

No. 41921-I-II

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STATE OF WASHINGTON

Division II

OF THE STATE OF WASHINGTON

Colin F. Young, Appellant

v.

David Ambauen and Jana Ambauen, Respondents

Reply Brief of Appellant

Colin Young Appellant Pro Se
1785 Spirit Ridge Dr.
Silverdale Wa 98383 360-509-5634

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I. Introduction

The principal issue in this counterclaim is Ambauens' mowing down and then filling Young's wetlands around the north half of their shared wildlife pond. In the seven years following, despite Ambauens' assertions of "recovery", neither the prominent five foot salmonberry canopy nor the wetlands ecosystem returned.

David Ambauen strives to achieve a "golf course" appearance to his properties. This "golf course" appearance is defined by great expanses of mowed lawns, the absence of underbrush, and trees limbed well off the ground. RP p.408-409

However, Ambauens' October 2003 destruction and converting of Young's wetlands was just the final chapter of David Ambauens' 10 year effort in destroying Big Valley's historic wetlands at the headwaters of Kinman Creek.

By all appearances, David Ambauen considers himself a man above the law. Ambauen expended many years of manpower draining, cutting down, burning, mowing and even poisoning his own wetlands with herbicides. As such, it comes as no surprise that as Ambauen prepared in 2003 to put his acreage and home for sale, he took to converting Young's wetlands, arrogantly expected to get away with it.

Clearly, by the history of his actions, David Ambauen envisioned Young's wetlands with a "golf course" look similar to his own. Were it not for the local property owners minding their own business, Ambauen would have suffered grave consequences for his nefarious acts under the Clean Water Act back in the 1990's.

After years of denial, David Ambauen finally admitted in 2008 to his mowing and filling Young's wetlands adjacent to the subject pond. However Ambauen's admission came only after being confronted with Young's evidence for arbitration.

Once having converted Young's wetlands similarly to his own, David Ambauen then listed his property for sale - featuring "his" well groomed pond as a principal selling point. Of course Ambauen's listing was completely devoid any mention of "wetlands," or that Ambauens owned just the south half of the pond. By August 2006, the Ambauens had quietly sold and moved to Mason County.

The Ambauens' much earlier sensational claim of "junk" vehicles stored on Young's property, was taken up by Kitsap County through political arm-twisting by David Ambauen and his attorney William Broughton. However, Ambauens' bald allegations of "junk" vehicles were disposed of in 2005 in Mason County Superior Court on Young's LUPA appeal. RP p.8 There Judge Sawyer overturned the Kitsap hearing examiner's finding, and in a material ruling having bearing on Ambauens' summary judgment, found of no evidence of "junk vehicles" on Young's property.

II. Supplemental Statement of the Case

Colin Young purchased the subject property under a real estate contract from his mother January 1, 2000, for tax assessed value. RP p.279-280. The Young property was continuously posted with "No Trespassing" signs since the late 1960's. The one and only time David Ambauen was ever allowed on the Young property, was in or about 1998 when Colin Young escorted him on foot to look at Kinman Creek, after Ambauen asked to view Kinman Creek. RP p.229:10-233 Neither Colin Young or Lorna Young gave Ambauen any permission to enter or do work on Young's property RP p.233:22-25 In mid 2003 - prior to Young's late spring 2004 discovery of his wetlands filled in - David Ambauen was caught on

Young's land with his back hoe, and run off. Within a few days Ambauen was back on Young's land with his backhoe, and Young photographed him at that time. RP p.232-235 (Ex. 16-N) Mr. Perry was witness to both incursions. RP 117-118

Ambauens lost all standing in their case on August 23, 2006 when they sold their Big Valley property (CP 499) In doing so, the Ambauens lost all "adjoining property owner" standing for any further action under their claim. RP p.174 20-23 This rendered moot their original action. The Ambauens failed to reveal to either the lower court or Young that they had sold their property or lost standing. Yet, from the time Ambauens sold their home, through 2010, they repeatedly defrauded the lower court, presenting themselves as still having standing of an "adjoining property owner," then bringing motions alleging contempt by way of their initial attorney, William Broughton. However, the lower court records reveal Ambauens' unfounded contempt allegations were never sustained, and eventually, in 2010, the Ambauens were caught in a series of lies by the lower court, including misleading the court with false claims of an "injunction", service on Young, and their having "adjoining property owner" standing. After August 23, 2006, Ambauen's bringing of further motions under their original claim, was done under false pretenses and amounted to fraud on the court, RPC violations, and intransigence. Young's repeated requests for costs and sanctions were ignored.

In their response brief, the Ambauens make a general assertion of "insufficient evidence" to support either of Young's core proposed instructions 19 or 20 - two statutes and remedies which are the core of Young's theory of the case. As a result, in reply it was necessary to identify and list all relevant trial evidence and argue

supporting for each of Young's seven separate claims - thus the length and detail of this Reply Brief. Reply is also provided to respondents' claims as to the extent and application of Young's objections, and to the respondents claims of the adequacy of the final instructions.

Lastly, as Ambauens continue the rehash of their earlier claim. Their response brief is peppered with misrepresentations that fail to speak to any counterclaim issue. It is requested that all such irrelevant and inflammatory pleadings be stricken, including the first five paragraphs of respondents' "Statement of the Case"

III. Argument

A) The trial court improperly denied Young's Motion in Limine.

The trial court heard Young's Motion in Limine the first day of trial. After considering pleadings and hearing oral argument, the trial court ruled against Young's motion. Young formally objected to the ruling. RP p.31

In their response brief the Ambauen's submit the trial court "*properly denied Mr. Young's Motion in Limine.*" by citing from Equitable Life Leasing Corp. v. Cedarbrook Inc 52 Wn.App 497, 503 (1988) "A motion in Limine is addressed to the discretion of the trial court and will be reversed on in the event of abuse of discretion." Respondents' provide no other specific argument. [Resp. Brief-29] Shown below, the trial court abused its discretion as it based its decision against Young's motion on untenable reasons. In his limine motion, Young pled:

"for an order to exclude all plaintiff testimony, evidence, photographs and documents concerning the storage of vehicles on a portion of Defendant's property" ... "1.5 acre portion of defendant's 14 acre parcel. This 1.5 acre subject area is situated on the west property line, not shared with plaintiff."

And in relief, Young pled the following:

“to preclude the presentation of any evidence or testimony relating to the of storage of cars or (counterclaim) plaintiff’s use of the subject property for automotive activities”

During oral arguments on the motion Young proposed a practical method of determining the “relevant” counterclaim evidence - applying to photographs:

“...the scope of the testimony and the evidence should be restricted to the proximity of the area where the damage occurred, and that in itself is -- I am going to ball park it -- with in 250 feet of the property line between the Ambauens’ property and my property. This’s where all the damage occurred. The rest of it really doesn’t come to bear on the issue” [Young - RP p.4:4-9]

Although the above proposal would have “evenhandedly” eliminated inflammatory photographs of vehicles, the trial court was not receptive.

At trial Young detailed the impropriety of raising Ambauens’ previous claim, submitting that even one picture could result would result in jury bias. RP p.31 Exhibits 5 and 10 serve as a prime examples of this issue.¹ Exhibits 5 and 10 were not previously disclosed, but Young objected to each photograph prior to the jury viewing them. RP p273:17-19, p.30:7-22 However, these are just two of a number inflammatory and irrelevant photographs before the jury showing Young’s vehicle collection stored in the pasture land, located on the opposite side of Kinman Creek from the subject wetlands. On their face, these photographs demonstrate why a well founded and openly balanced court ruling on Young’s motion was essential to a fair trial and proper review.

¹ Unfortunately Judge Haberly did not act on Young’s specific objections to Exhibit 10 (RP p.30:7-22) and admitted it as “illustrative” RP p.77 This poster sized “aerial” picture was displayed without modification in front the jury without throughout the trial. Undoubtedly the jury was tainted on th first day of trial with its initial viewing of Exhibit 10. Admitted or not, Exhibit 10 prejudiced the jury by suggesting previous wrongs committed by Young - previous wrongs only reinforced by the de facto retrial that occurred later, RP p274-275:13

By way of Ambauens ER 904 submissions, oral arguments, and Young's written Motion in Limine, the trial court was thoroughly aware of the prejudicial nature and the lack of relevance that applied to the entire class photographs and testimony Young sought to preclude.

Respondents' lone argument against Young's motion was a transparent allegation that Young's reason for his counterclaim was "*spite*" over Ambauens' earlier claim. In short, Ambauens' theory of "*spite*" amounted to: Young would not have sued Ambauens were it not for Ambauens' suit against Young. Here was a ludicrous theory of shoestring relevance at best,² and one which the trial judge should have openly balanced against Young's claims. RP p.5-6

Only in defense of Young's limine motion, did the Ambauens proffer the absurdity of "*spite*" as their "theory of the case." Ambauens' claim of a "*spite*" was a trail tactic³ which by design, later served to taint and prejudice the jury with evidence suggesting other wrongs by Young. It is not reasonable to imply, that Young would take *no action* after discovering David Ambauen had once again driven his heavy equipment onto Young's property, and this time mowed and filled Young's wetlands around the Young family's historic wildlife pond of 40 years.

Obviously, David Ambauen's earlier about-face admissions in discovery to mowing and filling Young's wetlands around the pond stripped Ambauen of his credibility. This left Ambauen without a tangible defense to his intentionally

² It is extremely telling of respondents lack of confidence in their trial argument against Young's Motion in Limine motion, that in Ambauens' 50 page response brief, they failed to even once mention "*spite*" or their "theory of the case."

³ It is noteworthy that "*spite*" was not mentioned any proposed or final jury instruction, nor was "*spite*" mentioned in the questioning of any witness at trial..

entering Young's property and wrongfully destroying Young's wetlands. All this for substantial monetary gain realized on the sale of Ambuaens' home. The trial judge held reservations concerning "*spite*" as Ambauens' defense:

"I am just having a hard time figuring out where spite comes in. It is not an affirmative defense. Its not a defense to trespass " (emphasis added)
[Judge Haberly RP 1/4/11 p.29:8-10]

Still, Judge Haberly denied Young's Motion in Limine.⁴ Young formally objected to the ruling, stating that just one picture would prejudice the jury. RP p.31

"The superior court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons." Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Here the trial court's ruling on the Motion in Limine was untenable because Ambauens alleged "need" for the inflammatory vehicle related evidence was without merit or foundation, and resulted the jury viewing irrelevant and highly inflammatory automobile related photographs of Young's vehicles stored well away from the subject wetlands. (see: exhibits 5,10,9-G,9-M Ambauens' theory of "*spite*" was entirely dependent on the court permitting the Ambauens to step outside the instant case, show inflammatory pictures of vehicles, and then rehash their earlier adjudicated claim against Young to allege motive⁵ and taint the jury - which is essentially is what happened.

⁴ Acceptance of such a meritless theory as "*spite*" requires turning a blind eye to the fact that in discovery David Ambauen confessed to excavating Young's half of the pond and filling Young's wetlands with his backhoe. This confession coming years after his earlier answers to pre-arbitration admissions where he denied mowing down and filling Young's wetlands. Here David Ambauen has shown his propensity to conceal the truth and lie under oath.

⁵ Ambauens' claim against Young clearly stands alone - as it was completed five years earlier with a July 26, 2005 summary judgment. Revisiting such a judgment was clear abuse

By no means should Ambauen have been permitted to promote prejudice within the jury by denigrating Young with irrelevant photographs of vehicle storage on a separate portion of Young's 14 acre property and unfairly prejudice Young. In balance with Ambauen's confession of filling the wetlands, this undemonstrated claim of "*spite*" was an untenable reason to deny Young's motion, and a manifest abuse of trial court's discretion which denied Young his right to a fair trial.

B) Young had a standing objection and was not required to object to photographs showing vehicles to preserve error.

Contrary to respondents' assertions [Resp. Brief-30], no follow-on objection was required to preserve error of admitted evidence of the nature specified in Young's Motion in Limine - excepting where Ambauen's "*brief inquiry*" into the "*timing of their action*" exceeded a "*context argument*" which would be "*subject to objections.*" as per Judge Haberly's following instruction:

"the defendants are limited to a very brief inquiry as to the timing of the suit and the context that leads us here today..... and that would be subject to objections by you if you think it's going beyond just a context argument"
[Judge Haberly - RP p.31:8-14]

Shown above, at the time ruling on the motion, Judge Haberly established the limited circumstance where Young would have to object to preserve error. Here the trial court defined its exception to the general denial of Young's motion. Judge Haberly's instruction established her "exception" as a singular "*context argument*" of "*very brief inquiry*" - meaning only questions to a witness, and the testimony of a witness "*to the timing of the suit*" were subject to Young's

of the court's discretion, as it served only to taint and inflame the jury, and bring jury prejudice against Young and his counterclaims.

objection. Otherwise while ruling on this motion, Judge Haberly never mentioned “photographs” or any other evidence being “*subject*” to objection in order to preserve error. RP p.31:8-14

Respondents argue the trial court instructed Young he was “*required to object*” to photographs “*during the course of the trial.*” [Resp. Brief-30] But respondents neglect to mention that that this instruction came two days after the limine ruling, and not “at the time of the motion ruling.” Not only were the subject photographs not specified as “vehicle” related, but Judge Haberly’s instruction to Young was “*When they are offered, then you can make your objections.*” RP p.189:15-17 However, “*you can object*” is not the equivalent of “*subject to objection.*”.

Under words of command, “*can*” does not mean one “*must*” or “*shall*” object to preserve error of the subject photographs. Regardless, automobile related photographs were already covered by Young’s standing objection and not subject to exception to the general denial of the motion ruling “at the time of the ruling”

Respondents falsely claim that “*the court stated the Ambauens could admit photographic evidence...*” “*Id.* This claimed statement by the court is not found in the trial record. Under no circumstances were any photographs showing vehicles subject to further objection to preserve error. *Id.* Young’s assignment of error “D” reads: “*The trial court erred in denying Young’s limine motion to exclude automobile related evidence and testimony.*” Here Young assigns error to all automobile related photographs of the nature specified in Young’s Motion in Limine, just as his Motion in Limine requested preclusion of to all automobile related evidence. Thus Young’s standing objection applies to all automobile related

photographs and he was not required to address each offending photograph individually with objection or error. Here respondents' claim of that each photograph's admission must be individually designated as error and argued is without foundation or authority. *Id.*

“Unless the trial court indicates further objections are required when making its ruling, its decision is final and the party losing the motion in limine has a standing objection.” *State v. Ramirez* (1986) 46 Wn.App 223, 229, 730 P.2d 98. “To preserve issues of relevance or prejudice of such exhibits or testimony for review, the objection is implied by its presence of such evidence in the record.” *Id.*

Photographs showing vehicles admitted in the trial record were clearly **not** part of Judge Haberly's exception to the general denial of Young's Motion in Limine. Consequently, Young's standing objection to the evidence he requested excluded in limine holds - including all photographs showing vehicles ⁶

C) The trial court improperly excluded Young's rebuttal expert.

At the center of Ambauens' day of trial motion to exclude was Young's expert rebuttal witness, Joe Callaghan, a wetlands biologist from GoeEngineers. CP 511-12 Young's initial expert from 2008 was Robert Rodman, an environmental site assessor. (Ex 14 - letterhead), while Ambauens' late-on-scene expert, Mr. Marc Boule is a wetlands biologist and botanist RP 454:15-455:1

Unlike Boule and Callaghan, Rodman had no formal education as to specific plants, shrubs, or trees at issue. (Ex 14) This Judge Haberly emphasized before of the jury, stating Rodman was “*not an arborist.*” RP p.315:19-316:8 Moreover,

⁶ See: p. 29-30 of the Appellant's Opening Brief for comprehensive argument on this issue.

Rodman testified for his 2008 estimate he used a botanist RP 317:3-8 and that he out-sourced certain work. RP p.306:2-10

In Boule's August 2010 expert report, Ambauens revealed a last minute theory proposing that seven years after Ambauens "disturbance" Young's wetlands were self "recovering" - citing returning vegetation. However measuring "wetlands recovery" based on vegetation factors was outside the expertise of Rodman. Hence, Callaghan's expertise was necessary to rebut this new theory and Boule's "late raised" derivative issues and opinions of restoration, permits, and damages..

Ambauens' support for their motion to exclude amounted to procedural arguments in discovery and bald assertions that Callaghan was cumulative, duplicative, and Rodman was equally qualified RP p.14 Here respondents failed to provide any actual facts demonstrating Callaghan and Rodman were equally "qualified". Nor were there any facts showing Rodman was qualified to address the Ambauens' new theory of "recovering wetlands." Therefore respondents have failed to show Callaghan was not required as a "rebuttal" expert.

1) Only Callaghan was qualified to rebut Ambauens' opportunistic new theory of "wetlands recovering" based on alleged regrowth of "vegetation"

Ambauens' late raised issue and new theory of damaged "wetlands recovering" was based on vegetation factors beyond the expertise and training of Young's 2008 initial expert Robert Rodman - an environmental consultant.(Ex 14 - letterhead)

Callaghan was hired to assess the damaged wetlands and Boule's report. He specifically was to consider Boule's new theory of "recovering wetlands." Callaghan was Young's only expert qualified to rebut Boule's new theory and restoration estimate of \$5000. RP p.21,22 (Ex 14) CP 511-12

When the trial court excluded Callaghan, Young was unfairly prejudiced. Callaghan was Young's only expert qualified to analyze and rebut Boule's claim of returning vegetation as factor indicating "wetlands recovering." As a consequence, either Rodman testified to Boule's "late raised" theory from the position of a layman, or Boule's claims would go unanswered. Young was thus substantially prejudiced by Judge Haberly's oral ruling excluding Callaghan.

Contrary to respondents' assertions, Young objected Boule's testimony prior to Mr. Boule taking the stand. RP p.363:9-11 [Resp. Brief-38] Young presented the court with lengthy oral objections to Mr. Boule testifying under the circumstances of exclusion of Mr. Callaghan as a rebuttal or replacement expert. RP p.15-p.23:4, p.363- p.366:18 Young also objected to the court's motion ruling of the same effect. RP p.22:23

Rodman eventually testified to the fact that invasive reed canary grass had taken over the subject area, and that both this grass and its roots had come out and why, but from the practical standpoint of a layman, not as a botanist RP 319-320:6

2) The trial court was aware of the qualifications and expertise of all three experts, and knew Rodman's limitations.

At the time of the hearing on Ambauens' motion to exclude, the trial court was aware of Rodman's expertise, as well as the near equal qualifications between Callaghan and Boule. In Young's "Counterclaimant's Response to Counterclaim Defendant's Motion to Exclude Late-Disclosed Witness" Young pled:

Mr. Boule's costs estimate for restorations of the area is principally based on his June 2010 assessment that the damaged area is well on its way to 'recovery' His suggestion is that approximately \$5000 worth of restoration might be involved.

Shortly following receipt of the report, Mr. Young contacted Mr. Rodman to go over the Boule report. Due to Boule's claims that minimized the damages

- founded on his assessment of the current conditions in the damaged wetlands area being on its way to “recovery” - further analysis was required.

However, as Ambauens’ expert is more qualified in the area of assessing wetlands “recovery” than Mr. Rodman, it was necessary to locate a qualified rebuttal expert that could consider and address Mr. Boule’s assessment of the damaged wetlands’ “recovery” in the past 2-3 years since Mr. Rodman’s assessment. Due to Boule’s claims, that expert would also need practical experience in restoring wetlands....Boule’s report threw a new twist to the matter, that being a claim that the damage was on the way to “recovery” thus diminishing the costs of restoration. (emphasis added)

[Counterclaimant’s Response to Counterclaim Defendant’s Motion to Exclude Late-Disclosed Witness - CP]

Young comprehensively pled that Rodman’s expertise was insufficient to address Boule’s claim of “wetlands recovering”. RP p.15:10 -16:18. Young testified to Callaghan’s qualifications RP p.15, p.24-17:1 CP 511-12 The experts’ reports, estimates, and motion pleadings were before Judge Haberly for the motion hearing RP p.12-22 .There is little doubt the court was fully aware of Rodman’s limitations. RP p.15, p.315:19-316:7 (Ex. 14-letterhead)

Shown above, the trial court was informed of the vast qualification differences between Young’s two experts.⁷ Also apparent was Young’s need for a qualified expert like Callaghan to rebut Boule’s new theory and late issues of “wetlands recovery” and no damages for permitting RP p.15-p.20:4. CP 511-12

In light of the foregoing Judge Haberly made no effort to “evenhandedly” resolve the expert rebuttal issue. The trial court simply ruled Young’s “new theory” prejudicial to the Ambauens then granted exclusion of Callaghan, and Young formally objected RP p.22:22-25 In consideration of excluding Callaghan, Judge

⁷ Young spoke to what Mr. Callaghan “could” testify to - should further rebuttal be needed at trial - but detailing what Callaghan “could” address is not an outline of a new theory RP p 16:19-p.17:10, and even if Callaghan had presented a “new theory”- which was not evidenced - Boule was more than qualified to respond and there is no prejudice shown.

Haberly took no complementary measure to limit Boule's testimony, Young was thus prejudiced in his ability to rebut Ambauens' new theory and late raised issues.

3) Trial court's exclusion of Young's only expert qualified to rebut Ambauens' "new theory" of wetlands "recovery" was prejudicial to Young.

Before the trial court can properly exclude an expert witness it must explicitly find that the delayed disclosure substantially prejudiced the moving party's ability to prepare for trial. Here, although Judge Haberly's found that Ambauens had been prejudiced, she did not find the prejudice to be substantial. The reason for this omission is readily apparent as no facts support any finding of prejudice, let alone a finding of substantial prejudice.

Young would not have had to deal with late raised theory and issues had Ambauens not held off their site investigation six years beyond service, and two years beyond Rodman's report. It is noteworthy that two earlier trial de novo dates passed and Ambauens had no expert or opinion. Moreover, Ambauens' attorneys repeatedly delayed near term rescheduling of the jury trial.⁸ All tolled, Ambauens' failure to answer counterclaim and trial delays resulted in nearly seven years of aesthetic rather than substantive "recovery" of Young's destroyed wetlands.

During the hearing on the Motion to Exclude, Young demonstrated Boule's new theory of "recovering wetlands" and the need for rebuttal opinion. Young further explained Rodman's limitations when compared to Mr. Boule and Mr.

⁸ Ambauens first waited two years to answer Young's counterclaim - only then on a motion for default. This was then followed by habitual claims of scheduling conflicts by Ambauens multiple attorneys, resulting in repeatedly pushing back trial until 2011

Callaghan. RP p.15-16 However, Judge Haberly appears to have confused exactly who raised this “*new theory of how to approach restoration*”⁹ RP p.21-22

In any event, based on the argument in the reports attached, this is a new expert opinion. It's a new theory of how to approach restoration. It's a new approach. Its not a rebuttal expert as it's kind of cast by Mr. Young to the motion, and from everything I have heard here, it is not rebuttal... There is prejudice. They weren't able to find -- This is your primary expert now. Apparently it's a lot more money in restoration costs, Is that correct? That's what you are going to argue to the jury is we should follow Mr. Callaghan's opinion I suppose... (emphasis added) You are rebutting both your primary witness, Mr. Rodman, and Mr. Boule, both. emphasis added [RP p.21:11-p.22:6 - Judge Haberly only]

However Ambauens never complained Callaghan had presented a “new theory,” nor did they factually show how they were prejudiced by disclosure of Callaghan November 19, 2010, some six weeks prior to trial. RP p13:4-14, p.20

In point of fact, Ambauens asserted that Callaghan's opinions were “duplicative” and “cumulative” to Rodman's opinions - which stands in opposition to the trial court's conclusion of Callaghan presenting a “*new theory*” RP p.14:22

Bald assertions aside, the only “new theory” identified and detailed in the motion pleadings or oral arguments was Ambauens “wetlands recovering” theory. This theory was based on returning vegetation factors first claimed within Boule's August 2010 report, then later testified to at trial.¹⁰ As shown above, either the trial judge confused the issue, as to who presented a “new theory,” or she ruled without Ambauens showing substantial prejudice. In either case the trial court ruling to exclude Callaghan was based on untenable reasons.

⁹ It is noteworthy that Judge Karen Haberly recently announced her upcoming retirement.

¹⁰ Here the Callaghan and Rodman reports both agree to the necessity of removing fill and introducing new wetlands soils, then replanting wetlands vegetation, including the salmonberry canopy. Callaghan's 2010 total damages estimate came within a few hundred dollars of Rodman's \$48,600 estimate from 2008, both including about \$20,000 in permits.

4) Young was prejudiced by Ambauen's trial tactics, including waiting two years after Rodman's report before investigating the wetlands site.

Young's prejudice was born of Ambauens' unreasonable delay in waiting to investigate the site past two previous trial dates of August 18, 2009 and February 17, 2010, then waiting until just four months before trial to produce a new theory in Boule's August 2010 report. Rodman's estimate and report was first provided to Ambauens for the July 14, 2008 arbitration. CP 656 However, at no time have the Ambauens presented any excuse for their years of delay in investigating the site.

When the trial court excluded Callaghan, Young unfairly sustained substantial prejudice of having to rebut Ambauen's new theory of "wetlands recovering" with an expert unqualified to address vegetation regrowth as a measure of recovery.

Rodman's letterhead on his report identified him as Environmental Consultant and Certified Environmental Site Assessor. (Ex 14) Ambauens were therefore aware that "vegetation regrowth" factors were outside Rodman's expertise.

Obviously Ambauens waited until the last minute to investigate and raise their theory of "wetlands recovering" to exploit Rodman's professional limitations and limit Young's opportunity to respond. No other reason exists for Ambauens delay.

Furthermore, it was unreasonable for Ambauens to not accept Young's early offers of Callaghan's deposition on short notice CP 505-14. Ambauens' had the resources of two law firms, and several weeks of opportunity to prepare for trial having received Callaghan's report December 10, 2010. RP p.13 But deposing Callaghan would likely have resulted in him testifying at trial. And, Callaghan's testimony would have spoiled Ambauens trial advantage of having their late theory

rebutted by Rodman. Ambauens' abject disinterest in deposing Callaghan, is shown by the signature date of 12/6/10 on their motion to exclude Callaghan.

5) The court's lack of evenhandedness is shown by an unqualified expert having to rebut Ambauens' new theory of "wetlands recovering".

At trial Boule's summer 2010 "recovering" vegetation factors. were shown by his 2010 photographs of tall grass growing over Young's filled wetlands. (Ex 1,2).

At trial Boule testified "*most recently disturbed area consists of reed canary grass.*" RP p.494:9-495:23 Boule's summer 2010 "recovering" vegetation factors. were shown by his 2010 photographs of tall grass growing over Young's filled wetlands. (Ex 1,2) But wetlands plants native to the area were not shown present..

Rodman's expertise is in removing and restoring the observable wetlands damage It was not in measuring the return of vegetation as a factor indicating "wetlands recovering" Most importantly, from the time of Ambauen's destruction of the wetlands to Rodman's May 2008 investigation, no evidence in the record suggests expertise in "wetlands recovering" was necessary. RP p.331:1-4

The respondents argue that Young was not prejudiced because Young was "*allowed to present, through Mr. Rodman, the same opinions he intended to have Mr. Callaghan express*"¹¹ [Resp. Brief-37] Ambauens' argument is misplaced. Here the respondents are referring to opposing experts, Boule and Rodman, each being allowed to testify to Ambauens "late raised" issues of 1) whether in 2011, there was a need for restoration of the damaged wetlands based on the current and returning vegetation; 2) necessity and extent of reed canary grass eradication from

¹¹ By this same logic, it would also be fair if Young, not a wetlands biologist either, would have forced to testify before the jury on the Ambauens new theory of "wetlands recovery" as measured by vegetation factors.

the damaged wetlands; and 3) whether removal of soils containing canary grass roots was required to properly restore the salmonberry.

However, in this instance, the true measure of the court's "evenhandedness" is not "**what**" each side's expert testified to, but rather, "**who**" was permitted to testify to Ambauens "late raised" issues. Any unbiased jury would certainly weight each expert's qualifications to speak to each issue.

At issue was whether the returning vegetation is a sufficient indicator of "recovery," and if the removal of reed canary grass is a requirement of proper restoration. Each of these issues Boule and Callaghan were well qualified to speak to as wetlands biologists, but Rodman was not a wetlands biologist or botanist.

D) Callaghan's rebuttal of Boule's opinions of "wetlands recovering" and "no permitting required" would have changed the trial outcome.

Had Joe Callaghan, a "wetlands biologist" from GeoEngineers, been allowed to rebut Boule's claims of vegetation based "wetlands recovery," the jury would been informed of Callaghan's expertise in assessing the return of grasses, plants, or shrubs, as well as all other factors, as measures of wetlands actual "recovery" This type of assessment was within both Boule's and Callaghan's fields of study and expertise, but clearly not within Rodman's. CP 511-512

Had Callaghan been permitted to testify, he would have rebutted Ambauens' trail raised issues of "restoration not necessary" RP p.460:16-19 and "no permitting required" RP p.457:6-7 Callaghan would have testified to his findings and the statutes triggering of federal jurisdictional requirements of permitting and studies. He also would have detailed eradication of the reed canary grass as a requirement of proper restoration of the native salmonberry canopy. This included the

excavation of Ambauens' fill, proper restoration of wetlands soils, restoring the native vegetation to the area, and accommodating all government mandated permitting, studies, as detailed in Callaghan's report before Ambauens 12/10/10.

Had Callaghan been allowed to rebut Ambauens' claims of Young's "wetlands recovering," and had the jury been given Young's proposed instructions 19 and 20, any unbiased jury would have found in Young's favor. This, due to Callaghan's expected testimony of the continuing absence in 2010 of proper soils, hydrology, and vegetation, and his opinion that the damaged wetlands remain incapable of sustaining normal wetlands plants, shrubbery, or ecosystem.

Accordingly, an unbiased jury would also have found extensive restoration and permitting was yet required, and under proposed instruction 19 or 20 would have awarded restoration damages in "*treble the amount of damages claimed.*" As shown above, the full estimate amount was necessary to provide for the restoration of the wetlands soils and the salmonberry canopy to the water's edge. Such a jury finding and award would have dramatically changed the outcome of this trial.¹²

E) The lack of formal on-site wetlands delineation was of no consequence.

In their brief, the respondents argue Young questioning began to "*stray in to the are of federal jurisdiction*" implying some impropriety. Additionally, respondents point to trial assertions of "*no wetlands delineation done*" for their defense of the trial court not allowing Young to examine Boule on his opinions and his permit assessments conflicting with the Wetlands Manual [Resp. Brief-39] RP p.468 However, respondents' argument is misplaced and misleading.

¹² Under an unbiased jury, such finding likely would have met the improperly imposed "substantial damage" standard of proof.

Boule was first to testify of federal Section 404 jurisdiction. He also testified the subject wetlands are identified in the federal wetlands inventory. RP p.469 Boule testified characterizing a wetlands "delineation" as a merely "*legal line in the ground, which is wetlands on one side and not wetlands on the other.*" RP p.487:6-19 Boule confirmed the entire area around the pond and west of Kinman creek is recorded as "wetlands" by government entities. RP p.277:5-9, p.478-479

At trial substantial evidence supported the fact that a healthy wetlands had once existed around the subject wildlife pond RP p.478-479:13 and expert's reports confirmed this well before trial. RP p.21:5-10 (Ex 14) Young testified to the destruction of his wetlands, which he documented in 2004 RP p232-254 (Ex 16)

In his report and at trial Boule admitted to his site investigation showing plant materials buried "*within the disturbed, probably filled, wetlands area around the pond*" RP 491:22-492:9. While substantial evidence at trial established wetlands around all around the pond and southwest of Kinman creek, respondents present no evidence to the contrary. Quite simply, if these wetlands exist then permitting is required under federal jurisdiction. Here all records show wetlands.

For wetlands in the federal inventory such as Young's, nothing suggest that federal jurisdiction waits for on site delineation - regardless of Boule's opinion that for most projects "*the first step is to delineate the wetlands to identify what the boundaries are*" As shown by Ambauens' initial survey (Ex 18), and Boule's testimony, the wildlife pond is smack in the middle of federally designated wetlands. p.475:16-p.476:10

Yet the trial court untenably reasons that federal jurisdiction and permitting do not apply until delineation of the subject wetlands is done, then uses this reasoning to prevented Young from exploring Boule's opinions against the Wetlands Manual. RP p.488-491:5 It was unreasonable for the trial court to assume the Mapper's federal wetlands inventory was incorrect or irrelevant. But proving the court wrong required examining Boule's opinions against the Wetlands Manual - a "catch 22".

F) Young was unfairly prevented from examining Boule on his material opinions conflicting with the Department of Ecology Wetlands Manual.

The trial court's restrictions on Young's cross-examination of the basis of Boule's opinions conflicting with the Wetlands Manual were unfairly prejudicial and abuse of discretion. The basis of these restrictions was shown by the court's the ruling that the Wetlands Manual was "*not relevant*," ironically founded on Boule's previous "opinions" as detailed below. Yet the respondents argue the court's discretion to exclude *cumulative* evidence under ER 403 [Resp. Brief-40]

The respondents off-issue argument in defense of the trial court's restriction boils down to unsupported speculation that "*cumulative*" evidence would be the product of Young's cross-examination. In fact "permitting not required" and lack of federal jurisdiction under Section 404 were first raised by Boule on direct. RP p.457 Therefore Young was entitled to cross-examination using Section 404 requirements within the Wetlands Manual that would show the unreliability of Boule's opinions that permitting and federal jurisdiction did not apply to wetlands restoration or dredging.. Moreover, respondents fail to cite any previous testimony by Boule that would make cross-examination under the Wetlands Manual "cumulative." Here the issue remains as called out in Young's assignment of error.

Under Young's cross-examination, Boule admitted to being familiar with the 400 page Department of Ecology / Army corps of Engineers Wetlands Manual testifying to having "*read it a number of times*" RP p.472:1-p.473:19, p.475:16-p.476:10. Yet the trial court unfairly did not permit Young to examine Boule's opinions against the Wetlands Manual. RP p.489:13

All wetlands (or surface water) projects fall under federal jurisdiction. The requirements for wetlands permitting are detailed in the Wetlands Manual, a joint production with the Army Corps of Engineers and the EPA . RP p.472:14-473:18 Here, as laid out in the Wetlands Manual, federal jurisdiction under Section 404 of the Clean Water Act applies. Also detailed therein are requirements for permitting and studies applying to all surface water and wetlands projects RP p.475:16-476:10

There is no evidence that the Wetlands Manual, excludes un-delineated wetlands, non-designated wetlands, or any un-mapped or mapped surface waters from federal jurisdiction. Any such exclusion would fly on the face of all logic. Digging, dredging, draining, filling or restoration projects in designated wetlands such as Young's, clearly invoke federal jurisdiction under Section 404, which in turn triggers a variety of extremely costly permits and studies.

Boule testified to the fact that both the Young and Ambauen properties are designated wetlands in the Federal Fish and Wildlife Service National Wetlands Inventory Online "Mapper." RP p.469 Rodman's report describes the wetlands damages (Ex 14) Boule also testified that the entire area southwest of Kinman creek is designated as wetlands by the "Mapper" (includes the pond and adjacent wetlands - Ex. 23) RP p.477-479:16 Ambauens' survey (Ex 18) also designates

the wetlands around the pond - based on the "Mapper." Boule further testified the valley floor from the creek and the toe of the hill as wetlands RP p.468:18-469:24.

The quantum of trial evidence proves that the whole subject area is in fact a "wetlands" It is of no consequence that the absolute edge of the wetlands may not have been finitely established and marked by an on-site "delineation." Clearly, many wetlands exist without formal delineation. It was untenable for the trial judge to ignore the foregoing facts as she did.

The trial court has made a critical mistake in judgment in ruling the Wetlands Manual irrelevant, based on assumption that no on-site wetlands delineation means no federal jurisdiction or permitting. RP p.489:13-22, p.490:7-15, p.490:21-491:5.

On direct, Boule was first to take issue with applying some of the 400 page Wetlands Manual's elements and mandates, including application of federal jurisdiction required under Section 404 of the Clean Water Act to the subject wetlands, claiming "*a pond itself is considered by those jurisdictions to be preexisting conditions*" RP p.456:7- p.457:12 Even if this statement were shown to be true, the Boule's claim applies to the "*pond*" and not to adjacent wetlands.

Boule also incredibly testified that Kitsap County Critical Area's Ordinance preempted Section 404 jurisdiction as it applied to site and that permitting was not required for restoration of Young' wetlands. RP 457:6-7, p507

Cross-examination revealed that Boule's "no permitting required" assessment was not based on the Wetlands Manual but was based his phone calls to unidentified "*resource agencies who might have jurisdiction*", and to whom Boule related his limited assessment of wetlands "disturbance." RP p. 502-503 However,

Boule testified he did not “*recall*” if he presented the damaged being limited to a 20’x 20’ as a precept to “resource agency” assessment. RP p.504:13

Boule alleges he told by “individuals” at “various agencies” the restoration project was “*too small, it’s marginally out of our jurisdiction*” RP p.502 Nothing suggests Boule ever represented to these “agencies” the damage area was bigger than 20’ x 20’ or that it was overgrown with reed canary grass. Here Boule went rogue to unaccountable sources for permit determination. In point of fact, at trial Boule presented someone else’s opinions on permitting, not his own. RP p502-505

Accordingly sufficient basis existed to examine Boule on his diversion from standard permitting and project requirements. Young was entitled to investigate the flaws and inconsistencies between Boule’s assertions and opinions and the controlling wetlands regulations laid out in the Wetlands Manual. RP p.513-518

The trial court unfairly refused to allow Young to “*go into*” the manual during cross examination of Boule - as to his basis of assertions and the validity of his “no permitting required” opinion - which conflicted with Section 404 requirements within the Wetlands Manual. RP p.488-p.490, p.514:4-15 Young was substantially prejudiced by the court’s not allowing him to explore the Wetland Manual’s requirements differing from Boule’s opinions and assessments.

With the jury excused Young argued the need to explore the Wetlands Manual and Section 404. RP 489:11-p.491:5 Judge Haberly stated “*Well, we are not going to go into this manual. That is not relevant*” and “*I am going to limit some of your examination*” RP p.489:13, p.491:13 Thereafter when examination of Boule approached permitting and federal jurisdiction Young was repeatedly

interrupted by sustained objections from Ambauens' counsel to avoid exposing Boule's flawed opinions and assessments on permitting. RP 488-492, p.513-518

Preventing Young's examination of Boule using the Wetland Manual was untenable. Here Young faced a 'catch 22.' Young had to "go into" the manual's Section 404 requirements to show federal jurisdiction. Yet Boule claimed federal permit requirements did not apply because the "disturbance" was "too small" and suggested that delineation be done first. Young then argued federal jurisdiction was also invoked by Ambauen's "dredging" of the pond as well depositing of fill on his wetlands RP p.418-419 which requiring permitting under Section 404 provisions of the manual. The court responded "*You call it 'dredging' other people don't call it that*" RP p.490:8 But this was mincing words. Boule repeatedly testified to Ambauen's "*dredging*" the pond RP p.514:21, 522:15, 523:22

Ironically, the proof of Boule's mistaken and unfounded opinions as to federal jurisdiction, permitting, and the need for delineation prior to jurisdiction each lay within the Wetlands Manual. Thus Young was unable to show the inaccuracy of Boule's claims of "restoration not necessary" and "no permitting required"

Section 404 requirements for both the dredging the pond and restoration of the adjacent wetlands, and mandatory biological assessment were detailed in the Wetlands Manual. The trial court limiting Young from "*going into*" the Wetlands Manual was abuse of the court's discretion based on untenable reasons.

G) Young objected to final instruction 8 and all final jury instructions that conflicted with his theory of the case .

Respondent contend "*Mr. Young did not object to Jury instruction # 8*" and suggest that Young failed to propose a "*correct instruction*" as an alternative to

instruction #8 “trespass.” [Response Brief at 46] Clearly Young’s proposed instructions 19 and 20 do just that - as they are the “*correct instruction*” The trial record shows Young repeatedly presented this issue with the trial court. Young’s selection of his statutory remedies was detailed for the trial court in his trial brief.

Clearly at issue here is the sufficiency of the final jury instructions. The test for sufficiency of the trial court’s instructions to the jury is as follows:

Instructions are sufficient if they (1) permit each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole properly inform the jury of the applicable law. [*American National Insurance v. B&L Trucking* 82 Wn.App 646, 920 P.2d 195 (1996)]

Here the court’s final instructions failed to permit Young to argue his theory of the case and imposed unforeseen conditions to be proven Young’s theory of the case was best shown by his proposed instructions 19 “Timber trespass” and 19 “Waste to the land of another”. Young’s theory of the case was not accommodated by final instruction 8 - proposed by the Ambauens. Contrary to respondents assertions, inclusion of “*substantial damage*” as an element of proof in instruction 8 was far from “*harmless.*” [Resp. Brief-47]

When compared to Young’s twin statutes based theory, the final “Trespass” instruction held higher and ill-fitting standards of proof. The final “Trespass” instruction also held an unfair “substantial damage” prerequisite, and it required trespass to be established in all counterclaims for an award of damages. Furthermore, the court’s final jury instructions held no “continuing trespass” component or specific instruction to accommodate the “continuing trespass” of the large volume of yard and vegetation waste Ambauens dumped on Young’s land nor

could it accommodate the “*continuing trespass*” of the foot bridge which Ambauens built on Young’s land.

Young’s proposed alternative instruction 18 “Waste by Trespasser” and his proposed instruction 24 “Continuing Trespass” would have instructed the jury on “continuing trespass” relating to the yard waste and Ambauens bridge on Young’s land. Young’s continuing trespass instruction would have rendered moot any issue of dates of initial damage - so long as the item of trespass remained on the land - and would have resulted in a judgment for Young on these two issues.

Withholding of Young’s proposed jury instructions #19 and 20 was unwarranted. Clearly Ambauens’ simple “Trespass” proposed instruction 7 worked on the same body of evidence as Young’s proposed instructions #19 and 20. Thus by the trial court’s same logic, Ambauens’ simple “Trespass” instruction 7 also was without sufficient evidence to support being submitted to the jury

Respondents urge this court “*not to consider Young’s arguments regarding any instructions to which Young failed to object.*” arguing Young’s objections were limited to proposed instructions 15,18,19, and 20 [Resp. Brief-42,46] Following the close of evidence, Young specifically objected to the whole body of final instructions RP p.550:14-12, p.554:24-555:20 and to final instruction 8 by its offensive “substantial damage” requirement RP 1/11/11 p.17:18-18:9

Young also specifically objected to exclusion of his proposed instruction 15 (RP p.551:23-25, p.556:7--21, RP 1/11/11 p.9:12-18, p.15:21-25 p.16:15-21, p.16:2-21, p18:2-10); proposed instruction 19 (RP 550:6-23, p.551:23-25 and

proposed instruction 20¹³ (RP p.551:23-25, p.552:24-556:6; p.550:24-555:1) as well as all his proposed supporting instructions¹⁴ including proposed instruction 24 “continuing trespass.” (RP p.551:23-25) Although Young may not have objected to all his proposed instructions correctly by “number,” he objected their omission collectively and by reference.

The trial record contains lengthy jury instruction discussions intertwined with references to instruction numbers, instruction titles, statutes and statute titles. There is little doubt that the omission of Young’s instructions 15, 19, and 20 as well as supporting instructions were discussed and objected to. Moreover, inadequacy of the final instructions “as a whole” are identified and objected to RP p.548-56:21

Referring to the trial court omitting his proposed instructions 19 and 20, as well his other supporting instructions, Young made the following objections :

“I am going to object to excluding those two statutes and the supporting jury instructions that I had associated. If the jury doesn’t get it, they are not going to have the instruction necessary for making a determination of choice. Rather it’s a prejudicial choice that had been put forward by those” (final instructions) [Young- RP 1/10/11 p.551:23]

“Objections to jury instructions are sufficient to permit review on appeal if the trial court is made aware of the specific issues involved and the theories of law relied upon”, *Holt v. Nelson (1974) 11 Wa.App 230, 523 P.2d 211*. Here the record shows that the trial court was sufficiently put on notice of Young’s

¹³ There was some confusion in court over which instruction was Young’s proposed “waste” statute. The court kept referring to proposed instructions 18 and 21 for “waste” based on the numbers on the outside of the packet Young gave the trial judge. However, in this confusion, Young used “RCW 6.24.630” to clearly describe his proposed instruction and makes clear instruction 20 is argued, and that it was objected to. RP 1/11/11 p.10:18-24.

¹⁴ Young’s proposed instruction 18 was not statute based and was a supporting instruction to 20, serving to instruct on “continuing trespass” continuity through change of land owner and may have been used clarify the bridge and dumping vegetation waste counterclaims.

objections to its selection of jury instructions - even though at times the actual instruction “number” of the argued instruction may not have been properly or formally stated. Young’s referring to Ambauens’ proposed instruction 7 and final instruction 8 as Ambauens’ simple “trespass” instruction was not unclear.

The record shows Young’s lengthy argument and specific objection to the both the trial court’s omissions and inclusions of individual proposed instructions applying to the sufficiency of the final jury instructions. RP p.548 -556:21 , RP 1/11/11 p.2-18 (generally) Young’s theory of the case was framed by his essential proposed instructions 15, 19, 20, and 24. Young strenuously objected to the trial judge’s selection of instructions not representing his theory of the case. In doing so, by implication, Young objected to all those final instructions inconsistent with his theory of the case, which includes final instructions 3, 7, and 8. (Appendix - CP 635,639,640) Collectively, these three final instructions failed to properly instruct the jury of the elements and proper measures of proof for each and all of Young’s counterclaims under RCW 64.12.030¹⁵ and RCW 4.24.630(1).

¹⁵ In 89 Wn.2d 190, 570 P.2d 1035 Seattle-First National Bank v. Brommers the court decided: “The rules in Washington for awarding treble damages under RCW 64.12.030 and .040 are well established, as are the reasons for the rules. A person who willfully or recklessly cuts down and removes trees from the land of another is liable to the latter for treble damages. Willfulness or recklessness may be shown by circumstantial evidence. See: Smith v. Shifflett, 66 Wn.2d 462, 403 P.2d 364 (1965); Blake v. Grant, 65 Wn.2d 410, 397 P.2d 843 (1964); Longview Fibre Co. v. Roberts, 2 Wn. App. 480, 470 P.2d 222 (1970).” The statute is applicable to ornamental trees and shrubs as well as timber. Butler v. Anderson, 71 Wn.2d 60, 75-76, 426 P.2d 467 (1967); Nor is it necessary to prove intent on the part of the trespasser. Fredericksen v. Snohomish Co., 190 Wash. 323, 326, 67 P.2d 886, 111 A.L.R. 75 (1937). Here, there was evidence that permission was not obtained and no effort was made to ascertain the location of the easement. The purpose of the treble damage statute is to (1) punish a willful offender; (2) provide, by trebling the actual present damages, a rough measure for future damages; and (3) discourage persons from carelessly and intentionally removing another's shrubs or trees. Guay v. Washington Natural Gas Co., 62 Wn.2d 473, 383 P.2d 296 (1963)

“Each party is entitled to have his theory of the case presented to the jury; and failure to do so constitutes reversible error.” Meabon v. State (1970) 1 Wa.App 824, 463 P.2d 789. It was manifest error of law that Young’s theory was not presented in final jury instructions.

“Refusal of requested instruction is reversible error where instruction requested is correct statement of law, and refusal result in there being no instruction covering part of requesting party’s theory of the case.” Izett v. Walker (1966) 67 Wash.2d 903, 403 P.2d 802. Here the final jury instructions failed to provide for “continuing trespass.” Moreover, final instruction 3, 7, and 8 were insufficient to properly instruct the jury for theft of crop, removal of bridge, theft of fencing, and depositing or laying of waste to Young’s land. Final instruction 8 imposed an inappropriate and undefined threshold of “substantial damage” - not part of Young’s theory of the case under RCW 4.24.630(1) or RCW 64.12.030. In effect this was an error of law.

The trial court’s refusal instructions 19 and 20, was refusal of RCW 64.12.030 and RCW 4.24.630(1) - Each a correct statement of law. This resulted in 1) no instruction properly covering Young’s theory of “timber trespass” for Ambauens’ destroying the salmonberry canopy (on just showing circumstantial evidence without proving trespass); 2) loss of all punitive measures including trebling and mandatory award of attorney fees and costs; and 3) due to “substantial damage” no instruction covering claims of theft of crop, removal of bridge, theft of fencing, or any act of depositing or laying of waste to Young’s land under RCW 4.24.630

“This provision has two requirements for liability: the act must be intentional, and the actor must know or have good reason to know that he or she lacked authorization. ‘{T}he plain language of RCW 4.24.630(1) envisions wrongful conduct, any violation of that statute is analogous to an intentional tort, like trespass to personal property or conversion.’ Standing

Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 246, 23 P.3d 520 (2001) (citing 16 David K. DeWolf & Keller W. Allen", [Washington Practice: Tort Law and Practice sec. 13.32-33 (2d ed. 2000)])

Straight out of Young's trial brief, the above citation shows the test for liability under RCW 4.24.630 has just two requirements. This test applies to Young's counterclaims for theft of hay crop and fencing, as well as counterclaims for causing waste on Young's land, including the bridge to the nesting island and loss of habit. As evidenced below both test elements were met under each claim.

In this matter, RCW 4.24.630(1)'s two test conditions amounted to 1) whether Ambauen's acts were intentional,¹⁶ and 2) whether Ambauen lacked Young's permission of the landowner for the act. However the test does not include "substantial damage." Here the trial record overwhelmingly evidences Ambauens knew where the property lines were RP p.428, and as shown by a preponderance of the evidence - Ambauens did not have permission to enter Young's land, and that the acts at issue were intentional.¹⁷ Moreover, it is well established that "timber trespass" liability can be shown by circumstantial evidence like Young's testimony of where his salmonberry canopy had been cut down - although Ambauen earlier, and at trial, confessed to brushhog mowing around the north end of the pond.

¹⁶ The respondents mistakenly claim Young failed to cite any evidence showing Ambauen's acts were intentional [Response Brief p. 45] In fact Young does just this as he demonstrates Ambauens' knowledge of the property line by surveys and his personally marking the property lines across the pond [Opening Brief p. 86].

¹⁷ Respondent mistakenly claim Young failed to cite to any evidence that would establish Ambauens "intent" [Response Brief p.45] Here Ambauens' admission to surveys shows detailed knowledge of the dividing property lines - and thus intent Here Young cited to Ambauen's admitting to surveys and knowledge of property lines. [Opening Brief p.66]

Circumstantial and/or direct evidence at trial has shown, for each claim, “more likely than not” Ambauens, or their agents, were the actors who damaged or removed Young’s property, and harvested his hay crop.

Shown above and below, all test factors were met for both of Young statute based theories, and proposed instructions 19 and 20, were sufficiently supported.

H) The question from the jury during deliberation points to inadequacy of the trial court’s final instructions leading to jury confusion.

Respondents now argue the final instructions were “*proper based on the evidence.*” However, no final instruction addressed statute of limitations after the court refused Young’s proposed instruction 15 and his supporting instructions 18 and 24, which together spoke to limitations and “continuing trespass.” Absent any “continuing trespass” instruction he jury had no instruction on how to deal with a bridge constructed beyond the three year statue of limitation. Young objected to the omission of his entire package of proposed of instructions.

First the jury had to interpret “substantial damage” as either a monetary or aesthetic threshold, and no matter which, that threshold had to be met. Here, final instructions led to a revealing jury question on instruction 8 in deliberation:

“In Instruction #8, are each of the statements, (a), (b), and (c) inclusive or exclusive? (ie (a) AND (b) AND (c))” [question from the jury - CP 628]

The trial court answered “*Each element must be proven.*” Her the trial court’s final instructions failed to provide for several of Young’s claims, including loss of hay crop, stolen fencing, bridge removal, and removal of vegetation waste. This was because of the trial court’s unfair creation of an ultimate question of “Was there substantial damage?”, very likely caused the foregoing claims to be

disregarded by the jury and easily could have precluded award on all of Young's counterclaims. The mere fact that a jury returns a question to the court shows a jury confused by the selection of final instructions. But this jury question shows the jury confused over simple "Trespass" and *substantial damage*. Obviously, the jury was looking for a way around "*substantial damage*" to make an award to Young.

Further factoring into the court's ultimate question is final instruction 3. Instruction 3 imposed an improper "proof of trespass" as it applies to removal of ornamental salmonberry shrubbery. However, had the jury considered the loss of salmonberry canopy under proposed instruction 19 "Timber trespass," no proof of trespass, or aesthetic "substantial damage" applies.

As a whole, final instructions 3,7, and 8 are inadequate, as they omit purposeful punishing trebling and fees, and fail to accommodate "timber trespass" that specifically does not require "proof of trespass" or "substantial damage" for an award of damages, and where damage is shown by just circumstantial evidence. "The giving of inconsistent, inadequate, or contradictory instructions, after proper objection by the party is prejudicial." *Galvan v. Prosser Packers, Inc (1974) 93 Wash.2d. 690, 521 P.2d 929*. Here sufficient objection was made to adequacy of final instructions, RP 1/10/11 p.555:7-15 and the trial court's selection of final instructions have been shown to inadequate.

J) Respondents mistakenly argue Young's "supporting" proposed instruction 18 as a "continuing trespass" remedy

Contrary to the thrust of the respondents' argument, proposed instruction 18 "Waste by Trespasser" was not a remedy of "continuing trespass." [Resp. Brief-43] As presented in Young's Trial Brief, "continuing trespass" was material to

RCW 4.24.030(1) for statute of limitation purposes. The trial court's final jury instructions were inadequate for failing to provide for "continuing trespass" found in proposed instruction 24 "Continuing Trespass."

Young's proposed instructions 18 and 24 were supporting instructions for instruction 20, each instructing the jury on the nature of "continuing trespass", as used in Young's proposed instruction 15. Concept of "continuing trespass" was material to at least two of Young's claims - bridge removal and waste removal. It became relevant at trial when Jana Ambauen indicated, and exhibit 10 supported, Ambauens had hayed the front field each year. RP p.159:13-23, and when she admitted Ambauens had been cutting Young's hay crop. RP 169:25-170:13

All tolled, no legitimate argument has been presented by the trial court, or by the respondents, to support the wholesale disregard of Young's package of proposed jury instructions and theory of the case, including unfounded claims of insufficient evidence addressed below.¹⁸

K) Final instructions to the jury were inadequate as they did not accommodate Young's theory of the case.

It is a foregone conclusion that Young's "timber trespass" and "Waste to the land of another," proposed instructions 19 and 20 respectively, could not have resided in any set of final instructions that included Ambauens proposed simple "trespass" instruction - final instruction 8. Clearly this would have led to jury confusion over substantial damage and proof of trespass. By this measure the scope of Young's objection to all instructions conflicting with his theory is obvious:

"There's different levels of proof that go on with these different theories of the case, and my theory of the case is based -- and it has been briefed and it's

¹⁸ See: RP 1/11/11 p.6-18 generally

and it's in my documents before the court --the theory of the case is based on statute. If you pull that out from underneath me you have undone my whole case, because the measure for trespass, the burden of proof, is slightly different between straight up trespass, waste of land of another, and timber trespass" (emphasis added) [Young - RP 1/10/11 p.555:7-15]

Although Young was permitted to speak at length to the issue of instruction, the record makes clear Judge Haberly's unwillingness to work through those issues and the inadequacy of her final instructions RP p.347:13-348:3. Young argued how he would be prejudiced by this set of final instructions as they did not include his theory of the case or his package of proposed instructions. RP p.540-556

"It is prejudicial error to give irreconcilable instructions on a material issue in case". Smith v. Rodene (1966) 69 Wash.2d 428, 418 P.2d 741, 423 P2d 934

Shown herein, the material issues given irreconcilable instruction were "substantial damage" and "proof of trespass" as all of Young's claims improperly and unfairly being made subject to a "substantial damage" threshold.

L) Young's proposed instructions 19 and 20 were supported by sufficient evidence to go forth to the jury.

Each counterclaim was brought on by Young's discovery of Ambauens' intentional and wrongful acts on Young's land. Denials aside, by way of Ambauens' own property line surveys, RP p.390:22-p.393, p.428 David Ambauen knew, or had reason to know, the following: 1) that he was harvesting Young's hay; 2) that he was removing Young's fencing; 4) that he was depositing his yard and vegetation waste on Young's land; 5) that he was excavating Young's half of the pond, 6) that he was limbing Young's alders, 7) that he earlier built the bridge to the nesting island on the Young's land, and 8)

that he was mowing, filling, or otherwise destroying Mr. Young's wetlands around the pond - And all without asking or receiving permission from Young.

Young's case was built around the "best fit" statutes recited in his proposed instructions 19 and 20, RCW 64:12:030 Injury to or removing trees etc. and RCW 4.24.630(1) Liability to land and property It has never been argued or evidenced that Young was not entitled to the remedies specified in these statutes.

Young's overall package of proposed jury instructions was required to individually address each counterclaim issue, RP 1/11/11 p.14:13-p.18:10 excepting a few proposed instructions included as trial evidence contingencies and alternatives to be worked through at the close of evidence that became moot with the court's unfair exclusion of Young's proposed core instructions 19 and 20.

Respondents contend "*The trial court declined to give Mr. Young's proposed instructions 18 and 19 as there was insufficient evidence to support those causes of action.*" [Response Brief at 42] In fact, the record shows the court declined to give any of Young's proposed instructions which would have resulted in awarding treble damages or mandatory attorneys fees and costs. Referencing 19 and 20:

The Court: *I know. You have two theories there. One is under the timber trespass, under Title 64, and the other is for damages and attorney's fees under Title 4. There (They) are alternate theories that I am not going to give you the one of.* (emphasis added) [RP 1/11/11 p.11:2].

Judge Haberly was quite clear in expressing her aversion towards Young's instructions requiring treble damages and mandatory attorney's fees. But Young had built his theory of the case around the two statutes that best fit the events at

issue, RCW 4.24.630(1) Liability to land and property and RCW 64:12:030 Injury to or removing trees etc. (“timber trespass” statute)

A close examination shows that proposed instructions 19 and 20 were - word for word - a recital of their respective laws. Being correct statements of law, the trial court’s refusal to submit Young’s proposed instructions 19 and 20 denied the jury just opportunity to apply the facts of the case to the law and Young a fair trial. This constitutes reversible error for the trial court’s manifest abuse of discretion.

M) Young’s proposed instruction 15 was essential to the separation of counterclaims and was not a “comment” on the evidence.

Due to the separate nature of Young’s various claims, it simply was not responsible or feasible for the trial court to attempt roll all counterclaims into one decision - as it did with final instructions 3, 7 and 8. Proposed instruction 15 was based on WPI Burden of Proof and Measure of Damages, and essential to the separation of claims,¹⁹ It also separated elements of proof for each issue, and the established the application “continuing trespass” to limitations CP 594-597.

One of the statute of limitation sensitive claims was Ambauen erecting a bridge on Young’s property. Ambauen then used this bridge to “*park out*” the wildlife nesting island, limbing Young’s trees and stripping the island of its native vegetation which then destroyed the water fowl nesting habitat. Like Young’s other claims where “continuing trespass” factored in, this claim falls squarely within the scope of RCW 4.24.630(1)

¹⁹ Young’s proposed instruction # 15 was not a “comment” on the evidence but rather was necessary to detail the differing elements of proof for each of the various counterclaims

Shown by proposed instruction 15, Young's approach to instructing the jury provided separate instructions and jury decisions for each issue. Instruction 15 would have permitted the jury to decide each counterclaim separately, and where applicable, the latitude to choose from between proposed instructions 19 or 20 for damages determination. This choice of path and separation of issues and claims was essential to proper instruction to the jury, because each claim rested on a separate set of facts and trial testimony. Therefore it was necessary that the jury weigh each claim under either instruction 19 or 20, and without a "substantial damage" requirement.

Respondents mistakenly contend that the final jury instructions were "*properly based upon the evidence*," couching this contention on a generalized claim of insufficiency of evidence to support Young's claims under instructions 19 and 20. [Resp. Brief-40,42] However, if there was sufficient evidence to support Ambauens proposed simple "Trespass" instruction (with its additional elements of proof), then there was sufficient evidence to sustain Young's proposed instructions 19 and 20. All three instructions operated on the same overall body of evidence.

The trial court has thus been shown to have based its underlying decisions for selection of final instructions on untenable reasons, and in doing so it has abused its discretion on selection of final instructions.

N) Redefining "waste" as it applies to RCW 4.24.630(1) is improper

In their response brief, respondents now argue for adoption of an obscure definition of "*Waste*" from Washington's landlord-tenant laws of 1869. This definition was not argued at trial nor was it before to the jury. [Respondents brief p.

43] Citing *Kane v. Timm*, 11 Wn.App 910, 911 (1938) Respondents urge this court to redefine the term “Waste” as having been brought on “*by one rightfully in possession*” of real estate which results in “*substantial injury*.” to the property²⁰ However, *Kane* is easily distinguished from the instant case.

Aside from the obvious factor that Young was clearly the “*one rightfully in possession*,” yet not responsible for bringing on the waste at issue here, the respondents’ argument to redefine “waste” is unpersuasive. *Kane* is essentially a landlord-tenant case where one of the estate’s buildings was significantly damaged while under the executor’s control. The resulting action for damages raised RCW 64.12.020, a now obsolete landlord-tenant statute repealed from the RCW in 1965. *Kane* defines the types of “waste” that applied structures under a landlord-tenant relationship But “waste” defining liability under such a relationship is clearly is not relevant to the case at hand, nor does it reasonably address the “waste” at issue.²¹

Without citation the respondents also claim “*The trial court was, therefore, correct in concluding the proposed instruction did not properly define ‘waste’*” [Resp. Brief-43] But the respondents present no argument or citation supporting *why* the reviewing court should adopt *Kane*’s meaning of waste. On the assumption the respondents are referring to the trial court’s comment that proposed instruction

²⁰ Respondents’ Brief at p. 43 - citing *Kane v. Timm*, 11 Wn.App 910, 911 a 1938 executor/estate action that reaches back to 1869 landlord tenant laws for this definition of “waste”

²¹ Respondents’ reliance on the definition of “Waste” as utilized in *Kane* is clearly misplaced. This obscure definition of “Waste” is proposed in an effort to supply foundation to the trial court’s unfair refusal to submit Young’s proposed instruction 20. Respondents’ obvious objective is to have this court apply “*substantial damage*” as an implied condition of RCW 4.24.630(1) (Young’s instruction 20). Respondents attempt to level the playing field with final instruction 8 over the trial court’s improper application of a “*substantial damage*” threshold.

18 “Waste by Trespasser” was “*an inaccurate statement of law,*” RP 1/11/11 p.10:9-13 - proposed instruction 18 was a supporting instruction for proposed instruction 24, which in turn supported Young’s “core” instruction 20, or RCW 4.24.630(1), in the event of “continuing trespass.” The trial judge did not find “waste” insufficiently defined as it applied to instruction 20

There exists no valid reason for the court to reach beyond RCW 4.24.630(1) for further definition of “waste”, or exceed the plain meaning of the term “waste.” Had the framers of RCW 4.24.630(1) intended “waste” to be defined as the respondents suggest, or “substantial damage” to be prerequisite to finding damages in RCW 4.24.630, the legislature would have done so by providing the appropriate language. Here the respondents’ “waste” argument should not be accepted.

O) Young’s claims and theories under the RCW 4.24.630 and the “Timber Trespass” statutes, as well as statute of limitations under “continuing trespass” were sufficiently evidenced to support instruction to the jury.

Respondents claim that “*the court concluded there was insufficient evidence to support a claim for waste or timber trespass theories.*” Respondents also claim insufficient evidence to support a “Continuing Trespass” instruction. [Resp. Brief-42-43] However, claims of insufficient evidence are not supported by the record. “Evidence is substantial if it would convince an **unprejudiced thinking mind** of the truth of the declared premise” *Jefferson Co. v. Seattle Yacht Club (1977) 73 Wa.App 576, 588.* (emphasis added)

Shown below, no valid argument has been presented by the trial court or by the respondents, to support wholesale disregard of Young's jury instructions and theory of the case, including claims of insufficient evidence addressed below²².

P) Evidence and damages testimony was sufficiently demonstrated to support proposed instruction 19 for destruction of the salmonberry canopy.

Proposed "timber trespass" based instruction 19 properly fit Young's claim of salmonberry canopy being mowed down and buried. The trial record shows ample evidence to support Young's proposed instruction 19. "Timber Trespass" was therefor the correct instruction, statute, and remedy for this claim.

Despite the respondents' claims of insufficient evidence to support instruction 19, the trial record evidences the pre-existence of Young's salmonberry canopy at the time of Ambauens' October of 2003 destruction the wetlands adjacent to the north end of the pond.

Original 1970 documents and engineering drawings dimension the pond at 200' x 120' [Ex 13] As established above, the dividing property lines were known by the Ambauens.[Ex 18,23,24] Young testified to his previously existing wetlands and salmonberry canopy and discovering his wetlands mowed down and filled by Ambauen RP p.336:16-p.240 Young testified to the size of his damaged wetlands area around the edge of the north half of the pond at 25' x 200' RP p.227:7-9 David Ambauen testified to mowing around the north end of the pond as well as filling in Young's wetlands. Rodman testified to his findings in 1998 when he investigated the site, RP p.296-299, p.305:16-19 and the restoration under his estimate of \$48,600 in restoration damages, to restore the salmonberry to the

²² See: RP 1/11/11 p.6-18 generally

pond's edge. RP p.300-303:21,p.324-325 Photographs in evidence clearly show that the whole area within 25 feet of the north half of the pond was still absent of salmonberry in 2010, and exhibiting a stark border of salmonberry where Ambauens' sand and clay fill and brushhog mowing ended. (Ex 1-J) RP p.545:3-8

In the seven years between Ambauens' destruction of Young's wetlands and trial, evidence and testimony show only the invasive reed canary grass has taken hold (Ex 1-A, 1-B, 1-E, 1-F). At trial Rodman took exception to Boule's report which minimized damage to the wetlands RP p.329:11-332:11 Rodman testified to Boule's opinion conflicting with known permit requirements. Rodman testified to a Department of Ecology publication as to the threat posed by reed canary grass to wetlands ecosystems. RP p.329:10-332:10 Boule testified that he agreed with this Department of Ecology threat assessment RP 498 2-12. Boule also testified "*I don't know how close the salmonberry might have originally gotten to where the pond was*" RP 497:18 showing his testimony of the extent of Young's damage and his cost estimate of damages as unreliable.

Ironically, Boule's testimony shows his measure of wetlands "recovering," an nothing but the invasion of reed canary grass into the "disturbed" area.

It is essential to note that when it comes to evaluating and determining the amount of award under proposed instruction 19 "timber trespass," the statute specifies that an award "shall be given for treble the amount of damages claimed or assessed" Here the "amount of damages *claimed*" is \$48,600, as per Rodman's estimate. RP 324-325:15 Substantial evidence following reveals Rodman's estimate totals to the damages required to restore the salmonberry

canopy: removing the fill from the wetlands, restoring buried surface soils, and proper eradication of reed canary grass, all precede replanting salmonberry canopy.

Q) Destruction of ornamental shrubbery was substantially evidenced.

Respondents assert the “*trial court’s instructions were proper based in the evidence* “; and there was “*insufficient evidence*” to support proposed jury instruction 19 “timber trespass” (Response Brief p.40,42) However these assertions are not born out by the record.

At issue is the trial court’s determination of insufficient evidence to support Young’s proposed jury instruction 19 for the “timber trespass” statute, as it applied to restoring the “salmonberry canopy.” Young objected to the trial court omitting his instruction on the “timber trespass” statute, showing the court’s final instructions (including 3 and 8) inadequate for “*finding a violation of the timber trespass statute*” RP p.550:6-23

Of primary consideration, Boule admitted he had no knowledge of the pond’s construction, or the vegetation around the pond and under the tree canopy, prior to Ambauens’ 2003 encroachment and thus his testimony must be removed from all consideration on this issue. RP p.482:21-p.483:19

Young testified using Exhibit 23 to demonstrate the location of the extensive salmonberry canopy - prior to mowing and filling “*its was all salmonberry around the edge of the pond -- there was a deer trail that came through here and you had to fight your way in to the edge of the pond.*” RP p.541:9-p.542:12 Young explained he visited the pond to clear out the drain culvert in the fall -2 or 3 times a

year - but other than that the area “*should have been left alone, and not mowed, not cut back, not limbed, and just let nature take its course*” RP 542:4 - 543:8

David Ambauen testified to mowing Young’s wetlands adjacent to the wildlife pond. with his “brushhog” mower behind his tractor. RP p.403-04, p.374-76

Ambauen also testified to dredging the north end of the wildlife pond on Young’s land in October of 2003 with his back hoe and then spreading the fill adjacent to the pond RP p.417:21- p.424:19 (generally) Young testified to the reed canary grass only existing at the south end of the pond around the time of damage. RP 541:6-20 Exhibit 1 - 2010 photographs 1-A, 1-B, 1-E, and 1-F all show tall reed canary grass that has taken over the filled wetlands area. Boule testified in the immediate vicinity of the pond the reed canary grass had been moving in “*probably since the first day of disturbance*” RP 517:14-18 Rodman testified restoration of Young’s extensive salmonberry canopy first required eradication of the canary grass by excavation of filled wetland’s top 18 inches of soil and then restoration of wetland soils. RP p.311:20-p.313:6 This entire process is provided for under the statute’s ornamental shrubbery provision.

Prior to 2003, Young’s salmonberry canopy around the pond was “*up about five feet or so*” RP 242:25, and had previously run to the ponds edge all around the north end before a Ambauen mowed down a 25’ swath next to the pond with his brushhog mower. Young testified to photos 16-J and 16-L (see also: Ex 16-O) as showing his discovery of the remains of salmonberry canopy in the spring of 2004 coming only 10-12 feet away from the creek towards the pond. RP p.241:20- p.243:20 Yet the respondents argue the court concluded “insufficient evidence” to

support a “timber trespass” instruction. In fact, this “*insufficient evidence*” conclusion by the court applied to the count of salmonberries for damages

The court: *Okay, As to the timber trespass, there is insufficient evidence for the court to give that instruction. While there is testimony regarding salmonberry, there is no number of salmonberry plants, or any method to assess the damages to the salmonberries, so I decline to give the instruction.* [RP p.552:5-11]

However the trial record clearly shows the court was clearly mistaken in its assessment of the lack of testimony of damage evidence required. RP p.324-p.325 Young argued against the trial court’s ruling RP 1/11/11 p.7-p.9:3

Rodman testified to extent of the fill at 25’ from the waters edge on the north end of the pond, with its’ absence of shrubs or bushes RP p.332:15-p.334 He also testified to the necessity of the removing the soil and reed canary grass, roots and all, and the cost of permitting at \$20,000 and process of replacing the fill with new wetlands soil prior to planting the salmonberry. RP p.311:20-p.333 Rodman established the time of trial cost for blown in wetlands soil - after excavation - at \$11,000 (\$58 a yard). Rodman also testified to soil compaction factors, and 3 years of maintenance costs at \$3600. RP p.318 Most directly contradicting the court’s later determination, Rodman testified to the restoration costs of 200 “one gallon” salmonberries at “\$3 apiece” RP p.317:8-18 and maintenance of \$3600.

The Court: *What you are talking about is the trespass trouble (treble) damages instruction that you want in, and I said there was insufficient evidence of shrubbery or ornamentals. The berries --*

Mr. Young: *This was specifically toward the timber trespass statute?*

The Court: *You wanted the timber trespass statute because you said some of the ornamental shrubbery was --*

Mr. Young: *Right. That is right. The ornamental shrubbery is a part of that description. That is correct, and I provided case law supporting that.* [RP 1/11/11 p.6]

It is not the case. as the trial court proscribes relating to salmonberry restoration RP 1/11/11 p.7:23-p.9:3, that the prerequisite to award of restoration damages under the timber trespass statute, is a count of the of salmonberry shrubs cut down.

“There is no testimony as to what you allege. Mr. Ambauen removed ‘X’ amount of salmonberry bushes or mowed down ‘X’ amount of bushes.”

[Judge Haberly - RP 1/11/11 p.8:8-10]

Aside from the fact that no such shrub count requirement is found in RCW 64.12.040, such a count was impossible. Ambauen could not have operated his backhoe in a 5’ thicket of salmonberry, as described by Young. Thus, Ambauen’s mowing down of the salmonberry occurred prior to his filling Young’s wetlands.

The trial judge’s prerequisite of a count of the cut down salmonberries was clearly unreasonable. The salmonberry canopy had both been cut down and buried many months before Young discovered the damage in the late spring of 2004. Here the trial court abused its discretion as it created an “impossible to meet” shrub count to exclude Young’s proposed jury instruction 19

Given the evidence in the trial record, an untainted jury most certainly would have grasped the events and extent of destruction by Ambauen. Any unprejudiced “thinking mind” would have known removal of reed canary grass and restoration of the wetland soils meant replacement of native wetlands plants. Given proposed instruction 19, rather than dwelling on the “number” of salmonberry shrubs cut down²³, an unbiased jury would have utilized Rodman’s overall estimate of

²³ Rodman’s estimate was based on the “area” of mowed then filled wetlands at 25’ x 200’ [Ex 14] - and not a pre-destruction plant count. Rodman’s methodology was not shown by respondents as insufficient showing of damages to support instruction of #20, and was within the requirements of the “timber trespass” statute. For the trial court to undermine Young’s theory of the case by imposing the impossible minutia of plant counts, was a clear and manifest abuse of its discretion which denied Young his right to a fair trial..

\$48,600 as damages for proper permitting, replacement of the soils, and replanting of the salmonberry canopy. RP p.325:13-18 This total award would then have been trebled and awarded to Young.

Thus there was sufficient evidence to support instruction 19 on the basis of restoration of salmonberry canopy. The trial court abused its discretion when it refused for untenable reasons not to give the “Timber Trespass” instruction.

R) Excavation of the pond and then filling Young’s wetlands was sufficiently evidenced to support “Waste to the Land of Another” and “Continuing Trespass” - Young’s proposed instructions 20 and 24

When it came to Ambauens’ filling of Young’s wetlands - which clearly constitutes “waste” under RCW 4.24.630(1) - the jury should have been afforded the “choice” of proposed instruction 20 with 24 as an alternative remedy to the “timber trespass” remedy for wetlands restoration discussed above. Under the pretense of the jury opting for such a choice, the following trial evidence supports the damage to Young’s wetlands

Ambauens had never been given permission to come on Young’s property or do any kind of work by either Colin Young or Lorna Young, and in fact had previously been ordered off the property yet paid no heed to this order. RP p.110:13-24, p.111:10 - p.112:1, p.231 21-235, p.114-118, p.129:17-25 For all purposes of this counterclaim Ambauen substantial evidence showed a pattern of intentionally and wrongfully entering Young’s property without permission, and in violation of Young’s posted “no trespassing” signs. RP p.131:16-132:18.

The filling of Young’s wetlands adjacent to the north end of the pond was initially evidenced by Young and Perry in the late spring of 2004 as they dug and

photographing numerous test holes. Perry testified to discovery of buried green vegetation at the bottom of test holed 15-18 inches deep. RP 120-121:19 Rodman also testified to drilling numerous test holes on Young's land around the north end of the pond and to his finding the damaged area. RP p.296-300

As shown above Rodman's estimate was sufficiently detailed to separate out damages for the removal of wetlands fill and restoration of the wetlands soils. Even without consideration for plants and shrubs, Young's instruction 20 was sufficiently supported by evidence and damages testimony to go to the jury.

Even Boule testified to the fact that "damage would be driving a piece of equipment through there" RP p.510:24 which Ambauen did as he brushhogged around the north end of the pond with his tractor. RP p.403-04, p.374-76 and then again to fill the wetlands in October of 2003, RP p.417:21-p.424:19 (generally).

David Ambauen showed intent when he admitted to personal knowledge of the property lines shared with Young by product of his initial survey RP p.428, and his survey crossing the pond. RP p.390:22-p.393:

Using Exhibit 23 David Ambauen testified "what you a characterizing as excavation occurred right here at the very northern most tip, so it was debris that collected here that we -- I pulled out of the pond and spread over the grass" This clearly was an admission of filling Young's wetlands. Moreover, David Ambauen admitted to repeatedly moving his backhoe for further excavating and spreading of "debris." David Ambauen testified to repositioning his backhoe to two other areas around the north end of the pond on Young's land to do further excavating and spreading of fill, which he indicated on Exhibit 23. RP p.419:10-25 Ambauen's

testimony confirmed both Young's 2004 assessment and Rodman's 2008 forensic assessment of the extent of the fill (see: Ex 14 p.3)

Furthermore, Ambauen's forgoing testimony clearly undermined Boule's assessment that just one single 20' x 20' area of Young's wetlands was "filled" by Ambauen. Boule testified this 20' x 20' being adjacent to the west side of the pond, RP p.460:23-p.461:9, p.491:22-p.493:2 and near the southern limit of the fill on the west side of the wildlife pond as delineated by Rodman [Ex 23,13 page 3]

Invasive reed canary grass was establishing itself in Young's damaged area the following spring of 2004. Using Exhibit 16 A and B, some of Young's photographs from Young's late spring of '04 discovery, Boule testified to some of the damaged area and invading reed canary grass.

"the relatively unvegetated area is the area of disturbance from Ambauen's activity. All of the grass surrounding it is reed canary grass, and much of the stuff coming up through that, the material that was dredged from the pond as well as through the straw itself, much of that is reed canary grass" (emphasis added) [Boule - RP p.522:10-16]

David Ambauen further testified that he worked with his backhoe for "probably three hours" excavating the pond and spreading fill (on Young's wetlands) in the fall of 2003. RP p.423:10-17 This "three hours" of work further discredits Boule's testimony. It is unreasonable to conclude that it would take three hours with a backhoe to deposit 3-6 inches RP p.459:24-p.460:3: over an area the size of two cars, or 20' x 20', which Boule claims was the limit of the area filled by Ambauen. RP p.460:23-p.461:9, p.491:22-p.492:9 Yet his depth of fill was determined by just two test holes, one each at the east and west sides of the pond, just north of the property line, but no test hole at the north end of the pond.(Ex. 23)

Boule testified his establishing the extent the wetlands area filled by looking at vegetation: “*the only thing I had to look at was the state of vegetation*” RP p.494 Boule describing finding in 2010 where “*someone had done something to leave bare soil*” and “*a thin layer of straw*” RP p.494:15-19 which was similar to what Young and Perry found and photographing in 2004.

Boule’s testimony of the area filled being limited 20’ x 20’ did not constitute substantial evidence and did not support “no permitting required.” All witness testimony and evidence on the size of the area filled considered, any unprejudiced and would have concluded Boule’s claims of the fill in Young’s wetlands being limited to one 20’ x 20’ area. less than reliable, RP p.491:22-492:9 and deferred to the Rodman and Young estimates of the filled area at 200’ x 25’. As shown above sufficient evidence supported instruction #20 and the trial court manifestly abused its discretion in not submit instructions 20 and 24 to the jury.

S) Loss of pond habitat were sufficiently evidenced to support proposed instruction 20 “Waste to the Land of Another” (RCW 4.24.630)

Sufficient evidence supported Young’s instruction 20 and award of non-economic damages under RCW 4.24.630(1) for limbing and loss of pond habitat.

“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.” (emphasis added) [RCW 4.24.630(1)]

Non-economic damages were called out in Young’s proposed instruction 15 Had the jury been given proposed instructions 15, 20, & 24, the jury could have compensated Young with “non-economic” damages. for loss of limbs and excavation of his pond under the “not limited to” and/or “injury to the land” clauses of RCW 4.24.630(1) and the non-economic damages of proposed

instruction 15. As detailed above, Ambauen admitted to excavating Young's pond thus instruction 20 is sufficiently supported. Moreover there is sufficient evidence that Ambauen limbed Young's trees to support instruction 20.

Young testified to his trees being limbed. Exhibit 19 - photographs 19-G, 19-I, and 19-J, show limbs on alders around the pond typical to the period prior to damage while Ambauen's are burning alder limbs removed on the island. Photographs and testimony substantially evidence the lower limbs from Young's trees had been cut and piled on the north end of the island in late 2003 in preparation for burning them RP p.244:23-247:1,p.376:20-378:18 Ambauen testified to his habit of doing this. RP p.397:22-24, p.408:6-408:9

As the forgoing constitutes substantial evidence of Young's trees being limbed and Ambauen admitting at trial to excavating Young's pond which obviously destroyed the subsurface ecosystem and adjacent surface ecosystem RP p.418-419, Young was thus entitled to his jury instruction 20 and compensation for loss of pond habitat without providing evidence as to the amount of damages or being forced into replacement of the trees and causing further environmental damage. It was abuse of discretion for the trial court not to put forth instructions 15, 20 and 24 based on insufficient evidence for instruction for the untenable reason, in part, that no arborist testified at trial to the value of the trees.

T) Depositing of vegetation waste on Young's land and theft of hay crop was sufficiently evidenced to support "Waste to the Land of Another" and "Continuing Trespass" - Young's proposed instructions 20 and 24

David Ambauen admitted by product of his initial survey in the court record (Ex 15,18) that he was aware of where all his property lines were. RP p.428 Young

established Ambauen's intentional entry and wrongful acts for all counterclaims, when Young testified that David Ambauen had showed him the property lines and corner stake for the strip behind his front garage in 1995 or 1996. RP p.223:8-17 As shown above Ambauens knew quite well where the property lines were when Ambauen or his agents intentionally and wrongfully dumped vegetation waste on Young's land RP p.130-131, then harvested then sold Young's hay crop from Young's strip behind land behind Ambauens front garage.

Using Exhibit 16 Young testified to his 2002 discovery of 5 - 10 cubic yards of yard and vegetation waste dumped over the years on his property just over the property line with the Ambauens and close to the old manure shed RP p.225:15-p.226:21, stating it was the "first thing I spotted" RP p.225:15-19 (preceding Young's discovery of stolen hay, fencing, and filled wetlands later counterclaimed in this lawsuit) Young further testified "continuing trespass" of the this 5-10 yards of vegetation waste and the amount for removal damages RP p.227:14-18

After Young spotted this 5-10 yard pile of vegetation waste in 2002 (Ex 16M - photos Y-2, Y-3) he posted two "No Trespassing" signs on his strip of land facing Ambauens "*to let him know that I didn't want him doing this. I didn't want to have him coming onto the property*" RP p.228 :16-24. Yet these signs did nothing to prevent Ambauens from later harvesting Young's hay crop with their own.

Ambauens never sought or were granted permission to harvest Young's hay. RP p.222:22-25 Yet, Jana Ambauen admitted to having Lee Miester harvest the hay "regularly" between 2001 and 2005, suggesting a "continuing trespass" aspect to this RCW 4.24.630 claim RP p.159:13-23

Using Exhibit 10. and 24 to examine Jana Ambauen as to where Ambauens cut hay, Young pointed out his strip of land behind Ambauens' front shop and asked "Did you guys cut that?" In a nervous and rambling answer Jana Ambauen admitted to knowingly cutting Young's hay in the strip of Young's land.

*"Oh yeah, I used to bring that up with Dave....
we decided, you know, if a foot or two or three feet -- we have never met the person that owns it, he's never showed up, we don't know anything about it, you know. It couldn't possibly hurt if the tractor nicked it a little bit. We just weren't worried about it. If someone had -- if you would have-- the owner never had come over and said, look, or put up signs or a fence, there was no doubt about it, we would have followed that."*[Jana - RP p.169:25-170:13]

Ironically, the same excuse could just as easily be made to Young's other counterclaims.²⁴ Jana Ambauen further demonstrated "*this whole area had to be hay, where the tractor went*" pointing out the tracks in Exhibit 10 that ran through Young's strip of land behind Ambauens front "shop, and showing where the hay crop had recently been harvested across the whole front area. RP p.177:11-22

Young testified to his late summer discovery of his hay crop cut and removed on strip of Young's land behind Ambauens' front garage, as designated in Exhibit 24 "stolen crop area". Young used both the large photograph (Ex 10) and Exhibit 24 to show the property lines, testify, and demonstrate his stolen hay crop claim. Young pointed out his strip of land for the jury, and the telltale "striations" (ex 10) continuing through Young's "stolen crop area" from Ambauens land. RP p.221:24 - 223:16 This established that at the time of the photograph Ambauens

²⁴ Trial has shown David Ambauen never showed any hesitation as he marched his heavy equipment onto Young's property and destroyed the wetlands around the pond. Ambauen never asked permission to enter Young's wetlands, nor did he show any remorse at trial for his encroaching on Young's property or filling Young's wetlands. There is no indication Ambauen would have acted any differently when it came to dumping waste or making off with Young's hay crop or fencing

had cut and removed the hay from Young's land while they were harvesting their own hay. Although David Ambauen denied personally cutting Young's hay crop,²⁵ he testified that while he had the adjacent property (1990-2006) he never saw Young cut the hay up this strip. RP p.530:14-18 The jury was left to conclude the obvious: Ambauens, more likely than not, had their agents harvesting Young's crop behind Ambauens front garage - as shown in Exhibit 10

Young testified to the value of his hay crop taken from his strip of land behind Ambauens' front garage, as "\$5 to \$7 times 20 bales." RP p.225 lines 5-8

Young was qualified to testify to the damages of waste removal, stolen hay crop, and stolen fencing by his decades of farming experience. He was able to testify to damages for remove the bridge because of his architectural experience. RP p.221:9-23 The forgoing claims and damages were sufficiently demonstrated to support submitting instructions 15, 20 and 24 relating to Young's theft of crop and continuing trespass of depositing of vegetation waste claims. It was abuse of discretion and arguably a miss-application of law to for the trial court replace these instructions with simple "trespass" and its "substantial damage" as a threshold.

U) Claims of bridge constructed on Young's land and theft of fence were sufficiently evidenced to support "Waste to the Land of Another" and "Continuing Trespass" - Young's proposed instructions 20 and 24

Respondents assertions of "insufficient evidence to support instructions" as to location and continuing trespass of the bridge, damage and waste to the island, and

²⁵ Although David Ambauen finally admitted to mowing around the north end of the pond and filling Young's wetlands, through the end of trial he maintained his personal denial to claims of removing Young's fence, harvesting Young's hay, dumping vegetation, and laying waste to Young's half of their shared wildlife pond. This brings should have brought to the jury the issue David Ambauen's credibility. RP p.530:10-20 The believability of David Ambauen's testimony was an issue taken from the jury, by the court's inadequate final instructions.

theft of fence are not born out by examination of the trial record. The respondents further assert that evidence of the foot bridge “*partially built on Mr. Young’s land was not sufficient to support the instruction*”²⁶ [Resp. Brief-43]

Here, respondents fail to cite any evidence supporting Ambauens’ did not build the foot bridge on Young’s land, but rather support their position only on Young’s failure to ask for bridge removal. Clearly, by his counterclaim, Young asked for bridge removal within a reasonable period of time after discovery of its offensive location in 2003.²⁷ As shown below, substantial evidence shows the foot bridge was constructed on Young’s land, and thus proposed instructions 20 and 24, “Waste to the land of another” and “Continuing Trespass” are supported.

Young testified to the accuracy of Exhibits 23 and 24 RP p.210-p.212. as well as to the foot bridge’s continuing trespass, construction, and damages for its removal. RP p.218 - 221 Using Exhibit 23 Young testified to first noticing the Ambauens had built a foot bridge to the nesting island in 1999 or 2000. Young explained that he did not at that time further investigate the bridge because of the heavy salmonberry canopy, and his initial assumption the bridge was on Ambauens property. RP p.219:6-25. Young testified to his discovery of the bridge’s actual location in 2003 RP p.220:4-6; and that Ambauens were never given permission to build the bridge to the island RP p.219:15-220:6

²⁶ Respondent argue at length against proposed instruction 18 “Waste by Trespasser” on the basis that 18 is a stand alone instruction. However, Young never argued instruction 18 as anything but a supporting instruction. Proposed instruction 18 supported proposed instruction 24 “Continuing Trespass” which supported instruction 20. Instruction 18 addressed continued trespass “*On the event of transfer of ownership of land.*”

²⁷ In the event respondents’ argument of Young’s failure to complain is given any weight, it should be noted that when Young put out fencing along the property line to block Ambauens’ encroachment and access to the bridge, Ambauen it disappeared..

Young testified to circumstances of his summer 2003 discovery of Ambauens' survey, RP p.220:4-p.221:5, a survey which David and Jana Ambauen personally run and marked in 2002 or 2003. RP p.145:17-p.151:6 Young testified to then using Ambauens' markers on the island and on each side of the pond [Ex 1-L, 1-J, 17], and at the creek corner stake Ex 1-L to sight down the property line and discover that all but the west 5 feet of the bridge had been constructed on the Young property. RP p.211:2-15 (see: Ex 23) Perry also testified to the survey markers crossing the pond and Young showing him how the property line crossed the bridge RP p.125:2-126:13 Perry testified to his surveyor training in the army RP p.134:1-4 Young testified to the bridge's continuing trespass RP 218:19-23.

Young testified that after discovering the bridge was on his property, he set out fencing and posts along the property line to keep Ambauen out. Young testified that his roll of sheep fencing and posts were removed within a few weeks, along with a dinghy Ambauens had stored on Young's land. RP p.253-254 Ambauen testified to having removed the dingy RP p.390:17-20 But Ambauen also testified to having the same steel fence posts and fencing in his front shop at the time Young's fence was removed and that he had workers, until 2004, that would have put the fencing in the shop RP p.382:13-16, p.383:6-p.384:11 Yet, Ambauen attributed these steel posts to "*random metal left over, or rusty things we saved to recycle, pipe, plumbing*" RP 382-384:1²⁸ Young testified the damages for loss of fencing RP p.255:2-8

Respondents further assert no damage was evidenced at trial relating to the bridge's presence. [Resp. Brief-43] This clearly conflicts with Lorna Young's

²⁸ Ambauens denial of removing the fence was a credibility question for the jury, and should not contribute to claims of insufficiency of evidence for instruction 20 on this issue.

testimony RP p.105-107:3 and ignores the substantial trial evidence of Ambauens ongoing destruction of the wildlife island nesting habitat, including the stripping Young's half of the island of vegetation and limbing his alders, all clearly facilitated by the continuing trespass of the bridge.²⁹

Most certainly, an untainted jury would have found Ambauen had motive for removing Young's fencing from the property line adjacent to the pond. Clearly the fencing laid out on the property line blocked Ambauens' access to Ambauens' bridge to the island, which impeded Ambauen's further "grooming" the pond and thus provided motive for its removal. (see: Exhibit 23,24) When this motive is combined with circumstantial evidence of David Ambauen's testimony of having steel fence posts and sheep fencing in his front shop without good reason, and his admitting his employee would have put it there, and his off-handed attributing these steel posts to "*random metal left over*" RP p.382-384:11, any untainted jury would have found Ambauen had removed Young's fence to Ambauens' front garage.

V) Substantial evidence does not support the jury verdict and the opinion testimony of Ambauens' expert was neither convincing or reliable

Ironically, trial has shown Boule's claims of regrowth of wetlands vegetation was limited to invasion of the subject area by wetlands choking reed canary grass.

²⁹ Using Exhibits 16-M and 16-I Young testified to his spring 2004 discovery of his trees limbed on the island, the native vegetation stripped from the whole island (See -Ex. 9-A pre-2003 heavy salmonberry on island) and finding recently cut limbs and piled up on his end of the island. RP p.244:23-p.247:1 (Ex. 16) Pictures of piled up and cut end branches on the island were testified to by Young and Perry. David Ambauen testified to his habit of limbing the trees and burning branches on the island. The credibility of Ambauen's claim he limited limbing of the trees around the pond to his own property is a question that should have been before jury by way of proposed instructions 15, 20 and 24

At trial Boule testified “*most recently disturbed area consists of reed canary grass.*” RP p.494:9-495:23 Boule also testified “*The goal of restoration work in this area would be the eradication of reed canary grass...and then replanting the native species*” calling reed canary grass a “*non-native wetland weed*” RP p.460:6-p.461 Yet, Boule testifies to his conclusion that wetlands restoration was “*not necessary*” RP 460:18-19

Boule admitted he had no knowledge of the “understory” vegetation around the pond prior to Ambauen’s 2003 damage. RP p.482:21-p.483:19 Yet Boule speaks to reed canary grass being present as Ambauen filled the wetlands. RP p.460:9-22

Boule’s waffling and inconsistent testimony on the issues of reed canary grass in wetlands and implications on permitting and restoration damages for Young’s wetlands does not amount to “substantial evidence” to support a jury verdict.

Opinion aside, Boule’s evidence supporting his claim of “recovery” starts and ends with his photographs of the damaged area overgrown with “vegetation” that is principally reed canary grass.³⁰ (Ex 1 - photos 1-A,1-B,1-E,1-F) No other factors are evidenced by Ambauen supporting their late theory of “wetlands recovering.”

Boule failed to reasonably support his trial opinions of no damages, restoration is “not necessary,” and “no permits required” for Ambauen’s “disturbance” Boule’s vague answers and longwinded rambling generalizations in support his opinions and why no permits are required in this matter, did not constitute

³⁰ This, by no means, shows Rodman’s 2008 assessment or estimate was not sufficient. It merely means Ambauen newly formed factors and issues (valid or not) were not present, or were insignificant during Rodman’s’ initial site investigations 2-3 year prior.

substantial evidence. RP p.456-57, p.499-505 David Ambauen described his dredging of Young's north end of the wildlife pond RP p.418-419

Under Young's cross-examination of Boule on permit requirements for Ambauens dredging, depositing fill, and for the wetlands restoration project, Boule failed to sufficiently and credibly support his opinion that the subject pond, or work in surrounding wetlands area, is exempt from Federal Clean Water Act - Section 404, federal jurisdiction, or permitting. RP p.498-507:17

Rodman testified to the filled wetlands RP p.301:16-p.303 and the returning vegetation he found there in 2008 not being "wetlands" vegetation. RP p.302:2-4

Boule's 2010 photographs presented at trial showed the "returning vegetation" claimed as an indicator of "wetlands recovering" showed nothing but tall reed canary grass overwhelmingly the filled area. adjacent to the pond (Ex. 1 - photo 1-A;1-B,1-E,1-F) ,and not the proper native wetlands plants or shrubs.

For any unprejudiced and "thinking mind," including Rodman, Boule's claims of self "recovering wetlands" by overgrowth of reed canary grass was irrational. RP p.331 Rodman, who clearly took issue with Boule's opinions, pointed out in court "half of all this 'smoke and mirror' stuff is common sense." RP p.352:14

X) Manifest abuse of discretion was shown allowing appellate review.

Respondent urge that "manifest errors" claimed by Young -- including failure to object to select jury instructions -- does not apply to civil disputes [Resp. Brief-30] but respondent provide no authority for this position. Here Young has repeatedly claimed the court committed a manifest abuse of discretion and that his

right to a fair trial was violated. Young has shown “actual prejudice” with each claim of the trial court’s “manifest” abuse of discretion.

Rule providing that appellate court may refuse to review any claim of error which was not raised in the trial court is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level. *Pulcino v. Federal Express Corp. (2000) 141 Wa.2d 629, 9 P.3d 987*. The appellant has the burden too demonstrate that alleged error to which he or she did not object at trial affected his or her rights. It is this showing of actual prejudice that make the error ‘manifest error’ allowing appellate review *State v. Gregory (2006) 158 Wa.2d 759, 147 P.3d 1201* As shown above and in Appellant’s Opening Brief, for each; the exclusion of Callaghan, the denial of Young’s Motion in Limine, the trial court’s restriction from use of the Wetlands Manual to examine Boule, and the inadequacy of final instructions 3,7, and 8; Young has met the burden of showing “actual prejudice” and those errors or issues are therefore “manifest” and the appellate court may review them.

IV. Conclusion

As shown above, Young was unfairly and substantially prejudiced by improper exclusion of his rebuttal expert and denial of his motion in limine. Furthermore, the court’s final jury instructions were inadequate as they discarded Young’s theory of the case and improperly attempted to collect all Young’s claims to one decision. It has been demonstrated above that Young’s proposed instructions 19 and 20 were supported by substantial evidence, and the court abused its discretion in refusing to put forward instructions 19 and 20 along with supporting jury instructions.

Despite Young's argument and objections, the trial court ignored the fact that the higher threshold of proof of "substantial damage" in the courts' final "trespass" instruction was unfairly prejudicial and not required under the statutory remedies of Young's theory of the case. As a result "substantial damage" became a subjective interpretation left to jury leading to confusion, and a question from the jury during deliberation on the final instructions.

Furthermore, the jury was tainted by oversize Exhibit 10 and prejudicial photographs of automobiles of Young's storage of vehicles from the opening minutes of trial through its conclusion, tainting the jury with suggestion of previous wrongs by Young. This then opened the door for an emotional jury decision based on irrelevant and prejudicial evidence. As shown above the verdict in this matter is not supported by the evidence. In sum, Young was denied his right to fair trial.

The jury's verdict should be vacated and the counterclaim remanded for new trial with instructions to exclude all vehicle related evidence, permit Callaghan's testimony, and provide separate jury instructions for each issue while including instructions for "timber trespass", "waste to the land of another", "agency", and "continuing trespass."

Respectfully submitted this 30th day of April 2011



Colin Young Appellant pro se
1785 Spirit Ridge Dr.
Silverdale, WA 98383 360-509-5634

- Appendix -

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IN OPEN COURT

JAN 11 2011

DAVID W. PETERSON
KITSAP COUNTY CLERK



SUPERIOR COURT OF WASHINGTON
COUNTY OF KITSAP

David Ambauen ETUX
Plaintiff(s)

vs.

Colin Young ET AL
Defendant(s).

SAVE - MUST BE FILED

No. 04-2-00642-4

INQUIRY FROM THE JURY
AND COURT'S RESPONSE

(JYN) (RSP)

JURY INQUIRY:

IN INSTRUCTION #8, ARE EACH THE STATEMENTS (a), (b)
and (c) inclusive or exclusive? (i.e. (a) AND (b) AND
(c))

[Signature]
Presiding Juror

1/11/2011 12:00
Date/Time

1/11/11
Date Received

12:05
Time Received

COURT'S RESPONSE: (After affording all counsel/parties opportunity to be heard.)

Each element must be proven.

JUDGE [Signature] M. KARLYNN HABERLY

DATE AND TIME RETURNED TO JURY: 1/11/11 9:10

----- DO NOT DESTROY -----

INSTRUCTION NO. 3

Mr. Young has the burden of proving each of the following propositions:

First, that the Ambauen's trespassed onto Young's property.

Second, that the Ambauens' trespass, if any, was a proximate cause of actual and substantial damage to Mr. Young's property.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 7

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for Mr. Young, then you must determine the amount of money that will reasonably and fairly compensate him for such damages as you find were proximately caused by any trespass by the Ambauens.

The burden of proving damages rests upon Mr. Young. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

INSTRUCTION NO. 8

Washington law defines a trespass as occurring when a person:

- (a) intentionally invades property in another's exclusive possession;
- (b) it is reasonably foreseeable that the act would disturb the other's possessory interest; and
- (c) the act causes actual and substantial damage.

RECEIVED AND FILED
IN OPEN COURT

JAN 11 2011

DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

DAVID AMBAUEN and JANA
AMBAUEN, husband and wife,

Plaintiffs,

vs.

COLIN YOUNG, a single man,

Defendant and Counterclaimant.

No. 04-2-00642-4

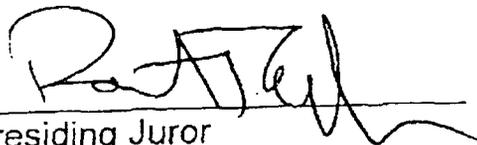
VERDICT FORM A

We, the jury, find for the Ambauens.

DATE:

11 January 2011

Presiding Juror



304

RECEIVED AND FILED
IN OPEN COURT
JAN 11 2011
DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

DAVID AMBAUEN and JANA
AMBAUEN, husband and wife,

Plaintiffs,

vs.

COLIN YOUNG, a single man,

Defendant and Counterclaimant.

No. 04-2-00642-4

VERDICT FORM B

We, the jury, find for Mr. Young in the sum of _____.

DATE: _____

Presiding Juror

Ex 14 P 3
Rodman Est.

