation

was established under the statutory "probable cause" exception because "[the trespasser] *did not rely on his own subjective interpretation of the property line*; rather, he relied on the victim's assertion that the fence was the property line") (emphasis added).

No evidence put forth by defendants demonstrated anything more than their vague, imprecise, unsubstantiated, and subjective notions of where the boundary line was located—based solely on hearsay more than a decade old. In fact, the citations to the record by respondents in support of the trial court's summary judgment ruling on timber trespass mitigation cite exclusively to the trial proceedings, not to the record on summary judgment. Even so, the evidence mustered by defendants on mitigation supports nothing more than "good faith." As a matter of Washington law, it is insufficient to make out a *prima facie* case of mitigation: there is no evidence that the trespass was "casual" (accidental); there is no evidence that the trespass was "involuntary" (coerced); there is no evidence that any defendant had "probable cause" (objective facts beyond mere unsubstantiated surmise) to believe that Mr. Wood's trees were on the Brummond side of the property line.

E. The Trial Court Erred on Summary Judgment by Misconstruing Washington Law on Timber Trespass Emotional Distress Damages

Finally, the trial court also erred when it agreed with defendants that, in order to recover emotional distress damages, a plaintiff is required to prove that the timber trespass was "willful." Respondents on appeal continue to argue that this is the law.

In fact, Washington law provides that emotional distress damages are recoverable for intentional torts; that trespass is an intentional tort; and that, therefore, emotional distress damages are recoverable in an action for timber trespass. Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 117, 942 P.2d 968 (1997):

A hundred-year succession of Washington cases supports damages for emotional distress arising from intentional torts such as trespass generally. Emotional distress damages may be recovered for intentional interference with property interests specifically. *We hold emotional distress damages, if proved, may be recovered under RCW 64.12.030.*

It is critical to note that the Birchler Court held that emotional distress damages are recoverable *under RCW 64.12.030*. That statute requires nothing more than a trespass for recovery—it says absolutely nothing about the timber trespass being "willful" or "intentional." Thus, under Birchler, *because* timber trespass is an intentional tort, emotional distress damages are recoverable. The trial court reversed this holding 180 degrees when it ruled that only

upon proof of willful or intentional timber trespass are emotional distress damages recoverable.

As a result, the trial court erred when it refused to rule that, because the timber trespass occurred as a matter of law, Mr. Wood was entitled to whatever emotional distress damages he proved were proximately caused by the trespass.

III. THE TRIAL COURT MADE THESE SAME LEGAL ERRORS AT EVERY SUBSEQUENT STAGE OF TRIAL

A. Motions in Limine and Trial Evidence

The trial court's misunderstanding of Washington law regarding restoration or replacement cost damages persisted throughout trial. The respondents' only support for the trial court's evidentiary rulings is their erroneous contention that the trial court properly applied the law. But they are incorrect.

Based in its misunderstanding of timber trespass damages law, and over Mr. Wood's objections, CP 363-64, the trial court allowed the defendants to present damages evidence of the cost to plant 8-10 foot baby trees. CP 552, RP 55, 80-84. This was basically the same damages evidence as submitted by the defense on summary judgment. CP 276, 320:23-321:15.

This evidence suffers from the same immateriality as the

defendants' damages evidence on summary judgment: planting 8-10 foot baby trees and then waiting 23 years for them to grow to the 47 and 38 foot size of the trees that were trespassed is simply not relevant, because it is neither a restoration nor a replacement that puts Mr. Wood's property back to the condition it was in pre-trespass. Allowing the jury to hear that a local government calls planting baby trees a "restoration" was error because this evidence was not relevant, was not helpful, and was contrary to the law on damages. It was, in fact, prejudicial (since the jury cannot be expected to differentiate between the "restoration or replacement" authorized under state law and the minimal "restoration" allowed under the BMC code for non-critical areas). Thus, the trial court's rulings were an abuse of discretion.

The trial court's misunderstanding of timber trespass mitigation under RCW 64.12.040 also persisted through trial. The trial court refused to allow Mr. Wood to testify that his trees were planted in a critical area, which means that they could not be cut without a permit and that cutting to improve views was not a basis for issuance of the required permit. The respondents' argue that this evidence was prejudicial to defendants on the mitigation issue. How this is so is difficult to understand. Simply put, cutting without

a permit in a critical area is not the same thing as cutting without probable cause to believe the trees are on your property.

And, precluding this evidence was highly prejudicial to Mr. Wood. Being precluded from so testifying, Mr. Wood was unable to respond to the defendants' "evidence" for mitigation (that there was no fence marking the property line) with the truth—that no one can build a fence in a critical area, and that it is unnecessary to protect one's property anyway because *no one* is allowed to cut down trees in the critical area. That evidence also would have been helpful to the jury to understand why Mr. Wood originally planted the tree on the boundary line—because no one could ever legally cut it down under local ordinances, it simply did not matter if the tree was partly on the uphill neighbor's property.

B. Directed Verdict

The trial court's misunderstanding of Washington law on the major issues in this case were also repeated at the conclusion of trial when Mr. Wood moved for a directed verdict on restoration or replacement cost damages, on timber trespass mitigation, and on his entitlement to emotional distress damages. Properly applying Washington law on this issues, there was simply not enough evidence in favor of the defendants' positions on these issues to

deliver the case to the jury. The respondents' only argument on appeal, again, is that the trial court was correct on the applicable law. Since that is not the case, the trial court made the same errors at the conclusion of trial that it made on summary judgment.

C. Jury Instructions

On jury instructions, the respondents again argue that the trial court properly presented Washington law. Because the trial court made the same legal errors in jury instructions that it made on summary judgment, it erred.

1. Instructions on Damages

The trial court's instructions on damages failed to instruct the jury that the purpose of restoration or replacement cost damages is "to return an injured party as nearly as possible to the condition in which it would have been had the wrong not occurred" per Tatum, 30 Wn. App. at 584 n.2.²

Respondents argue that Mr. Wood did not object to the court's not giving his proposed instruction 19 (CP 423). But Mr.

² See also Watkins v. FMC Corp.-Niagara Chemical Division, 12 Wn. App. 701, 705, 531 P.2d 505 (1975) (emphasis added):

The primary aim in measuring damages is compensation, and this contemplates that the damages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred.

Wood did object to the court's failure to give his proposed instruction 46 (RP 3/17 7:6-7), which contained language similar to his proposed 19—explaining to the jury that the purpose of damages is to return the damaged property to its pre-trespass condition. CP 594. Moreover, plaintiff's proposed instruction 19 was also included in Mr. Wood's final proposed set of instructions as proposed 45, CP 593, so the court was well aware that Mr. Wood wanted the jury to be so instructed. Likewise, because the court's Instruction 10 did not include the language proposed in proposed instruction 46, Mr. Wood's objection to the failure to give 46 is sufficient objection to the court giving Instruction 10.

These errors were prejudicial because it allowed defense counsel to argue to the jury that the "restoration" allowed under Burien Code was the same as Washington's restoration or replacement cost measure of damages, and prevented Mr. Wood's counsel from countering accurately with the support of instructions that they were not. RP 3/17 60:19-61:1.

2. The Court's Mitigation Instructions

The only argument on the Court's Instruction 11 (CP 632) by respondent is that it correctly states the law that no emotional distress damages are recoverable unless it is proven that the

trespass is "willful" per WPI 14.01. Because, as explained above, this is contrary to Washington law, the trial court erred in so instructing the jury. This instruction was also prejudicial because it allowed defense counsel to inaccurately argue in closing that proving the trespass was not "willful" was the same as proving mitigation under RCW 64.12.040. RP 61:10-13.

3. The Court's Instructions on Burien Municipal Code Provisions

Mr. Wood assigned error to the trial court instructing the jury on BMC provisions (Assignment 8). Respondents argue that Mr. Wood failed to brief the issue. However, the issue was briefed in the evidentiary objections section of appellant's opening brief (at 37-41, especially at 40). Once that evidence was erroneously admitted, Mr. Wood had no choice but to attempt to mitigate the issue by instructing the jury on the totality of the BMC code provisions relating to critical area restorations. Had the trial court properly excluded the objectionable testimony about minimal BMC code provisions that allegedly defined "restoration" as planting baby trees to replace mature trees, then there would have been no need to instruct the jury about BMC provisions. Mr. Wood's reasonable attempt to make the best of a bad situation created by

the trial court admitting such evidence over his objection should not be viewed as a waiver of the proper objection that giving these instructions was error and was prejudicial because it supplanted Washington law on timber trespass damages with the inapplicable Burien standards for non-critical area restorations.

D. Post-Trial Motions

1. Restoration or Replacement Cost Damages

Respondents argue that the jury's verdict on restoration or replacement cost damages was within the range of evidence. This argument is flawed on several grounds. First, its expert arborist's testimony on the cost to plant baby trees should never have been admitted. Second, planting baby trees does not put Mr. Wood's property back in the condition it was in just before the trespass; rather, it only puts it back into the condition it was in 1982 when he first started landscaping his property.

Third, even if the appellate court holds that returning Mr. Wood's property to its 1982 condition is consistent with Washington law, the jury's verdict is still outside the evidence because it is less than the minimum required by the trial evidence. Respondents dispute this contention, arguing that it contested parts of the costs Mr. Wood claims were uncontested. But respondents cite to no

evidence admitted at trial contesting these damages elements. Moreover, this argument ignores the undisputed fact that the City of Burien required the second survey after the Brummonds claimed that Mr. Wood's pre-trespass survey was inaccurate and that the cut trees were on the Brummond property. RP 3/10 43:4-11, RP 3/9 30:3-10. In truth, the jury's verdict was outside the range of even the erroneously admitted baby-tree measure of damages allowed by the trial court.

2. Timber Trespass Mitigation

Respondents argue that there was sufficient evidence to support the jury's verdict that the timber trespass was mitigated under RCW 64.12.040. But the evidence on which this argument rests belies the respondents' contention. First, respondents argue that mitigation was proven at trial because there was no fence on the property line. This fact proves nothing. Lack of a fence does not constitute probable cause, because lack of knowledge about the location of the property line does not constitute probable cause. Moreover, this is a red herring because under Burien code fences are not allowed in critical areas.

Second, respondents argue that there was no noticeable difference in the landscape at the property line. This is untrue, as

the evidence shows that there was a clear transition. Exs 26-27, RP 3/9 27:11-18. Moreover, there was enough of a difference for Mr. Clark to ask Mrs. Brummond if Tree 595 was on her property, which Mrs. Brummond could not answer. But even if there was not a clear transition, this evidence proves nothing more than that the defendants did not trespass intentionally. But mere "good faith" is not enough to prove probable cause.

Third, respondents argue that there were no visible boundary markers. Again, this is simply untrue, as there was a boundary marker within a couple steps of Tree 595. While it is true that it was covered by an upturned planting pot, Ex. 20, there was also a survey stake right next to it. Ignored is not the same as not present. But even if it is fair to construe this evidence as respondents do, it does not establish mitigation because it shows nothing more than good faith, *i.e.*, the trespass was not intentional because I did not notice the boundary markers.

Respondents also rely on the testimony of Mrs. Brummond that she thought her property extended down the hill to where it flattens out. This is another red herring, because Mrs. Brummond testified she had never been down the hill to inspect the area, RP 3.13 Vol. I 70 1-3, and that all she ever saw was the top of Tree

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596 from her house. Id. 85:23-25. There is no way she could see where the hill flattened out before the trees were cut. Moreover, she never told Mr. Clark that the boundary line was where the hill flattened out. Even if she had, it is simply a wildly erroneous assumption about the location of the property line, because a property line at that location would encroach halfway into Mr. Wood's back yard into his garden boxes. Exs 10, 30. This mere belief does not constitute probable cause.

Finally, respondents argue that, since Tree 596 is on their property, while Tree 595 on the Wood property is higher up the hill, their belief that Tree 595 was on the Brummond property was reasonable. Again, this is both untrue and irrelevant. It is untrue because Mr. Clark never testified to this, because Mrs. Brummond testified she only saw the very top of one of the trespassed trees, and because the photos clearly show that Tree 595 is not farther uphill than Tree 596. Exs 27, 135. It is also irrelevant because the mere erroneous belief that the boundary line is formed by a 90 degree angle, rather than an obtuse angle, is not probable cause.

In short, none of the mitigation evidence relied on respondents is sufficient under Washington law to establish the probable cause based on objectively reliable information that is

required by RCW 64.12.040 and the cases applying that statute.

3. Passion or Prejudice, Error of Law, and Substantial Justice

Respondents argue that there is no evidence from which to conclude that the jury's verdict was the result of passion or prejudice or errors of law, or that substantial justice was not done. To the contrary, the jury's verdict itself proves that it was the result of all of those things. Neither the evidence nor common sense support the jury's conclusion that \$6,854 cleans up Mr. Wood's property, pays the costs of satisfying the City of Burien's permitting process, *and* replaces Mr. Wood's trespassed property in a way that returns it as nearly as possible to the condition in which it would be had the trespass not occurred. The simple fact is that the jury did not award damages that restore or replace Mr. Wood's property to its 2005 pre-trespass condition. Rather, it only awarded enough in damages to put Mr. Wood's property back to its 1982 condition just after he first planted baby trees. Thus, the jury's verdict requires Mr. Wood to wait 23 years before his property is put back to its pre-trespass condition. This is not, should not, and cannot be consistent with Washington law on timber trespass damages.

Respectfully Submitted on JUNE 7th, 2010.

HAWKES LAW FIRM, P.S.

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

R. GARY WOOD,

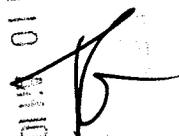
Appellant, No. 63677-4-1

vs.

JAMES C. BRUMMOND and
CAROL D. BRUMMOND,
husband and wife, and their
marital community; ROGER B.
CLARK AND KATHRYN
CLARK, husband and wife d/b/a
Treebalance Tree Service,

Respondents.

DECLARATION OF SERVICE
OF APPELLANT'S REPLY
BRIEF

2010 JUN 10 AM 10:41


COMES NOW the undersigned and declares under penalty
of perjury under the Laws of the State of Washington as follows:

1. I am of legal age, have personal knowledge of the
facts set forth herein, and am competent to testify.

2. I am an employee of Hawkes Law Firm, P.S., 19929
Ballinger Way N.E., Shoreline, WA 98155, attorney of record for
appellant in this matter.

3. Per RAP 18.6(b), on June 7, 2010, I sent by U.S.
mail, first class postage prepaid, an original and one copy of the
Reply Brief of Appellant Gary Wood, addressed to:

ORIGINAL

Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

4. Per RAP 18.6(b), on June 7, 2010,, I sent by U.S. mail, first class postage prepaid, a true and correct copy of the Reply Brief of Appellant Gary Wood to counsel of record for all parties, addressed as follows:

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DATED at Shoreline, Washington on June 7, 2010.


Kevin M. Winters
Kevin M. Winters