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I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it applied RCW 4.24.630 rather than RCW 64.12.030 to this timber trespass case, thus awarding Plaintiff/Respondent Structural Investments & Planning IV, LLC (hereinafter "Plaintiff") damages specifically disallowed under Washington law, including both actual damage and replacement/mitigation costs, loss of habitat, unjust enrichment, and attorneys fees and litigation costs.

Assignment of Error No. 2: The trial court erred when it awarded Plaintiff duplicative damages

Assignment of Error No. 3: The trial court erred when it awarded damages unsupported by the evidence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it applied the general property damages statute RCW 4.24.630, where liability was provided under the more specific timber trespass statute RCW 64.12.030, and RCW 4.24.630(2) specifically precludes application of that statute in any case where RCW 64.12.030 provides liability. **(Assignment of Error No. 1)**

2. Whether the trial court erred when it awarded Plaintiff damages under RCW 4.24.630 beyond those allowed under RCW 64.12.030, as limited by a century and a half of Washington case law

applying the timber trespass statute, including the duplicative damages of awarding both actual damage and replacement/mitigation costs; loss of habitat; unjust enrichment; and attorneys fees and litigation costs. **(Assignment of Error No. 1).**

3. Whether the trial court erred when it awarded Plaintiff duplicative damages, thus awarding redress under multiple theories for the same wrong. **(Assignment of Error No. 2).**

4. Whether the trial court erred when it awarded damages unsupported by competent evidence. **(Assignment of Error No. 3).**

IV. STATEMENT OF THE CASE

A. Substantive Factual History.

The facts of this case are relatively straightforward. The Schillers have owned a vacation condominium in the South Wind complex in Seaview, Washington since 1992. RP Vol. III p. 57, ll.12-22. This complex adjoined property owned by Plaintiff, Structural Investments & Planning IV, LLC. Plaintiff's property comprised of approximately 37 acres of undeveloped land, which, according to Plaintiff's corporate representative (Mr. Matthew Doney), is "difficult to traverse through given the wetland impacts and the high dense tree foliage" (RP Vol. III p. 19, ll. 21-24); areas of which are "very overgrown" and "difficult to traverse" (*id.* p. 11, ll. 22-25); and where there is "difficulty in transversing (sic) through the terrain" as it is "just too difficult to get through" and "too brushy" (*id.* p. 13 ll. 8-13).

The trial court found that on or about March 3, 2004, Defendant Ray Schiller cut three willow branches off of a willow next to a pond on Plaintiff's property. RP Vol. III p. 59, l. 23 – p. 60 l. 23. Mr. Schiller testified that the willow in question lay on the border between Plaintiff's property and that of the condominium where the Schillers reside. RP Vol. III p. 62 ll. 2-6. The unrefuted testimony at trial is that there was a history over the years of various outside people trimming in this area. *Id.* p. 71, ll. 7-10. Mr. Schiller admitted that he cut a willow branch to obtain a better view of the pond. RP Vol. III p. 65, ll. 8-13. Later that day, Mr. Matt Doney and his son, Trent Doney, representing Plaintiff's interests, approached Mr. Schiller to request that he not prune by the pond again. RP Vol. III p. 60, l. 23 – p. 61, l. 17. There is no testimony or other evidence that Mr. Schiller has cut any further willows or other vegetation in the pond area.

About a year later, in January of 2005, Mr. Schiller pruned a Sitka spruce tree in front of his condominium, which also lay on Plaintiff's property. RP Vol. III p. 66 ll. 1-9. Once again, there had been a history of pruning of these particular trees in the past, mostly by other residents of the South Wind condominium complex. *Id.* p. 117, l. 15 – 118, l. 15; p. 124, l. 19 – p. 125, l. 22. Mr. Schiller testified that he had permission from the prior property owner to continue this tradition, and there was no evidence or testimony challenging or refuting this fact. *Id.* p. 94, ll. 10-14; p. 118, ll. 16-19. The trimmed appearance of the spruce was obvious, with cuttings long preceding Mr. Schillers' residence at the neighboring

condominiums, as testified to by Plaintiff's own expert Francis Naglich. RP Vol. II p. 173, l. 24 – p. 174 l. 2; p. 177, ll. 6-16. Neither the Doney's nor anyone else ever approached Mr. Schiller regarding the pruning of the Sitka spruce, or otherwise gave any affirmative indication that the long-standing permissive trimming of the Sitka spruce was no longer acceptable. RP Vol. III p. 120, ll. 2-14. There is no allegation, evidence or testimony in the record that asserts otherwise.

B. Procedural History.

Plaintiff filed its Complaint February 25, 2005. CP 1-3. Plaintiff then filed an Amended Complaint (hereinafter the "Complaint", the governing pleading at trial) on March 4, 2005. CP 6-9. Plaintiff alleged that Defendant/Appellant Ray Schiller (hereinafter "Defendant" or "Mr. Schiller") entered onto Plaintiff's property and "unlawfully cut and poisoned a number of trees growing thereon," and damaged a total of 30 spruce trees and 10 willow trees. CP 7. Plaintiff claimed damages under RCW 4.24.630 and RCW 64.12.030. CP 8 ¶ 9. Mr. Schiller filed his Answer and Affirmative Defenses June 3, 2005. CP 10-12.

The matter went to trial before the Honorable Michael J. Sullivan of the Pacific County trial court on February 13-14, 2007. A verbatim report of proceedings has been ordered and provided to the Court. The trial court issued its Memorandum Opinion on February 15, 2007. CP 128-33. In that Opinion, the court determined the following:

- (1) That Defendant "knowingly and willfully" trespassed twice upon Plaintiff's property, once on or about March 4, 2004 to

cut willows, and a second time in or about January or February of 2005 to prune/limb Sitka spruce trees.

- (2) That since Defendant had asked the prior property owner for permission to cut the spruce, that Defendant knew that the property was not his own.
- (3) That Plaintiff gave Defendant clear notice in March of 2004 not to cut further willows by the pond.

The court also found the following damages:

- (1) For cutting of one clump of willow trees: \$2,000 for actual damages to the willow, trebled under the statute (for a total of \$6,000); and \$2000 for replacement trees to “mitigate” the loss, including labor and monitoring costs. The trial court also awarded \$3,000 for unjust enrichment, and \$2,000 for “loss of habitat,” bringing the total damage awarded for the willows to \$13,000. CP 130.
- (2) For trimming of six Sitka spruce trees by ten feet of vertical height: \$300 for each tree (\$1,800) for actual damages to the spruce, trebled under the statute (for a total of \$5,400); \$5,400 for the planting of eight additional trees to “mitigate” the damage, including labor and monitoring. The trial court also awarded \$2,000 per year for seven years for unjust enrichment (or \$14,000), for a total damage award for the spruce trees totaling \$24,800. CP 132.

The total damages awarded for Plaintiff thus totaled \$37,800. CP 132-33.

The trial court also reserved the issue of attorneys fees, pending submission of pleadings on the issue as well as proposed drafts for findings of fact and conclusions of law. *Id.*

Defendant filed a motion for reconsideration asserting that the trial court erred in awarding damages under RCW 4.24.630 that were not authorized by law where treble damages were already awarded under the timber trespass statute, RCW 64.12.030. CP 138-39, *see also* CP 141-144 (Plaintiff's opposition). On March 9, 2007, the trial court heard the motion for reconsideration and the motions on attorneys fees. The trial court issued a Memorandum Decision denying the motion for reconsideration on March 14, 2007. CP 173-74. With respect to the remaining issues, the trial court signed the Findings of Fact and Conclusions of Law provided by Plaintiff's counsel, without changes. CP 175-181. In addition to the \$37,800 in damages, the trial court thus awarded Plaintiff an additional \$30,953 in attorneys fees; \$607.33 in costs; and \$3,717 in expert fees, for a total litigation cost award of \$35,277.33, or 93% of the damages awarded. CP 181. The trial court entered judgment the same day, again on the form submitted by Plaintiff without changes. CP 183-184. The Judgment (CP 184 ¶¶ 3 and 4) and the Findings of Fact and Conclusions of Law (CP 178 ¶ 1, CP 179 ¶ 6 and CP 180 ¶ 17) provide that the award was based on RCW 4.24.630.

V. ARGUMENT

A. Summary of Argument.

The trial court erred in awarding damages under the broader scope of RCW 4.24.630, where damages were available and appropriate under RCW 64.12.030. By the specific terms of RCW 4.24.630(2), an award was *not* available under that statute where RCW 64.12.030 provided liability. Here, RCW 64.12.030 provided liability, and damages were thus limited to those allowed through the century and a half of case law governing this statute. Thus, the trial court's duplicative award of both actual damages *and* mitigation/replacement costs; the award of loss of habitat and unjust enrichment; and the award of attorneys fees and litigation costs were in error.

B. Standard of Review.

The appropriate review of a trial court's decision following a bench trial is a determination as to whether substantial evidence supports the findings, and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 644, 668-69, 754 P.2d 1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The appellate court will defer to the trier of fact in resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

Questions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003). This appeal centers primarily upon the correct application of two statutes relating to timber trespass claims. The meaning of a statute is a question of law that the Appellate Court reviews de novo. *King County v. Seawest Inv. Associates, LLC*, ___ Wn.2d ___, 170 P.3d 53, 55 (2007). The applicability of RCW 64.12.030 versus RCW 4.12.630, including the appropriate scope of damages under these statutes as applied to this case, were issues squarely before the trial court. CP 137-139 (Defendant's motion for reconsideration); CP 141-144 (Plaintiff's response); RP Vol. III p. 6, line 19 through p. 15, line 15 (hearing on motion).

With respect to a trial court's decision regarding attorney fees, the standard of review is abuse of discretion. *Estate of Johan Kvande v. Olsen*, 74 Wn. App. 64, 71, 871 P.2d 669 (1994). An abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 427, 54 P.3d 687 (2002). Here, however, the issue of attorneys fees is one of law to be reviewed de novo. The trial court's error was in awarding attorneys fees and litigation costs at all, as such fees and costs are not recoverable under the applicable statute.

C. **The trial court erred when it applied RCW 4.24.630 rather than RCW 64.12.030, thus awarding Plaintiff/Respondent Structural Investments & Planning IV, LLC (hereinafter "Plaintiff") duplicative damages specifically disallowed under Washington law.**

In its Complaint Plaintiff plead for two alternative forms of relief: damages under the timber trespass statute, RCW 64.12.030, as well as the statute governing waste or damage to land and property, RCW 4.24.630. CP 8. The findings, conclusions and orders signed by the trial court, which were those presented by Plaintiff, identify RCW 4.24.630 as the statute under which damages were awarded. CP 178 (¶ 1), CP 179 (¶ 6), CP 180 (¶ 17). The trial court adopted Plaintiff's arguments on the issue of applying RCW 4.24.630 despite the fact that RCW 64.12.030 clearly provided liability. CP 174; *see also* CP 141-144 (Plaintiff's briefing).

Respectfully, Defendant submits that both Plaintiff and the trial court confused the relevant statutes, and erred in analyzing the applicable case law. RCW 64.12.030 provided liability for the claims at issue, and recovery under RCW 4.24.630 was thus not available as a matter of law. The specific language of RCW 4.24.630(2) *precluded* application in this case, and the accompanying expanded scope of damages was unavailable "in *any* case where liability for damages is provided under RCW 64.12.030." RCW 4.24.630(2)(emphasis added).

1. *The relevant statutes.*

Washington's original timber trespass statute, first passed in 1869 and currently codified under RCW 64.12.030 reads as follows:

64.12.030. Injury to or removing trees, etc.--Damages

Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefore, as the case may be.

The companion statute, RCW 64.12.040, provides an exception to the strict provisions of this penal statute:

64.12.040. Mitigating circumstances--Damages

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.

In 1994, the Legislature passed RCW 4.24.630, providing liability for general damage to land and property where RCW 64.12.030 did not apply:

4.24.630. Liability for damage to land and property-- Damages--Costs-- Attorneys' fees--Exceptions

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is

liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

(2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

(Emphasis added). Thus, where liability is *not* provided under the more specific timber trespass statute 64.12.030, RCW 4.24.630 fills the gap and provides for general damages to land. However, under the specific language of the more contemporary statute, RCW 4.24.630 does *not* apply where RCW 64.12.030 provides for liability. RCW 4.24.630(2). Nor is there anywhere in the modern statute that expresses any legislative intent to supersede or negate the application of the long-standing timber trespass statute RCW 64.12.030.

2. *Damages are limited to those available under RCW 64.12.030, and thus the trial court erred in awarding damages under the broader scope of RCW 4.24.630.*

This distinction between the two statutes and their applicability is crucial because RCW 4.24.630 provides a broader scope of damages than RCW 64.12.030. Several elements of the trial court's award fall under

this broader allowance for damages, including replacement/mitigation costs (duplicative to the award of “actual” damages to the vegetation); loss of habitat, unjust enrichment, and attorneys fees and litigation costs. These damages constitute 84% of the total award, broken down as follows: \$7,000 of the total \$13,000 awarded for the willow tree, or 54% of that award; \$19,400 of the \$24,800 awarded for the Sitka spruce, or 78% of that award; and the \$35,277.33 in attorneys fees and litigation costs, or a total of \$61,677.33 in damages *precluded* by the applicable statute and attending case law.

Plaintiff argued that the two statutes were alternative forms of relief, with RCW 4.24.630 available if a claimant was able to meet a heightened burden of proof. CP 141-144. But, there is no case law or legislative history to support this novel but ultimately incorrect application of the statutes. Plaintiff argued that to look first to RCW 64.12.030, rather than allowing a court to chose between both statutes in timber cases, would negate the use of the word “timber” in RCW 4.24.630. Plaintiff’s interpretation, however, completely negates not just a single word, but an entire *section* of RCW 4.24.630, namely, subsection (2) which *specifically* precludes application of this statute where there is liability under RCW 64.12.030.

Furthermore, interpreting the two statutes as “alternative” forms of relief would render the more restrictive and conservative statutory damages under RCW 64.12.030 completely meaningless, as no reasonable

person would “choose” to utilize the statute that affords less relief for the same complaint.

RCW 4.24.630 provides for damages “includ[ing], but 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”; in addition to reasonable investigative costs, attorneys fees, and other litigation-related costs. In contrast, the long line of Washington cases applying RCW 64.12.030 and -.040 since its passage in 1869 unambiguously limit the available damages. For timber, available damages are the stumpage value of the severed trees, together with other damages that are a normal consequence of the logging operation. *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 111, 942 P.2d 968 (1997). When the damage is to a productive tree, the measure of damages is its production value. *Id.* When the damage is to Christmas trees, the appropriate measure of damages are lost profits. *Id.*

Finally, for injury to or destruction of residential/ornamental trees or shrubs, the measure of damages is the restoration or replacement cost for the vegetation. *Id.* That is the measure applicable to this case, as will be discussed further below in Section _____. These restrictions constitute an important part of the case law history defining and applying statutory liability for timber trespass cases. Washington courts have, as appropriate to a penal statute, narrowly interpreted the punitive damages provision. *Birchler*, 133 Wn.2d at 110-11; *Grays Harbor County v. Bay City Lumber*

Co., 47 Wn.2d 879, 886, 289 P.2d 975 (1955); *Bailey v. Hayden*, 65 Wash. 57, 61, 117 P. 720 (1911).

The court must presume that the Legislature knew the existing state of the case law when it passed further legislation in this arena. *Woodson v. State*, 94 Wn.2d 257, 262, 623 P.2d 683 (1980). It is not reasonable to suggest that the Legislature intended to so casually negate nearly a century and a half of law and significantly broadening liability for timber trespass without some indication that such was the intent.

3. *Resolving ambiguity: the clear terms of the statute preclude application of RCW 4.24.630 in any case where RCW 64.12.030 provides liability. Case law supports this.*

RCW 4.24.630(2) clearly states that “[t]his section **does not apply** in **any** case where liability for damages is provided under RCW 64.12.030.” Thus, where RCW 64.12.030 provides liability for a timber trespass claim, the claimant is entitled to damages under that statute *but not* RCW 4.24.630. The more general statute governing waste and damage to land, RCW 4.24.630, applies if *and only if* there is no liability for damages available under RCW 64.12.030. The trial court erred in its analysis, and in awarding damages under RCW 4.24.630.

While the language of the two statutes appear confusingly similar, thus at first blush appearing to provide alternative avenues of relief, a closer examination tells a different story. The key question seems to be what was meant by the following words: “[t]his section does not apply where liability for damages *is provided under* RCW 64.12.030.” More

specifically, perhaps, is the question of what the Legislature meant by the verb “is”? Did the Legislature mean that damages under RCW 4.24.630 were unavailable if liability *could* be found under RCW 64.12.030 for that particular claim? Or did the Legislature mean that damages for RCW 4.24.630 were unavailable only where a court *chose* to use RCW 64.12.030 instead? While no Washington case has yet squarely presented this issue, the clear assumptions in those cases decided after the passage of RCW 4.24.630 is that this statute will not, does not, and cannot apply where liability is available under RCW 64.12.030.

a. Division I affirmed that RCW 4.24.630 would not apply where damages are available under RCW 64.12.030 in JDFJ Corp. v. Int’l Raceway, Inc. (1999).

Most cases to date that deal with the general property waste statute, RCW 4.24.630, involved waste to the land from causes other than damage or cutting of trees, such as flooding or destruction of a hillside. There is, however, guidance directly on point from the 1999 Division I case, *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999). In that case, the tenant (International Raceway) filed suit against the landlord to enforce a contractual lease extension. In response, the landlord (JDFJ Corporation) asserted counterclaims alleging that the tenant had harvested trees from the leased land without first obtaining JDFJ’s permission, as required by the lease.

The landlord prevailed on its claim for timber trespass under RCW 64.12.030, but the court declined to find the “willful conduct” necessary to

award triple damages. The landlord then urged the court to utilize RCW 4.24.630 instead and award triple damages, arguing that RCW 64.12.030 shouldn't apply, anyway, because the liable party was a tenant, and thus not a "trespasser" in the sense required for a common law trespass claim. The court rejected this argument, finding that the timber trespass statute encompassed a more general sense of "trespass," and did not require that the act meet the specific elements required for a common law trespass.

Critical to the present case, Division I in *JDFJ* also determined that since RCW 64.12.030 afforded liability for the acts in question, that RCW 64.12.030 further governed the awardable damages, thus *precluding* any application of the broader remedies afforded under RCW 4.24.630:

... JDFJ asserted that International Raceway, Inc., should be held liable for treble damages under RCW 4.24.630 (removal of timber without authority), rather than timber trespass damages under RCW 64.12.030, because International Raceway, Inc. was a lessee and therefore could not commit a trespass. **The timber trespass statute, however, is not limited simply to situations equivalent to a common law trespass. It includes within its scope unauthorized logging by a lessee and RCW 4.24.630 is thus by its terms inapplicable.**

97 Wn. App. at 3 (emphasis added);

The statute proffered by JDFJ, **RCW 4.24.630, states that it is inapplicable where damages are provided for under RCW 64.12.030.**

97 Wn. App. at 5-6 (emphasis added);

RCW 64.12.030 encompasses the conduct of IRI in this case and provides the appropriate measure of damages for the acts that occurred.

97 Wn. App. at 7 (emphasis added). In JDFJ, Division I decision thus affirms that RCW 4.24.630 *does not and cannot apply* to afford a remedy where liability and damages for the act in question are encompassed by RCW 64.12.030.

There is no argument or evidence in the record or finding by the trial court in this case that RCW 64.12.030 would not apply to the acts in this case. To the contrary, Plaintiff asserted that Mr. Schiller's acts violated RCW 64.12.030 in its Complaint. CP 8 ¶ 9. The entire record in this case tells a classic tale of timber trespass, clearly encompassed under RCW 64.12.030. The arguments presented to the court relied on case law interpreting RCW 64.12.030, as pointed out by Defendant (RP Vol. III p. 7, line 7 through p. 8 line 15) and as admitted by Plaintiff's counsel (RP Vol. III p. 9, lines 6-18). Plaintiff argued that it relied on RCW 64.12.030 case law because of the sparse cases under RCW 4.24.630, but the bottom line is that Plaintiff's use of the long-standing case law under RCW 64.12.030 only affirms that this statute and its attendant case law can, in fact, apply to the present situation.

Therefore, as RCW 64.12.030 provides liability for Mr. Schiller's acts, as alleged in this lawsuit, RCW 4.24.630 "is thus *by its terms* inapplicable." *JDFJ Corp.*, 97 Wn. App. at 3.

- b. *Demystifying Birchler v. Castello Land. Co.: Where RCW 64.12.030 provides liability, claimant cannot seek damages otherwise encompassed by that statute.*

In its motion on reconsideration, Plaintiff utilized *Birchler*, 133 Wn.2d (1997) to argue that that RCW 4.24.630 should apply, along with its broader scope of available damages, as RCW 64.12.030 was not an “exclusive remedy statute”. CP 141-144. The trial court agreed, as reflected in its findings of fact and conclusions of law. CP 174. However, this is an overly broad and ultimately incorrect application of the holding in *Birchler*.

In *Birchler* the Supreme Court simply held that RCW 64.12.030 was not an exclusive remedy, and thus did not bar recovery of damages *not* already encompassed by the statutory liability: in that case, emotional distress damages. 133 Wn.2d at 115. Both Plaintiff and the trial court neglected to observe that the *Birchler* decision *also* made clear that the statute *did* operate to preclude any duplicative recovery for damages already encompassed under the rubric of RCW 64.12.030:

Numerous cases indicate that a party can recover treble damages under RCW 64.12.030, as well as other, provable, ***nonduplicative*** damages. For example, in *Henriksen v. Lyons*, 33 Wn. App. 123, 652 P.2d 18 (1982), *review denied*, 99 Wn. 2d 1001 (1983), upon which [the defendants] rely, ... [t]he Court of Appeals affirmed the award of damages for timber trespass, but reversed the \$3,000 judgment for diminution in the value of Henriksen’s land, stating:

In this state, the landowner suffering a timber trespass may ***elect*** to pursue ***either*** common law remedies ***or*** statutory remedies. ... The statutory remedy trebles the

“stumpage value” of the severed trees. **It is designed to compensate the landowner for all damages that are a normal consequence of the logging operation.**

* * *

The court held Henricksen was entitled to recover for diminution in the value of her land under the timber trespass statute, ***but only*** to the extent she could show the diminution was not a “usual or normal consequence of a logging operation, the Court of Appeals vacating the award of damages for loss of property value. [citation omitted]. *

* *

Henricksen does not hold an action under RCW 64.12.030 precludes the assertion of a claim for emotional distress, as [the defendants] contend. *Henricksen* stands only for the **straight-forward proposition that the timber trespass statute subsumes under its rubric all damage claims that are a usual or normal consequence of timber trespass.**

133 Wn.2d at 113-114.

Here, Plaintiff requested – and the trial court awarded – damages for damage to trees *as well as* replacement and mitigation costs; loss of habitat; and unjust enrichment. However, these are precisely the types of duplicative damage precluded under RCW 64.12.030. There was no evidence presented at trial or otherwise on the record that showed that these damages were anything other than a usual or normal consequence of timber trespass. With respect to unjust enrichment and loss of habitat, it is hard to think of any timber trespass scenario where there is not some form of “unjust enrichment” to the trespasser or loss of habitat – which is precisely the purpose of the treble damages, to negate any such possible

benefit to the trespasser. *Birchler*, 133 Wn.2d at 110-11. Nor are there attorneys fees available to claimants under RCW 64.12.030.

With respect to unjust enrichment, the *Birchler* court specifically recognized that unjust enrichment was a duplicative damages properly precluded when treble damages were recovered, in discussing the *Bill v. Gattavara* case, 34 Wn.2d 645, 209 P.2d 457 (1949). 133 Wn.2d 114-115. In that case, the trial court had dismissed the claimant's action against the purchaser of the timber, finding that the landowner "had already received full satisfaction for his loss in the prior case" wherein he recovered treble damages under RCW 64.12.030. *Id.*

The *Birchler* decision did not overrule, modify or negate the conclusion in *Bill* in any way. To the contrary, the court in *Birchler* specifically distinguished the *Bill* court's dismissal of unjust enrichment damages (damages already remedied by the full satisfaction through the statutory treble damages) from the issue of emotional distress damages sought in the *Birchler* matter. 133 Wn.2d at 115. Thus, the court in *Birchler* **affirmed** the distinction between unjust enrichment damages (a duplicative damage) from emotional distress damages (a damage separate from those part of the "usual or normal consequence" of a logging operation), rendering the decision in *Birchler* **inapplicable** to this case. In fact, the *Birchler* decision **affirms** the long-standing and "straight forward" premise that the timber trespass statute RCW 64.12.030 encompasses "all damage claims that are a usual or normal consequence

of timber trespass,” precluding alternative common law remedies for those same damages. 133 Wn.2d at 114.

c. Further guidance from Washington Practice affirms this interpretation.

Given the sparse case law on the topic, it is also worthwhile to note that the Washington Practice series reaffirms the interpretation of RCW 4.24.630 as precluding any recovery under that statute where damages are available under RCW 64.12.030:

In the case of a trespass in which “any person shall *cut down, girdle, or otherwise injure, or carry off* any tree, timber or shrub on the land,” RCWA 65.12.030 allows treble damages. (Emphasis added.) A quite similar statute, RCWA 4.24.630, adopted in 1999, allows treble damages against “every person who goes onto the land of another and who *removes timber, crops, minerals, or other similar valuable property from the land, or* wrongfully injures personal property or improvements to real estate on the land ...” (Emphasis added). The latter statute says it does not apply “where liability for damages is provided under RCW 64.12.030” and certain other statutes. The words “carry off” in RCWA 64.12.030 have the same meaning as “removes” in RCWA 4.24.630; so, it seems that the “removal” of “any tree, timber or shrub” is a violation of only RCWA 64.12.030.

17 Wash. Prac., Real Estate § 10.2 (author’s emphasis retained, footnote citations omitted).

Other errors in the trial court’s decision flow from here, as the trial court awarded substantial damages under RCW 4.24.630 that are outside the scope of allowable damages under RCW 64.12.030. These issues will be discussed in turn below.

4. *Interpretation of legislative intent further affirms that the specific language of RCW 4.24.630 means what it says: that the statute shall not apply in any case where RCW 64.12.030 applies.*

Application of Washington's legislative interpretation rules further supports the application of the plain language of RCW 4.24.630(2), precluding recovery under RCW 4.24.630 where RCW 64.12.030 otherwise applies.

Statutory interpretation is a question of law. *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). The fundamental objective in reading a statute is to ascertain and carry out the Legislature's intent. *King County v. Seawest Inv. Associates, LLC*, ___ Wn.2d ___, 170 P.3d 53, 55 (2007). If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. *Id.* Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Christensen v. Ellsworth*, ___ Wn.2d ___, 173 P.3d 228, 232 (2007).

If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. *Christensen*, 173 P.3d at 232. A statute is ambiguous only if it can be *reasonably* interpreted in more than one way. Statutes are not ambiguous, however, merely because one could conceive of a different interpretation, or other possible interpretations exist. *Indoor*

Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., ___ Wn.2d ___, 170 P.3d 10, 16 (2007).

An undefined statutory term should be given its usual and ordinary meaning. *Indoor Billboard*, 170 P.3d at 16. Under the plain meaning rule, such meaning is derived from all that the Legislature has said in the statute and related statutes that disclose legislative intent about the provision in question. *Seawest Inv. Associates*, 170 P.3d at 55. A court should avoid strained meanings and absurd results, and should not adopt an interpretation that renders any portion meaningless. *Seawest Inv. Associates*, 170 P.3d at 55.

A specific statute, such as the RCW 64.12.030 timber trespass statute, will supersede a more general statute, such as the more general waste and damage to property statute RCW 4.24.630, when both might otherwise apply. *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Statutes relating to the same subject “are to be read together as constituting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes.” *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974); *see also Waste Mgmt. of Seattle*, 104 Wn.2d at 630; *State v. Fairbanks*, 25 Wn.2d 686, 690, 171 P.2d 845 (1946)(“It is a cardinal rule that two statutes dealing with the same subject matter will, if possible, be so construed as to preserve the integrity of both.”). Statutory provisions and rules should be harmonized whenever possible. *Christensen*, 173 P.3d at 232. “Courts should assume the

Legislature means exactly what it says” in a statute and apply it as written. *Indoor Billboard*, 170 P.3d at 16.

“The primary goal of statutory construction is to carry out legislative intent.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Legislative intent is determined primarily from the statutory language, viewed “in the context of the overall legislative scheme.” *Collection Servs. v. McConnachie*, 106 Wn. App. 738, 741, 24 P.3d 1112 (2001). A court should further avoid an absurd result when interpreting statutes. *Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 802, 808 P.2d 746 (1991).

At trial, Plaintiff argued that the court could be able to choose either RCW 4.24.630 or RCW 64.12.030, depending on the facts. However, this is not what RCW 4.24.630(2) says. In plain language, that statute provides that it *shall not* apply to *any* case where there is liability available under RCW 64.12.030. Any other interpretation would negate any reason for the timber trespass statute, RCW 64.12.030, to exist at all. Why would any claimant select remedies under a statute limiting recovery. Such a result is absurd, and thus cannot be reasonably read as the Legislature’s intent. The more reasonable reading is that statute is meant as a *fall back* statute if, and only if, the timber trespass statute somehow did not apply to a case involving timber.

In addition, allowing a claimant (or court) to utilize the more general land damages statute 04.24.630 where RCW 64.12.030 otherwise applies presents an opportunity for the claimant to skirt the limitations

developed over the course of a century of Washington law governing timber trespass claims. RCW 64.12.040 and the case law attending RCW 64.12.030 and -.040 provide important checks and balances, limiting treble damages, limiting recovery for attorneys fees and costs, and limiting duplicative damages, and disallowing all other claims for any damages that are part of the “usual result” of logging or timber removal operations.

Application of RCW 4.24.630 inappropriately skirts that important exception, which would not be a result reasonably read into the Legislature’s intent. Plaintiff even argued this exact point in pressing for the duplicative award of unjust enrichment, an award of damages otherwise strictly prohibited in timber trespass cases under long-standing Washington law. There is no reasonable basis for suggesting that the Legislature intended such a fundamental shift in nearly a century of law with some ambiguous language, without more clearly defining such intent. In this context, the statutes can be reasonably read only one way: for a *timber trespass* case such as this one, damages are awardable under and governed by RCW 64.12.030, and are thus specifically *barred* from falling under the more general land damages statute RCW 4.24.630 by way of subsection (2) of that statute.

This was the very dilemma faced in the Division I case *JDFJ*, where the landlord wished to escape limitations on 64.12.030. The Appellate Court affirmed that where damages were available under 64.12.030, remedies under RCW 4.12.630 were simply unavailable. *JDFJ Corp.*, 97 Wn. App. at 3, 6-7. These include the duplicative damages of

“actual” damage *and* replacement/mitigation costs; and damages for loss of habitat and unjust enrichment. These damages are properly encompassed within the rubric of RCW 64.12.030, and Plaintiff adequately compensated though the treble damage award of actual damages, as intended by the Legislature. Furthermore, as RCW 64.12.030 applies and thus RCW 4.24.630 cannot, Plaintiff is not entitled to reach into the broader damages afforded under RCW 4.24.630 to recover the attorneys fees and litigation costs

D. The Trial Court erred in awarding duplicative damages.

Even if Washington statutory and case law did not operate to preclude application of RCW 4.24.630 where RCW 64.12.030 provided liability, the trial court erred in awarding duplicative damages. RCW 4.24.630 arguably affords broader remedies than those afforded under RCW 64.12.030, but that does not entitle an award that awards a duplication of damages, thus offering a double (or triple) redress for the same wrong. The trial court in this case awarded both “actual” damages (trebled under the statute) *and* mitigation/replacement costs; unjust enrichment; and loss of habitat damages. These are overlapping damages, and the trial court erred in awarding multiple forms of damage for the same wrong.

Furthermore, as some of these elements of damage were inappropriately duplicative, Plaintiff was not entitled to its entire spectrum of fees and litigation costs. As not all damages were properly recoverable,

the attorneys fees and litigation costs, if awardable at all, should be remanded for hearing to limit the recoverable fees and costs directly related to the actual claims Plaintiff prevailed on.

E. The Trial Court erred in awarding damages unsupported by the evidence.

Damages must be proven with reasonable certainty, or be supported by competent evidence in the record. Mathematical precision is not required, but the evidence must be sufficient to afford a reasonable basis for estimating losses. *Sherrell v. Selfors*, 73 Wn. App. 596, 601, 871 P.2d 168 (1994). Defendant entered numerous objections at trial as to the credibility of the “expert” testimony of Francis Naglich. Defendant asserted a number of problems, including the following: Mr. Naglich’s testimony was based on purely anecdotal evidence and life experiences; there was no scientific basis for any of testimony plans on giving; there was no evidence that Mr. Naglich’s anecdotal observations were backed by scientific community, or whether there was an actual recognized procedure to his methods; there was no scientific basis for his opinion; and, with respect to Mr. Naglich’s background in calculating replacement costs, there was no testimony as to whether those prior experiences were accurate, or whether he had experience, so again, there was no grounding in scientific background that would tie into his education, and no evidence of any scientific method. RP Vol. I p. 100, ll. 6-26; p. 103, l. 19 through p. 105, l. 17. Yet, the trial court allowed Mr. Naglich to testify as an expert. RP Vol. I p. 105, ll. 12-27.

Defendant entered repeated objections on the insufficient foundation for testimony regarding replacement costs. RP Vol. I p. 118, ll. 13-15. Mr. Naglich could not even answer the question of whether he had ever replaced a tree in wetland, so there was no basis for his cost estimates. RP Vol. I p. 122, l. 14 – p. 123, l. 6. The trial court overruled these objections. RP Vol. I p. 123, ll. 4-6. Upon examination by the trial court, Mr. Naglich admitted he had no experience replacing trees in the actual wetlands. RP Vol. II p. 190, ll. 18 – 23. Mr. Naglich also explained his reasoning for replacing vegetation with three to six times the amount of trees in mitigation as “standard,” could not state what that “standard” was based on, and in fact opined that using an exponential factor was in part a “penalty” (RP Vol. II p. 191, ll. 11-19), an element of damages already covered under the treble statutory damage provision.

Nor did Plaintiff provide sufficient evidence to support the assertion that mitigation was even necessary. Plaintiff alleged that the damaged trees were in wetlands and wetland buffer areas, and that Plaintiff would be “required” to mitigate such damage through the U.S. Army Corps of Engineers and Pacific County. CP 7 (Complaint ¶ 7). Yet there was no credible lay or expert testimony that mitigation plan even needed; indication by county that this particular area subject to mitigation, much less for these particular trees. Mr. Matthew Doney, speaking for Plaintiff, could not even say such permitting or mitigation *would* be required. The best he could say was that every time he has cut trees in past, he was required to do mitigation plan to repair damage, and reference

earlier conversations with county. RP Vol. III p. 15, l. 4 – p. 16, l. 10. Yet, Mr. Doney also affirmed that the County was aware of the “incident,” and that Plaintiff was proceeding with development plans, but yet gave no indication that any such mitigation of this single cluster of cut branches, among dense vegetation, *would* be required. RP Vol. III p. 16, ll. 2-4. Nor could Plaintiff’s “expert”, Mr. Naglich, testify as to the necessity of a mitigation plan, and admits that the anticipated development project for Plaintiff’s land could go forward without having to do the suggested mitigation plan, “if the County didn’t perceive it ... as a problem.” RP Vol. II p. 210, l. 21 – p. 211, l. 1. Mr. Naglich further admitted that he had not discussed with the county whether or not there was a problem at all, and admitted he was not sure whether the county would, in fact, require that mitigation work to be done. RP Vol. II p. 211, ll. 2-11.

Thus, Defendant respectfully submits that even for those damages awarded by the trial court, that there is insufficient competent evidence to support the various damages awarded.

VI. CONCLUSION

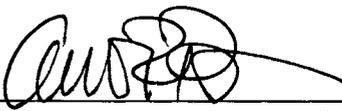
The trial court in this case misapplied the statutory law governing timber trespass cases when it applied RCW 4.24.630. RCW 64.12.030 provided liability for the claims at issue, and RCW 4.24.630(2) specifically precludes use of that broader statute when the more specific timber trespass statute RCW 64.12.030 applies. Thus, the trial court’s award of *both* actual damages *and* replacement/mitigation costs; and its award of loss of habitat and unjust enrichment; were duplicative damages

specifically precluded under Washington statutory and case law. Furthermore, by utilizing RCW 4.24.630 the trial court erred in awarding attorneys fees and litigation costs, which were not available under RCW 64.12.030. Finally, even absent the error in statutory application, the trial court erred in awarding duplicative damages, and the full spectrum of attorneys fees and costs.

Defendant requests that the Court find that RCW 64.12.030 applies, and that Plaintiff's relief is thus limited to the actual damages to the vegetation as determined by the trial court. At most, Plaintiff is entitled to a treble award of those damages, but is not allowed to recover under the other duplicative claims of mitigation/replacement, loss of habitat, or unjust enrichment. Defendant also requests that the Court reverse the determination of attorneys fees and litigation costs, as damages not available under the governing statute, RCW 64.12.030.

RESPECTFULLY SUBMITTED this 22nd day of January, 2008.

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

STRUCTURAL INVESTMENTS &
PLANNING IV, LLC,

NO. 36157-4-II

PROOF OF SERVICE

Respondent,

vs.

RAY SCHILLER

Appellant.

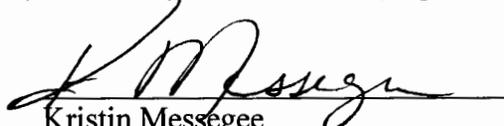
I hereby certify that on the 22nd day of January, 2008, I served the foregoing *Appellant of Motion for Extension of Time to File Appellant's Opening Brief*, and this *Proof of Service* on the following persons/parties, at the following addresses, by the following means:

1) A copy by First Class Mail and email:

Structural Investments & Planning IV, LLC
c/o Matthew A. Doney
P.O. Box 1515
Long Beach, WA 98631

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of January, 2008, at Olympia, Washington.


Kristin Messer