

FILED  
COURT OF APPEALS  
DIVISION II

No. 38686-1-II

09 MAY 28 PM 3:48

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY Cm  
DEPUTY

---

REX McCRARY,

Appellant/Plaintiff,

vs.

ROBY E. DOIDGE,

Respondent/Defendants

---

**APPELLANT MCCRARY'S OPENING BRIEF**

---

Ben D. Cushman  
Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia, WA 98501

360-534-9183

Attorneys for Appellant

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR .....	1
	Issues Pertaining to Assignments of Error	
	A. Was the dismissal of Roby Doidge on summar judgment proper when there is conflicting and disputed Evidence of Roby Doidge's role in, and liability for, the Trespass? ...	2
	B. Is Roby Doidge vicariously liable for the wrongful acts of Robert Doidge and Guillermo Bravo, when both were Roby Doidge's agents? .....	2
III.	STATEMENT OF THE CASE .....	2
	A. Defendant Robert Doidge's Testimony and Version of the Facts. ....	3
	B. Plaintiff Rex McCrary's Testimony and Version of the Facts. ....	5
	C. Guillermo Bravo's Testimony and Version of the Facts ...	6
	D. Roby Doidge's Testimony and Version of the Facts .....	7
	E. Inconsistency in Roby Doidge's Version of the Facts ...	10
IV.	SUMMARY OF ARGUMENT .....	13
V.	ARGUMENT .....	14
	A. The Standard of Review is <i>de Novo</i> .....	14
	B. There is Conflicting and Dispute Evidence of Roby Doidge's Role in, and Liability for, the Trespass; Therefore Summary Judgment was Proper .....	15

C.	Roby Doidge is Vicariously Liable for the Wrongful Actions of Robert Doidge and Guillermo Bravo, both of Whom were Roby Doidge's Agents .....	20
1.	<i>Robert Doidge as Roby Doidge's Agent</i> .....	20
2.	<i>Bravo as Roby Doidge's Agent</i> .....	28
3.	<i>Roby Doidge's Supervisory Duties Over His Agents</i> .....	29
VI.	CONCLUSION .....	31

## TABLE OF AUTHORITIES

### Table of Cases

<u>Baxter v. Morningside, Inc.</u> , 10 Wn.App. 893, 896-7, 521 P.2d 946 (1974) .....	25, 28
<u>Blake v. Grant</u> , 65 Wn.2d 410, 412, 397 P.2d 843 (1964) .....	31
<u>Bloedel Timberlands Development, Inc. v. Timber Industries, Inc.</u> , 28 Wn.App. 669, 675, 626 P.2d 30 (1981) .....	22, 24, 25
<u>Cameron v. A.E. Downs</u> , 32 Wn.App. 875, 881, 650 P.2d 260 (1982) .....	23
<u>Henricksen v. Lyons</u> , 33 Wn.App. 123, 126-27, 652 P.2d 18 (1982) .....	30
<u>Failor’s Pharmacy v. DSHS</u> , 125 Wn.2d 488 at 493, 886 P.2d 147 (1994) .....	14, 15
<u>Longview Fibre Company v. Roberts</u> , 2 Wn.App. 480, 470 P.2d 222 (1970) .....	30
<u>McLean v. St. Regis Paper Co.</u> , 6 Wn.App. 727, 728, 496 P.2d 571 (1972) .....	28, 29
<u>Morris v. McNicol</u> , 83 Wn.2d 491 at 494, 519 P.2d 7 (1974) .....	15
<u>O’Brien v. Hafer</u> , 122 Wn.App. 279, 281, 93 P.3d 930 (2004) .....	26, 28
<u>Smith v. Shiflett</u> , 66 Wn.2d 462, 466, 403 P.2d 364 (1965) .....	31
<u>Ventoza v. Anderson</u> , 14 Wn.App. 882, 895 (1976) .....	21

**Rules and Regulations**

CR 56(f) ..... 1  
RCW 4.24.30 ..... 30  
RCW 64.12 ..... 30

**Other Authorities**

BLACK’S LAW DICTIONARY, P. 64 (7<sup>TH</sup> ED. 1999) ..... 20

## I. INTRODUCTION

COMES NOW Appellant Rex McCrary, and requests that this Court reverse a decision granting summary judgment in favor of Defendant Roby E. Doidge and “Jane Doe” Doidge. As a matter of law, summary judgment was not appropriate in this case. The Order Granting Summary Judgment was filed on January 19, 2007 (CP 295-261) based on a letter decision issued December 22, 2006 (CP 224-226). Appellant sought discretion review at the time, but the Request for Discretionary Review was denied. The matter continued at the trial court level because there were other defendants that had not been dismissed. These claims were finally resolved by Stipulation and Order of Dismissal dated December 2, 2008 and attached to the Notice of Appeal initiating this appeal.

## II. ASSIGNMENTS OF ERROR

### *Assignments of Error*

- A. The Court erred by summarily dismissing claims against Roby Doidge on the grounds that Roby Doidge was not the involved in the underlying timber trespass when there was evidence that he directed or controlled, himself or through an agent, the person committing the trespass.
- B. The Trial Court wrongly ruled (in effect) that a principal is not vicariously liable for the trespasses of an agent and a sub-agent directed by the agent.

### *Issues Pertaining to Assignments of Error*

- A. Was the dismissal of Roby Doidge on summary judgment proper when there is conflicting and diisputed Evidence of Roby Doidge's role in, and liability for, the Trespass?
- B. Is Roby Doidge vicariously liable for the wrongful acts of Robert Doidge and Guillermo Bravo, when both were Roby Doidge's agents?

### **III. STATEMENT OF THE CASE**

This appeal is from an Order Granting Summary Judgment to Defendant Roby Doidge, dismissing him from the case. The facts showed that McCrary's land was trespassed by a timber crew, including a logger named Guillermo Bravo, under the direct supervision of Robert Doidge, Roby Doidge's father. (RP 210-212;135-206; 243-258.) The timber crew was harvesting timber on multiple parcels, including a parcel owned by Roby Doidge, when the trespass occurred. (RP 210-212.) Roby Doidge authorized both his father and Guillermo Bravo to conduct the harvest on his land. (RP 77; 251; 254-255; 275-281.) Despite this evidence of agency and authorization, the Trial Court dismissed McCrary's claims against Roby Doidge because Roby Doidge was not physically involved in the actual timber cutting. (RP 224-226.)

That is, the Trial Court rejected the idea of vicarious liability in the timber trespass context. The Trial Court attempted to backstop this erroneous decision by finding that Robert Doidge and Guillermo Bravo were not proper agents of Roby Doidge such that he could be vicariously liable. (RP 225.) However, this finding is contrary to admissible facts presented by McCrary in opposition to the summary judgment motion. Therefore, the Trial Court improperly decided disputed issues of material fact in favor of the moving party on summary judgment.

**A. Defendant Robert Doidge's Testimony and Version of Facts**

Defendant Robert Doidge engaged Guillermo Bravo and his crew to remove cedar boughs from his and his son Roby's properties in the Fall of 2001. The Doidge properties abut the McCrary property. Robert Doidge marked the property boundary with red ribbons, but only after harvest had begun. (RP 113; 155-159.) Bravo and his crew stopped work "because they were unable to sell the tree boughs due to being too late in the [Christmas] season." (RP 31; 66.) Robert Doidge then removed the red ribbons from the property line. (RP 66)

Defendant Robert Doidge again engaged Guillermo Bravo and his crew to remove cedar boughs in the Fall of 2002. (RP 66-67) Again, the harvesting involved all the Doidge properties, and Robert Doidge was

again acting as an agent of Roby Doidge. (RP 251; 254-255.) The harvest was a single cutting event, involving both Robert Doidge's property and Roby Doidge's property. (RP 214-215). During these harvests, the Bravo crew crossed the boundary line onto the McCrary property and cut and removed cedar bows without permission from the McCrary property. (RP 207-209)

In March 2003, Robert Doidge was contacted by the Thurston County Sheriff's Department about damage to Rex McCrary's cedar trees. Mr. Doidge went to the area adjacent to his boundary line and noticed cedar trees on McCrary's side with their boughs removed. (RP 67;191-194.)

During his deposition, Robert Doidge admitted that he had not flagged anything when he showed Guillermo Bravo his property boundaries. (RP 145-146) During his deposition, Robert Doidge also admitted that he showed Guillermo Bravo the property corner by pointing to it from 300 feet away. (RP 147-148) During his deposition, Robert Doidge admitted that he located what he believed to be the boundary line between his property and McCrary's based off a compass reading of the property boundaries he performed with his son approximately 30-35 years earlier. (RP 149-152.)

**B. Plaintiff Rex McCrary's Testimony and Version of Facts**

On March 13, 2003, Rex McCrary discovered that cedar trees on his property had been damaged when he was having the property line between his parcel and the Doidge's parcel surveyed. (RP 207-208) Rex McCrary contacted the Thurston County Sheriff about the damage to his property. When the Sheriff came out, Rex McCrary showed him the road coming from Roby Doidge's property adjacent to the McCrary property where it appeared cedar boughs were loaded and removed from the McCrary property. A pile of cut cedar boughs remained on the ground on McCrary's property, directly adjacent to the Doidge property line. (RP 208)

Rex McCrary continued to inspect his property. McCrary discovered more than 300 cedar trees had their boughs removed, all directly adjacent to and in the vicinity of the Doidges' property boundaries. (RP 208) Of critical importance, some of this cutting activity was directly adjacent to Roby Doidge's property and appeared to originate on the Roby Doidge property. (RP 208, ¶ 4.)

Rex McCrary found out that an individual named Guillermo Bravo was cutting cedar boughs in the vicinity. ( RP 208.) Rex McCrary met with Guillermo Bravo in September and October 2004. Guillermo Bravo

confirmed that he and his crew under the direction of a crew chief named Fernando, had been cutting cedar boughs on the Doidge's property, but was unaware of the exact property line and crossed over. (RP 208-209.)

Bravo confirmed his crew had crossed the property line and damaged Rex McCrary's cedar trees. Bravo agreed to pay approximately \$4,700 in clean up costs and testify on McCrary's behalf regarding the trespass. Bravo paid \$2,000 to McCrary but then stopped making payments and disappeared. (RP 209.) It was later confirmed by Robert Doidge that he had discussed this agreement with Bravo and told him to stop making payments to McCrary. (RP 209.)

### **C. Guillermo Bravo's Testimony and Version of Facts**

On October 19, 2006, Guillermo Bravo and his attorney met with Jon Cushman. Guillermo Bravo gave a Declaration confirming what he previously discussed with Rex McCrary. Bravo stated under oath that:

Mr. [Robert] Doidge directed us where to cut, what to cut and how much to cut. He did not adequately mark boundaries for us. He showed me where boundaries were from several hundred feet away. The first year he ribboned a portion of the boundary but not all of it. The second year, there were no ribbons on any of the boundaries.

RP 210.

Bravo confirmed his timber harvest activities included both Robert Doidge's property *and* Roby Doidge's property and that all the harvesting was supervised and controlled by Robert Doidge. (RP 210-211.)

**D. Roby Doidge's Testimony and Version of the Facts**

Roby Doidge admits he authorized his father Robert Doidge to engage Guillermo Bravo and have him cut cedar boughs on his property which is adjacent to McCrary's property. Roby Doidge entrusted supervision of Mr. Bravo's crew to his father, Robert Doidge. Roby Doidge also directly instructed Mr. Bravo to cut the cedar boughs next to the trunks, rather than leaving stubs. (RP 135-206; 243-258.)

When deposed on September 20, 2006, Roby Doidge testified:

- Q. [Jon Cushman] Now as I understand from reading your declaration and talking to your dad the last few hours, in 2001 your dad calls you up and says he is having some cedar boughs cut by a guy named Guillermo Bravo on his place, and he wants to know if you want cedar boughs cut on your place.
- A. [Roby Doidge] That's correct.
- Q. And--
- A. He wanted permission to go on it. "I've talked to Ross [Doidge]. He said that would be okay. Want permission from you too."
- Q. And that related to your 10-acre piece and your 12-acre piece?
- A. That's correct.
- Q. Okay. And so you gave your dad permission to proceed?
- A. Yes.

- Q. All right. And you left everything in his hands to take care of it?
- A. Yes.
- Q. Okay. So you wanted your dad to handle the interaction with Guillermo Bravo for you?
- A. That's correct.

RP 174; see also 248-251 for larger context.

During his deposition testimony, Roby Doidge admitted that he and his family have accidentally crossed over the property line onto what is now the McCrary property in the past. (RP 176-177.)

Roby Doidge testified that he relied on his father to direct Guillermo Bravo and his crew on the cutting.

- Q. (By Mr. Cushman) When you—when your dad asked for your permission to have these guys cut on your property and you said—you told him, “Dad, you take”—“make sure they know where the boundary is,” right? Is that right?
- A. [Roby Doidge] That's correct.
- Q. And he assured you that he would?
- A. He would walk the boundary with them.
- Q. Did he tell you how often he would be there?
- A. Not that I recall.
- Q. Okay. Did you tell him how often you wanted him there?
- A. Should go out and check on them.
- Q. **How often did you want him there?**
- A. **You know, I figured he lived right up the road, that he'd be out there every day. You know, when you have a crew working on your property, you should be out there every day. That's what I'll state.**

- Q. **Okay.**  
A. **I did not give him specifics.**  
Q. **Okay. But you were relying on him to control that crew?**  
A. **That's correct.**

(RP 181-182 [Emphasis added]; see RP 180-184 for larger context.)

Roby Doidge also knew that the cedar bow harvest would involve his property along his line with the McCrary property and that Guillermo Bravo was the harvester, but he authorized and relied on Robert Doidge, his father, to supervise and direct the harvest.

Q. [Jon Cushman] So you knew Guillermo Bravo was going to be cutting cedar boughs on your 12 1/2 acre parcel, which is adjacent to Rex McCrary's property?

A. Yes, that's correct.

...

Q. (By Mr. Cushman) And you yourself did not mark the boundary but relied on your dad to do that?

A. That's correct.

Q. And you yourself had no direct conversations with Guillermo Bravo about staying on the property, but you relied on your dad to do that?

A. That's correct.

Q. Okay. The only conversation you ever had with Guillermo Bravo was about cutting the trees back to the tree trunks along the road?

A. That is correct, on the 10.

Q. On the 10. Okay. Did he comply with that request?

A. As far as I know, yes.

RP 185.

With regard to this boundary, Roby E. Doidge specifically directed his father Robert Doidge, as his agent, to mark the boundary between his property and Rex McCrary's. That is, Robert Doidge was Roby Doidge's agent both for the purpose of directing and supervising the harvest and for the purpose of marking and policing the boundary.

- Q. [By Jon Cushman] Now what did you tell your dad [Robert Doidge] that you wanted him to make sure happened out there if these guys were going to be cutting limbs on your property?
- A. [By Roby E. Doidge] That he walk the [property] line.
- Q. Okay. Did you want him to mark it?
- A. You bet.
- Q. **Did you tell him to mark it?**
- A. **Yes.**

(RP 252-253 [emphasis added].)

**E. Inconsistency in Roby Doidge's Version of the Facts**

The Court ruled that Robert Doidge could not escape liability for Bravo's timber trespass, and denied Robert Doidge's Motion for Summary Judgment. However, the Court ruled that Roby Doidge, unlike his agent, could escape liability and granted Roby Doidge's Motion for Summary Judgment. In making this ruling, it appears that the Court accepted as true the statements made by Roby Doidge in his declaration. (RP 224-226; 259-261.)

However, those statements, in addition to being contested by testimony from McCrary and Bravo, are inconsistent with Roby Doidge's prior testimony in deposition. At a minimum, there are inferences from this testimony that are inconsistent with the Court's ruling; inferences the Appellant should have been allowed to test through litigation.

In Roby Doidge's Declaration he testified that he directed Guillermo Bravo's cutting on the 10 acre parcel "in the fall of 2001." (RP 78.) As noted above, in his deposition on September 20, 2006, Roby Doidge first stated he did not remember if he directed Guillermo Bravo on cutting trees on the 10 acre parcel in 2001 or 2002. (RP 250). Later in that same deposition, Roby Doidge testified he was sure that the interaction between himself and Guillermo Bravo on trimming the cedar boughs along the road took place in the fall of 2002. (RP 254-255.)

Roby Doidge testified in his Declaration that "I did not visit the twelve acre parcel on that occasion [when he spoke directly with Guillermo Bravo] or observe anything about the harvest of boughs on or about that parcel." (RP 78.) Yet in Roby Doidge's deposition of September 20, 2006 (five days after his declaration) Roby Doidge stated under oath that he went onto the 12-acre parcel in the fall of 2002 and observed that Guillermo Bravo had performed harvesting operations on it.

These statements by Roby E. Doidge are directly contradictory.

- Q. [By Jon Cushman] Well, do you know if they'd already cut on the 12?
- A. [By Roby E. Doidge] Yes.
- Q. Did you go on the 12?
- A. Yes.
- Q. Okay. And what did you see when you went on the 12?
- A. That that's already been done, as far as I knew.
- Q. Okay.
- A. What I could see.
- Q. **And what—is that the same day that you and Guillermo met on the 10?**
- A. **Yes.**

RP 251[emphasis added].

The Trial Court stated in its decision “that the only evidence of any Roby directive to Bravo occurred on a different parcel, well after the trespass at issue here.” (RP 225) While Mr. Winskill, on Roby Doidge's behalf, argued and asserted that same point at the summary judgment hearing, that contention is contradicted by Roby Doidge's own testimony under oath in his September 20, 2006 deposition.

- Q. [By Jon Cushman] In your conversation with your dad, you told him that you wanted the trees cut right up to the log close to the road?
- A. [By Roby E. Doidge] (Nods head).
- Q. But that wasn't the same day you told Bravo that, or was it?
- A. Yes.
- Q. Was your dad there?

- A. Yes.
- Q. So your dad was standing there when you and Guillermo were having this conversation?
- A. He was—he was up at the—no. He wasn't standing right--
- Q. So you told it to your dad?
- A. I told it to my dad.
- Q. And you told it to Guillermo?
- A. I said, "I'm going to walk up and show him where I want the trees cleaned up." It took five or ten minutes I said, "See this tree here? Cut it to there. Clean it up. See anything from 30 feet from this road to there? Clean it up. Make it look good.
- Q. **And you don't know the date of that meeting?**
- A. [Roby E. Doidge] **I'm sure it was 2002 when the cedar bough cutting took place.**
- Q. **Sometime in the fall of 2002?**
- A. **Yeah.**

RP 254-255 [emphasis added].

As a matter of law, if the credibility of a witness is in dispute, summary judgment is not appropriate. "Credibility issues involving more than collateral matters may preclude summary judgment." Powell v. Viking Insurance Co., 44 Wn.App. 495, 503, 722 P.2d 1343 (1986).

#### IV. SUMMARY OF ARGUMENT

When credibility of critical testimony of a defendant seeking dismissal on summary judgment is suspect and there are contrary inferences, which if true would support a claim against the defendant, Summary Judgment is not proper. This dismissal should be reversed.

There are strong inferences, and even some direct testimonial evidence, that Roby Doidge had delegated his father, Robert Doidge, to harvest timber bows on his property. Further, there is strong inference, and even some direct evidence, that Roby Doidge, either directly or through his father, hired Mr. Barvo to perform this work. On this evidence, Roby Doidge, along with his father Robert Doidge, is vicariously liable for the harm caused to the McCrary property when the Bravo crew trespassed over the property line to harvest cedar.

## V. ARGUMENT

### A. The Standard of Review is de Novo

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court. Faylor's Pharmacy v. DSHS, 125 Wn.2d 488 at 493, 886 P.2d 147 (1994). The Court of Appeals will affirm the summary judgment only if there are no genuine issues of material fact between the parties and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. Id. All facts and all reasonable inferences from those facts are considered in the light most favorable to the party resisting summary judgment. Id. The burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact.

Morris v. McNicol, 83 Wn.2d 491 at 494, 519 P.2d 7 (1974). Summary judgment is sustainable on review only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor. Failor's Pharmacy, Id.

**B. There is Conflicting and Disputed Evidence of Roby Doidge's Role in, and Liability for, the Trespass; Therefore Summary Judgment was Improper.**

Guillermo Bravo, when asked, testified that Roby Doidge personally showed him his property's boundaries immediately prior to the cedar bough harvesting taking place in 2002. (RP 275-281.) This directly conflicts with Roby Doidge's testimony that he only met with Guillermo Bravo once, and only to direct him on how to trim some cedar trees adjacent to the road. (RP 78.)

Roby Doidge stated in his September 15, 2006 declaration that he met Mr. Bravo once in the fall of 2001 and directed him to trim on some cedar trees on his property. Roby Doidge denied having anything else to do with the cedar bough harvesting or interaction with Guillermo Bravo. (RP 78.) Roby Doidge's attorney acknowledged that Roby Doidge was incorrect in stating in his Summary Judgment declaration that he met with Guillermo Bravo in 2001. Mr Winskill confirms that the interaction

between Roby Doidge and Guillermo Bravo actually took place in 2002.  
(RP 265-266.)

Roby Doidge's attorney stated unequivocally in his motion for reconsideration response brief that: **"Roby Doidge never met, talked to, directed, or otherwise had any contact with Bravo whatever before the cutting on Robert Doidge's parcel and the Roby 12 acre parcel."** RP 266 [emphasis added]. It is further stated by Roby Doidge's counsel that: **"Roby [Doidge] did not mark the boundary lines, visit the property in question during or around the time of cutting, or supervise or control the cutting in any way. All of that was done by Robert Doidge."** (RP 269.)

Yet Defendant Guillermo Bravo stated under oath in his recent deposition that:

- Q. [By Joseph Scuderi] You know his son also, don't you?
- A. [By Guillermo Bravo] Yes. [Robert Doidge] introduced me to him too.
- Q. Okay. **And did you meet him on more than one occasion?**
- A. **Yes.**
- Q. **How many times?**
- A. **A few times.**
- Q. **Okay. Did he ever show you any of the boundaries of the properties?**
- A. **Yes, he did.**

- Q. **The son I'm talking about.**  
A. **Right.**  
Q. **So Roby Doidge also showed you the boundaries of the properties?**  
A. **Yes.**  
Q. **Okay. Was that in 2001 or 2002?**  
A. **That's in 2002.**

RP 275-276 [emphasis added].

- Q. [By Joseph Scuderi] **And Roby Doidge, how did he show you the boundaries for his parcel?**  
A. [By Guillermo Bravo] **Oh, he just walk the property a little bit and he'd show me, you know, all this property from this side to this side, yeah. The property runs kind of like that and he'd show me, you know, from here this way.**  
Q. Okay. And what you're indicating with your hands is you have the declarations in front of you and you're saying they're approximately rectangular.  
A. Right.  
Q. And from that he would just kind of direct you out in the field where the boundaries were?  
A. Yeah. There's a fence on this side and in this side, and we started like from this side to back where the found—also the house is right here. His son has a house right here in the property too.  
Q. [By Joseph Scuderi] **Okay. Robert Doidge's son?**  
A. [By Guillermo Bravo] **Right.**  
Q. **So he directed you—he went out there and directed you how to cut and --**  
A. Exactly. **Yeah**  
Q. **—and wherever—you cut wherever they told you to cut?**  
A. **Exactly.**  
Q. Okay. And when you say you're sure you were on their property that is because they told you it was their property, correct? I mean, you don't know

exactly where the property boundaries are, you have to rely on what you're being told by the Doidges.

MR. MUSE: Object to form.

Q. [By Joseph Scuderi] **Let me ask you again. In terms of where the Doidge's property ends--**

A. [By Guillermo Bravo] **Right.**

Q. **--you relied on what you were told by Robert Doidge and Roby Doidge.**

A. **That's correct.**

Q. **Okay. You don't have any knowledge where that boundary is other than what you were told by Robert Doidge and Roby Doidge.**

MR. MUSE: Object to form.

Q. [By Joseph Scuderi] You can answer. He'll make objections.

A. [By Guillermo Bravo] **Well, he--like I say, you know, he said, you know, from this side to this side, you know. My property runs right here, comes this way. Yeah. It's what, you know, we did.**

Q. **So you rely on what they're telling you?**

A. **Exactly.**

Q. **Okay. Did Roby Doidge, the son--did he tell you how to cut cedar boughs on some of the trees?**

A. **Yeah.**

Q. What did he tell you?

A. The way we did, we divided three--in three partes. Take two off and leave on third of the tree up.

Q. Okay.

A. Is the way we did and that way the tree don't get hurt or anything like that. It grows back.

Q. So if I understand he told you to take off two thirds of the cedar boughs on the bottom--

A. That's correct.

Q. --and leave the top third on top of the tree so the tree wouldn't die?

A. Exactly.

Q. **Did he tell you how to cut the branches on the**

**trees?**

A. **That's correct.**

Q. **Did he tell you how close to the trunk to cut the branches?**

A. **Yes.**

RP 278-281 [emphasis added].

There were strong inferences supporting McCrary's contention that Roby Doidge was more involved, at least as an authorizing principal, than his self-serving declaration suggested. However, McCrary did not know that Roby Doidge may have been actually involved in marking boundaries until Guillermo Bravo testified about it at his deposition on February 12, 2007. This deposition was delayed due to the difficulty in finding Mr. Bravo for a deposition after the initial contact with him by both sides (which produced his declarations). RP 272-273.

It was error for the Court to initially grant the motion for summary judgment in the face of the logical inferences to the contrary. However, the Court compounded that error by failing to reconsider with the contrary inferences were substantiated by later discovery. This Court should reverse and remand.

/ / /

C. **Roby Doidge Is Vicariously Liable For the Wrongful Actions Of Robert Doidge And Guillermo Bravo, Both of Whom were Roby Doidge's Agents.**

To determine vicarious liability, the question is not whether there is evidence that Roby E. Doidge actually directed the actions of Robert Doidge or Guillermo Bravo. Rather, it is whether he *could* have directed their actions. At summary judgment, McCrary presented strong evidence to support that Roby E. Doidge retained the right to control the actions of Robert Doidge and to direct the actions of Guillermo Bravo and his crew. Summary judgment is not proper in the face of this evidence. Further, Roby Doidge himself acknowledged authorizing the work with the expectancy that he financially benefit from it. (RP 72.)

1. *Robert Doidge as Roby Doidge's Agent*

Robert Doidge was Roby E. Doidge's agent with regard to the cedar bough harvesting on Roby Doidge's land. An agent is one who is authorized to act for or in place of another. *See* BLACK'S LAW DICTIONARY, agent, pg. 64 (7<sup>th</sup> Ed. 1999) ("The agent normally binds not himself but his principal by the contracts he makes. . .").

The Trial Court focused on the agency relationship between Roby Doidge and Guillermo Bravo, but neglected the agency relationship between Roby Doidge and Robert Doidge.

A person cannot escape liability by appointing an overseer agent to an intervening place between the owner and the actor on the ground. In such case, if the owner fails to properly control his overseer agent, or negligently instructs that agent, he is liable for harm caused by the workers negligently instructed or directed by the overseer agent. When a person appoints another person to direct a third person, and the supervising agent issues negligent instructions, those negligent instructions count as negligent instructions issued by the principal. Therefore, contrary to the Court's ruling, there is strong evidence Roby negligently directed Bravo, even he did so through an agent he appointed for the purpose.

The Trial Court, relying on Ventoza v. Anderson, concludes that Roby E. Doidge is not liable for the timber trespass and damages that occurred as a matter of law. *See* Hon. Judge McPhee's letter to counsel, December 22, 2006, pg. 2 of 3 (14 Wn.App. 882, 895 (1976)). Ventoza is distinguishable from the facts in this case because Robert Doidge was not an independent contractor. Rather, he is agent, a true servant agent, of Roby E. Doidge. No defendant has ever claimed in this case that Robert Doidge was an independent contractor to Roby Doidge and there is no evidence to support such a contention. Further, by misdirecting Bravo, Robert Doidge was clearly acting in the scope of his authority.

Ventoza is also distinguishable because if “the facts as to the agreement between the parties to the transaction are in dispute or are susceptible of more than one interpretation or conclusion, then the relationship of the parties becomes a question to be determined by the trier of fact.” Bloedel Timberlands Development, Inc. v. Timber Industries, Inc., 28 Wn.App. 669, 675, 626 P.2d 30 (1981). Bloedel is a very revealing case. In Bloedel, the timber harvesting company was held vicariously liable, but the president of the company, who was protected by the corporate shield, was not held liable because he had no personal participation in the harvest.

However, in this case, Roby Doidge is relevantly like Timber Industries and not relevantly like Timber Industries’s president. Like Roby Doidge, Timber Industries did not act except through agents and did not actively supervise or participate in the work of its agents. As a corporation, Timber Industries could only act through agents, and could never act otherwise. Nonetheless, Timber Industries was vicariously liable for the harm caused by its agents.

The president escaped liability not only because he was not personally involved in the harvest, but also, critically, because he was insulated from liability by the corporate shield. However, there is no

corporate shield insulating Roby Doidge in this case. Roby Doidge is a direct and unprotected principal of Robert Doidge, and it is undisputed that Robert Doidge acted negligently within the scope of the authority (supervision) he has as an agent of Roby Doidge.

“A master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of their agency.” Cameron v. A.E. Downs, 32 Wn.App. 875, 881, 650 P.2d 260(1982)(*citing to* Restatement (Second) of Agency § 243 (1958)). “An act, although forbidden or done in a forbidden manner, may be within the scope of one’s agency.” *See Cameron*, 32 Wn.App. at 881 (*citing to* Restatement (Second) of Agency § 230 (1958)). The issue of fact to be determined is if Robert Doidge’s conduct, as agent for Roby E. Doidge, was within the scope of his agency at the time, the place and purpose of the act, and whether or not the master (Roby E. Doidge) had reason to expect that such an action would be done. *See Cameron*, 32 Wn.App. at 881 (*citing to* Restatement (Second) of Agency § 229 (1958)).

Roby E. Doidge specifically directed his father Robert Doidge, as his agent, to mark the boundary between his property and Rex McCrary’s.

Q. [By Jon Cushman] Now what did you tell your dad [Robert Doidge] that you wanted him to make sure happened out there if these guys were going to be

- cutting limbs on your property?
- A. [By Roby E. Doidge] That he walk the [property] line.
- Q. Okay. Did you want him to mark it?
- A. You bet.
- Q. **Did you tell him to mark it?**
- A. **Yes.**

RP 255-256 [emphasis added].

Robert Doidge failed to follow Roby E. Doidge's instructions in regard to marking the property boundaries. As pointed out in Rex McCrary's summary judgment opposition brief, Robert Doidge only marked 800 feet of the 2600 foot boundary in 2001 and failed to mark the boundary at all in 2002. *See, e.g.*, RP 116-117. Because Roby Doidge's agent, Robert Doidge, failed to adequately mark the property boundary—Rex McCrary was injured and damaged. Roby Doidge's failure to confirm whether or not his father performed this task should not excuse him from liability.

In Bloedel, even though M & M Logging was the contractor who committed the timber trespass, Timber Industries was held liable for the actions of M & M Logging in connection with the trespass. *See* Bloedel, 28 Wn.App. at 675. Mr. Winskill argued in his reply brief that “Roby Doidge had no knowledge of any cutting by Bravo's crew on McCrary

land, and no knowledge of any shortcomings in Robert Doidge's marking of the lines or supervision over the work." That was also true for Timber Industries in the Bloedel case. There was no evidence that Timber Industries knew that its subcontractor had crossed the boundary before the trespass occurred, but Timber Industries, as principal of M&M Logging, was still vicariously liable for M & M Logging's timber trespass. *See Bloedel*, 28 Wn.App. at 677.

Roby E. Doidge can still be held vicariously liable (just like Timber Industries was) for the wrongful and negligent actions of his agents. Robert Doidge was acting as Roby E. Doidge's agent during the cedar bough harvesting. The fact that Robert Doidge may have been a volunteer "does not necessarily preclude that a master-servant relationship existed." Baxter v. Morningside, Inc., 10 Wn.App. 893, 896-7, 521 P.2d 946 (1974). The determining points are control and scope of authority, not remuneration.

At summary judgment and on reconsideration, McCrary offered up a substantial amount of testimony from the Defendants themselves showing that there were instructions on what Roby E. Doidge wanted his father to do in regards to marking the boundaries. There was strong evidence presented in Plaintiff McCrary's opposition brief showing that

Robert Doidge was reckless in marking the property boundaries between Roby E. Doidge's and Robert Doidge's properties and that of McCrary and as a result Guillermo Bravo and his crew crossed those property boundaries and trespassed and damaged McCrary's property and trees.

Because Roby Doidge and Robert Doidge were being paid by the pound for cedar boughs harvested by Guillermo Bravo and his crew, Roby Doidge and his martial estate directly benefitted from the cedar boughs being wrongfully taken from Rex McCrary's property. RP 77; 163. Roby Doidge acknowledged that he did get paid in connection with the cedar bough cutting done by Guillermo Bravo in 2002. (RP 256). If Roby E. Doidge shared in the spoils of this trespass it only makes sense he shares in the liability.

A master-servant relationship under agency principals arises when one engages another to perform a task for the master's benefit. The one who seeks the benefit may control the performance. In any case, he has the right to control the performance his agent. Critically, "[t]he question of agency is generally a question of fact to be decided by a jury." O'Brien v. Hafer, 122 Wn.App. 279, 281, 93 P.3d 930 (2004). "The question of control or right of control is also one of fact for the jury." O'Brien, 122 Wn.App. at 284. The Trial Court usurped this factual question.

In this case Robert Doidge agreed for Roby E. Doidge's benefit to mark the boundaries for the cedar bough harvesting Guillermo Bravo was to perform. Robert Doidge only partially marked 800 feet of a 2600 foot boundary in 2001 and failed to mark the boundary at all in 2002. Thus, there is no question here that Robert Doidge acted negligently in marking the boundary. However, he was marking the boundary as an agent of Roby Doidge. As the owner of the timber harvest, Roby Doidge had a duty to determine and mark the boundary to prevent a trespass. He chose to perform that duty through an agent, Robert. Robert failed to properly perform that duty. Therefore, Roby failed to properly perform that duty. Roby cannot escape liability for this reason.

In this case there were several critical conversations between Robert Doidge and Roby E. Doidge about the timber cutting. Roby E. Doidge made it clear that he wanted the property boundaries marked. Roby Doidge stated: "I asked him [Robert Doidge] if he would walk the line with them." (RP 249). Robert Doidge agreed to do so. "[Robert Doidge] said he would walk the line and show them the line." (RP 179.) Roby Doidge testified that his father Robert Doidge stated to him: "I'll walk the line for 'em Roby" and "And show 'em where the boundaries are." (RP 179.)

Roby Doidge is not excused merely because he neglected to verify that Robert Doidge properly marked the boundaries. “[B]ecause of the nature of the service, no additional control, such as direct supervision, was necessary, and would have been impractical given the circumstances.” O’Brien, 122 Wn.App. at 285 (citing to Baxter v. Morningside, Inc., 10 Wn.App. 893, 521 P.2d 946 (1974)). Direct supervision is not a necessary element of control. See Baxter, 10 Wn.App. at 896.

“[T]he question of agency is for a jury to resolve.” O’Brien, 122 Wn.App. at 286. If the issue here is a dispute over whether or not Robert Doidge was the agent of Roby E. Doidge and the extent of that agency – these are questions that should have been allowed to go to the jury to decide. Even in the McLean case that Roby E. Doidge relied upon in his reply brief for the first time, the agency issue was submitted to the jury (which rejected the plaintiff’s arguments in that case). See McLean v. St. Regis Paper Co., 6 Wn.App. 727, 728, 496 P.2d 571 (1972).

## *2. Bravo as Roby Doidge’s Agent.*

Further, leaving the relationship with and through Robert Doidge aside, there is evidence that Roby E. Doidge had the right to control the actions of Guillermo Bravo in harvesting the cedar boughs. Roby E. Doidge admitted in deposition that he directed the cedar bough cutting by

Guillermo Bravo adjacent to a road. The 10 and 12.5 acre parcels are directly adjacent and contiguous to one another. RP 248. Further, this direction by Roby E. Doidge was done when Guillermo Bravo was in the process of doing cedar bough harvesting on both parcels.

When Roby E. Doidge asked Guillermo Bravo to cut the branches in a certain manner (for aesthetic purposes), Guillermo Bravo complied with Roby E. Doidge's request. Mr. Bravo obviously thought Roby E. Doidge had authority to direct his cutting of cedar boughs. That alone should have defeated summary judgment.

### *3. Roby' Doidge's Supervisory Duties over His Agents*

Defendant Roby E. Doidge claims that Robert Doidge was merely a "nonservant agent" of Roby E. Doidge. As seen above, that is not true (and is a factual question in any case). However, even if Robert Doidge were a "nonservant agent", Roby Doidge would not escape liability.

A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, if he neither intended nor authorized the result nor the manner of performance, **Unless he was under a duty to have the act performed with due care.**

McLean v. St. Regis Paper Company, 6 Wn.App. 727, 729, 496 P.2d 571 (1972)(*citing to* Restatement (Second) of Agency § 250 (1958))[emphasis added].

Robert Doidge was not wholly beyond Roby Doidge's control. Roby E. Doidge did direct and authorize his father Robert Doidge in the manner of performance, asking him to fully mark the boundaries of his property. The fact that Robert Doidge failed to do so should not be a defense for Roby E. Doidge to escape liability. Negligent supervision is not a defense to vicarious liability because of negligence by an agent. In fact, negligent supervision and negligent hiring are a separate and independent bases for liability – bases for direct liability.

Roby E. Doidge had a affirmative duty to act with due care in making sure the harvesting activities took place on his property and did not cross over to adjacent properties. That duty is imposed by RCW 64.12 and RCW 4.24.630. It is further shown in the timber case law that holds inadequate surveys and boundary marking support liability. Failure to employ persons reasonably skilled in locating boundaries, failure to consult with adjacent landowners to establish boundaries, and failing to properly establish corners can lead to a finding of liability and willfulness (allowing for treble damages). *See, e.g., Longview Fibre Company v. Roberts*, 2 Wn.App. 480, 470 P.2d 222 (1970); *see also, e.g., Henricksen v. Lyons*, 33 Wn.App. 123, 126-27, 652 P.2d 18 (1982)(errors in performing amateur survey can lead to liability and a finding of

willfulness); *see also, e.g., Blake v. Grant*, 65 Wn.2d 410, 412, 397 P.2d 843 (1964); *see also, e.g., Smith v. Shiflett*, 66 Wn.2d 462, 466, 403 P.2d 364 (1965).

This duty is also evidenced by the harvesting permit that Bravo and Doidges were obligated to obtain which states in bold type “**Be certain of property boundaries before operation begins.**” (CP 188.) While Roby E. Doidge may have delegated this duty to Robert Doidge and Guillermo Bravo, that alone should not excuse him from liability. While Roby E. Doidge may have arguments that based on the facts in this case his culpability (given the facts in this case) should be less than that of Robert Doidge and Guillermo Bravo – those are mitigation arguments for the jury to weigh and should not be used to justify a summary judgment dismissal.

## VI. CONCLUSION

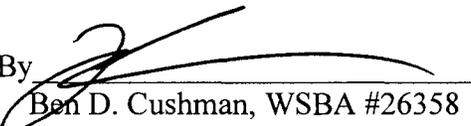
The Trial Court erred in granting Roby Doidge’s Motion for Summary Judgment. There is disputed evidence in this case on which a jury could find that Roby Doidge was directly involved in the trespass on McCrary’s land. Roby Doidge personally directed Mr. Bravo’s work in the area of a road near the McCrary boundary, which is an area in which physical evidence of trespass was found.

Even if Roby Doidge were not physically involved in the trespass, the trespass was committed by his agents acting on his behalf. Such agency, and the scope of such agency, are factual questions that should have been left for jury trial. These issues were hotly disputed, and Rex McCrary submitted strong evidence of Roby Doidge's role as principal, some of it in the form of Roby Doidge's own testimony.

In the face of these disputed facts and inferences supporting Roby Doidge's vicarious liability, it was error for the Trial Court to summarily dismiss the claims against Roby Doidge. This Court should reverse the order of dismissal and remand this matter for further proceedings against Roby Doidge.

Respectfully Submitted this 20<sup>th</sup> day of May, 2009

CUSHMAN LAW OFFICES, P.S.

By 

Ben D. Cushman, WSBA #26358  
Attorneys for McCrary

CERTIFICATE OF SERVICE

The undersigned declares as follows:

On May 28, 2009, I caused to be served on the undersigned and/or arranged for service of Appellant Rex McCrary's Opening Brief, to the Court and parties in the manner indicated:

By Hand Delivery:

Court of Appeals, Div. II  
950 Broadway #300  
M/S TB-06  
Tacoma, WA 984-2-4454

By Email and Regular Mail:

***Attorney for Respondent:***  
Ed Winskill  
Davies Pearson  
920 Fawcett Avenue  
P. O. Box 1657  
Tacoma, WA 98401-1657  
253-620-1500  
[ewinskill@dpearson.com](mailto:ewinskill@dpearson.com)

FILED  
COURT OF APPEALS  
DIVISION II  
09 MAY 28 PM 3:48  
STATE OF WASHINGTON  
BY em  
DEPUTY



Doreen Milward, Paralegal