

No. 48222-3-II

Jefferson County Cause No. 13-2-00098-8

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

ERNEST KIRK GEORGE,

Appellant

v.

JOHN DANIELSEN,

Respondent.

RESPONDENTS' BRIEF

W.C. Henry, WSBA 4642
Attorney for Respondent
2000 Water Street // PO Box 576
Port Townsend WA 98368
(360) 385-2229
chenrypt@qwestoffice.net

FILED
COURT OF APPEALS
DIVISION II

2016 APR 13 AM 11:16

STATE OF WASHINGTON

BY

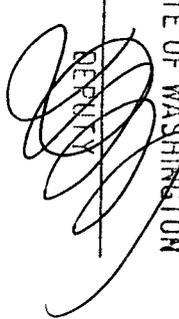

HENRY

Table of Contents

1.	Introduction -----	1
2.	Assignments of Error: Responses -----	3
3.	Statement of the Case -----	5
4.	Argument and Authorities -----	15
5.	Conclusion -----	24

Table of Authorities

Table of Cases

<u>Balise v. Underwood</u> , 62 Wn.2d 195, 199, 381 P.2d 966 (1963). -----	17
<u>Davis v. DOL</u> , 137 Wn.2d 957, 963-64, 977 P. 2d 554 (1999) -----	19
<u>Eriks v. Denver</u> , 118 Wn.2d 451, 456, 824 P.2d 1207 (1992) -----	17
<u>Gunn v. Riely</u> , 185 Wn.App. 517, 344 P.3d 1225 (2015), <i>rev. den.</i> 183Wn.2d 1004, 349 P.3d 1225 (June, 2015) -----	1, 2, 3, 10, 11, 12, 20, 22, 23,
<u>Happy Bunch LLC v. Grandview North LLC</u> , 142 Wn.App. 881, 173 P.3d 959 (2007) -----	20
<u>Hawley v. Sharley</u> , 40 Wn.2d 47, 49, 240 P.2d 557 (1952) -----	21
<u>Hendrickson v. Lyons</u> , 33 Wn.2d 47, 49, 240 P.2d 557 (1952) -----	21
<u>Ranger Ins. Co.</u> , 164 Wn.2d 545, 552, 192 P.3d 886 (2008) -----	17
<u>Rayonier v. Polson</u> , 400 F.2d 909, 922 (9 th Cir. 1968) -----	20, 21
<u>State v. J.P.</u> , 149 Wn.2d 444, 450, 69 P. 3d 316 (2003) -----	19
<u>State v. Pesta</u> , 87 Wn.App. 515, 521, 942 P.2d 1013 (1997) -----	19
<u>Young v. Key Pharm., Inc.</u> , 112 Wn.2d 216, 225, 770 P.. Rd 182 (1989) -----	17

Statutes

RCW 4.24.630 -----	2, 3, 4, 10, 11, 12, 14, 15, 18, 20, 22, 23,
RCW 4.24.630(2) -----	1, 4, 10, 11, 19, 20
RCW 64.12.030 -----	1, 2, 3, 4, 5, 10, 11, 12, 15, 23,
RCW 64.12.040 -----	1, 10, 11, 12, 21, 22,

Rules

CR 56(c) -----	17
----------------	----

1. INTRODUCTION

Appellant Kirk George petitions this Court to reverse its recent decision in Gunn v. Riely, 185 Wn.App. 517, 344 P.3d 1225 (2015), *rev. den.* 183Wn.2d 1004, 349 P.3d 1225 (June, 2015), to avoid a jury decision which did not bring the windfall he sought. The facts are not in his favor.

Facts presented to the trial court on Motions for Partial Summary Judgment convinced it that this case was governed by RCW 64.12.030 as a timber trespass case, because of the express language of RCW 4.24.630(2). Appellant George unsuccessfully sought additional remedies as a “waste statute” case. (See APPENDIX A, for the relevant statutes.)

Mr. George’s remedies remained open to treble damages, or subject to Danielsen’s mitigation (his Response to Motion for Partial Summary Judgment (CP 30, p. 2, ll. 13-16, and p. 16, ll. 13-22) essentially confessed judgment to single damages).

At trial under RCW 64.12.030, the jury found facts of a mere timber trespass, and returned a Special Verdict for single damages of \$12,500 for the trees, for which George had sought over \$150,000. The jury expressly denied grounds for treble damages because of the mitigation factors of RCW 64.12.040, and valued Mr. George’s claimed emotional distress at \$0.00. (SEE APPENDIX B, attached, and filed herein with Mr.

George's Notice of Appeal).

His argument, here, is as it was in a pretrial motions for partial summary judgment, and on an equally unsuccessful motion for Judgment Notwithstanding the Verdict and for New Trial.

Danielsen's logger, Morger, who prevailed on the Partial Summary Judgment issues relating to the limitation of claims to the "timber trespass" statute, settled with Mr. George before trial.

Supporting the trial court's ruling that this was a "timber trespass" case, not a "waste case", Mr. George's expert, in his "Declaration of Galen Wright in Support of Plaintiff's Motion for Summary Judgment", opined that the 18 cut trees had a landscape value of \$45,054, with a delivered log value of \$2,393, and that stump grinding and clean-up would cost \$4,033 (CP 18, p. 1). He found that the trees were felled and most logs and branches were removed from the site, so that "The disturbance to the understory was minimal". (CP 18, p. 8).

That is, this was clearly not a case of waste to the land under RCW 4.23.630, as all disturbance of the site was solely related to the simple trespass to trees, and adequately compensated by RCW 64.12.030/.040.

Because the jury found statutory mitigation, this case is a weak basis for Mr. George's attack on this Court's harmonization in Gunn v.

Riely, supra, of any arguable conflict between the 1999 waste statute, RCW 4.24.630 and the historic timber trespass statute, RCW 64.12.030/.040. This Court's reasoning in January, 2015, was sound, and remains so.

The simple effect of Mr. George's argument, if adopted, would be to render the timber trespass statute effectively and entirely superceded in any case involving damage to trees, and of no further application in any trespass case in which a tree or shrub was cut by anyone on another's land.

Gunn v. Riely does not render RCW 4.24.630 meaningless, as Appellant asserts. As to those who remove trees from another's property without authority, as an incident to the primary waste and injury to the land, it would still apply as the Legislature intended. As to trees removed primarily as the focus of a trespass to trees, as a matter of fact, the case leaves the remedies to the timber trespass statute. The difference can be resolved, as it was here, as a factual matter, on pretrial motion on proper evidence, or at trial under the usual rules and burdens.

2. ASSIGNMENTS OF ERROR: RESPONSE

Assignments of Error

1. On the facts presented, the trial court correctly applied the rationale and reasoning of Gunn v. Riely, supra, to the harmonization of argued

conflicts of the “waste statute” RCW 4.24.630(1) and (2), with the “timber trespass” statute RCW 64.12.030/.040, in denying George’s motion for partial summary judgment on the issues of those two statutory schemes.

2. The trial court correctly granted co-defendant Morger’s cross-motion on partial summary judgment, in which Danielsen had joined, dismissing George’s claim under RCW 4.24.630, based on which Plaintiff George and Defendant Danielsen proceeded to trial under RCW 64.12.030/.040 to jury verdict.

3. The trial court correctly denied George’s post-trial motion for judgment notwithstanding the verdict on the issues of RCW 4.24.630 and RCW 64.12.030/.040.

Issues Pertaining to Assignments of Error: Responses

1. Under the facts of the case, Danielsen had probable cause to believe the trees were on his own land, and the jury was entitled to make that finding as a matter of fact (assignments of error #1 and #3).

2. Under the exclusion of RCW 4.24.630(2), the remedies provided in RCW 4.24.630 (1) do not apply to every trespass to trees, when a person goes onto the land of another with probable cause to believe they are on his own land, and the damage if any to the land is simply related to the trespass to trees, causing direct and immediate, not collateral, injury; in such a case,

RCW 64.12.030/.040 provides the appropriate statutory remedy.

(Assignments of Error #1 - #3.)

3. STATEMENT OF THE CASE

The following was presented to the trial court at the pretrial hearing on motions and counter-motions for partial summary judgment:

In November, 2012, John Danielsen bought two small parcels of timbered land near Quilcene, in Jefferson County, Washington, for \$25,000. "Declaration of John Danielsen" CP 31, pp. 1-2 and its Exhibit A. He wanted to log them, to improve his view and obtain funds to put a residence on the hillside lot. CP 31 p. 2. He contracted with a local logger Morger and they looked at the lots together. CP 31 p. 4.

Although the logger tentatively flagged a presumed line for the South boundary of the Danielsen property, and began work, Mr. Danielsen wanted to verify his boundary with the downhill neighbor, Kirk George, who did not live on the property and was never there.

Mr. Danielsen met with his uphill neighbor, John Brush, who had lived there for several years, had his adjacent land surveyed in 1995 (CP 31, Exhibit F) and had at least one common corner with Mr. Danielsen staked and flagged. CP 31, p. 2, ll. 7-8, and ll. 21-27, also CP 31, p. 3 ll. 1-3 and Exhibit C to the Declaration.

The men had a plat map with them (CP 31, Exhibit B) had N-S widths of 111.5 and 178 feet for the two Danielsen lots, adding to 289.5 feet, which matched the Danielsen Deed (CP 31, Exhibit A).

Mssrs. Danielsen and Brush went to their surveyed common corner and, with a 200' engineer's tape, measured the East line of the Danielsen property 289.5 feet Southerly, to find the Southeast corner for Danielsen's lot, and the boundary with the George parcel. As they did so, they found a white wooden surveyor's witness stake at about 111.5 feet South of the starting point, so they believed they were on the proper line. At 289.5 feet from the survey stake, they found a scattering of fence posts, and an old barbed wire cattle fence which appeared to be inside the measured line. Danielsen believed that having the logger cut trees to the fence would keep the logging well inside his property. CP 31, p. 3 ll. 1-11. He instructed the logger, Dan Morger to cut the trees to the fence and it was done.

Danielsen felt that the operation was so simple, measuring South from a survey stake, a short distance, that it did not seem prudent or necessary to involve the cost of a new land survey, based on a prior survey of his Northeast corner. He believed he was cutting on his own property, and that there was nothing reckless or unreasonable about it. CP 31, p. 3, ll. 18-22.

When Mr. George found the logging had occurred, he removed all the old fence posts and partial fence, including the painted white witness stake Danielsen and Brush had believed was on the surveyed line, then had his own survey done, and demanded compensation from Mr. Danielsen, . CP 31, p. 4 ll. 13-19, and p. 5 ll. 2-12. Eighteen (18) mature Douglas fir trees had been cut from the George property, in a strip roughly 101 feet long and perhaps 40 feet wide. CP 18, p. 8.

When Mr. Danielsen first saw Mr. George's new survey (CP 31, p. 5 l. 1 27; and Exhibit D to Declaration), he noticed that it moves lines around other fences in the area, and right through the house and structures of other neighbors to the West. He didn't know what that meant, but he couldn't afford his own survey although there were rumors of other conflicting surveys in the area. CP 31, p. 5 ll. 13-17. He also noticed that the survey Mr. George had done (Exhibit D to CP 31) listed Mr. Brush's prior survey in its list of references, and that Mr. Brush's survey showed the same bend in the road where he and Danielsen had found their common survey stake. CP 31, p. 5, ll. 18-23.

Mr. George's Complaint against Danielsen and logger Morger, CP 1, claimed damages under both RCW 4.24.630 (the waste statute) and RCW 64.12.030 (timber trespass), with claimed damages to be trebled,

with damages for related costs of restoration, etc..

George brought a motion for partial summary judgment, seeking a ruling that the defendants should be held liable for treble damages under both statutes, based on landscape valuation and restoration costs, in the amount of approximately \$150,000, against which no defense of mitigation should be permitted under RCW 64.12.040. A claim for emotional distress damages was reserved for trial. CP 15.

On hearing of George's pretrial "Motion for Partial Summary Judgment", the trial court had before it the following additional documents on which the parties based their arguments:

CP 16: Declaration of Jon E. Cushman in Support of Plaintiff's Motion for Partial Summary Judgment including: extracts from the Deposition of John Danielsen including his explanation of how he measured the boundary of his property to find the common boundary with the George property ; Ex. B, plat map used by Danielsen to measure the boundary; Ex. C, the entire Deposition of John Danielsen, pp. 2-5, and p. 10, especially; Ex. D, the Deposition of Dan Morger (with his observation of Danielsen and Mr. Brush measuring the N-S boundary line).

CP 19: Declaration of Galen Wright in Support of Plaintiff's Motion for Partial Summary Judgment (Mr. George's expert witness,

arborist and forester for expert opinion value). Included his observation that the area of the logging was essentially undisturbed other than as related to the logging.

(Not designated as a CP by appellant herein, and we didn't notice its omission until too late to designate it ourselves. We mention it here because Appellant included his response to it in his Clerk's Papers on Appeal: Defendant Morger Constructions, Inc. and Dan Morger's Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment; its content may be inferred from the trial court's later order granting the relief Morger sought.)

CP 24: Declaration of Peter Blansett in Support of Defendant Morger's Response to Plaintiff's Motion for Partial Summary Judgment, and Cross-Motion for Partial Summary Judgment (Morger's expert, arborist and forester/appraiser for expert opinion value, differing in landscape valuation and other details, with nothing indicating this was a "waste statute" case).

CP 25: Declaration of Kelley J. Sweeney in Support of Defendant Jim Morger Construction, Inc. and Dan Morger's Response to Plaintiff's Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment, with Exhibits including: Ex. B, portions of the

Deposition of John Danielsen relating to his measurement of the East boundary of his property from John Brush's survey stake to locate the boundary with George; and Ex. C, portions of Deposition of Dan Morger including his observation of John Danielsen and John Brush measuring the boundary to locate George's North line.

CP 29: Plaintiff's Response to Defendant Morger's Cross Motion for Partial Summary Judgment, including his argument that the "plain language of RCW 4.64.630" applies to "every person who removes timber from the land of another", and can be harmonized with the language of RCW 64.12.030 in a way that gives meaning to the exception in RCW 4.24.630(2) without rendering the general provision meaningless. At page 2, it notes that Morger had raised five issues, one of which sought to dismiss George's claims under RCW 4.24.630.

CP 30: Response of Defendant Danielsen to Plaintiff's Motion for Partial Summary Judgment, and Cross Motion for Partial Summary Judgment: in which Danielsen essentially confessed consent to judgment for single-damages trespass to trees under RCW 64.12.030 as mitigated under 64.12.040, but opposed application of RCW 4.24.630 and its additional remedies, based primarily on Gunn v. Riely, supra as applied to the facts, and submitting documents to support the existence of substantial

disputed evidence and genuine issues of material facts regarding the mitigation defense, which must be reserved for trial. Both Defendants contended that RCW 4.24.630 did not apply to the facts of the case based on RCW 4.24.630(2) expressly providing that the waste statute did not apply to unauthorized removal of trees from land of another if RCW 64.12.030 did apply.

CP 31: Declaration of John Danielsen on Summary Judgment Motion, explaining the manner in which he had measured and determined his common boundary with George based on an existing official survey stake on his Northeast property corner, the simple measurement of known distances for the width of his two adjacent lots, adding up to the total shown on his plat map and confirmed by his recorded Statutory Warranty Deed, as summarized above in our Statement of the Case. Also included his forester Vail Case's report, Exhibit G, treating the project as a simple logging show as timber trespass, with a mill value of the trees at \$1,678, which if trebled under RCW 64.12.030 would total \$5,036.10.

CP 36: Defendant Jim Morger Construction Inc. and Dan Morger's Reply in Support of Cross-Motion for Partial Summary Judgment, with further argument on the inapplicability of RCW 4.24.630, and application instead of RCW 64.12.030/.040 , citing again the exclusion provision of

RCW 4.24.630(2) to a case involving primarily timber trespass under Gunn v. Riely, supra.

CP 37: Plaintiff's Reply in Support of Motion for Partial Summary Judgment: seeking to strike portions of the Declaration of John Danielsen, and to distinguish Gunn v. Riely, supra, seeking to apply RCW 4.24.630 and deny either defendant a defense of mitigation under RCW 64.12.040.

CP 38: Declaration of Jon Cushman in Support of Plaintiff's Motion for Summary Judgment, providing a copy of materials on plant appraisal.

CP 41: Order on Motions for Partial Summary Judgment; Granting Defendant Morger's Motion for Partial Summary Judgment, dismissing any claim under RCW 4.24.630 including additional remedies, or any claim for conversion, denying Plaintiff's Motion for Partial Summary Judgment in regard to treble damages under RCW 64.12.030 and his motion for setting of damages as landscape value of \$45,054 as the proper measure of damages, but granting Plaintiff's motion in regard to single damages trespass by each defendant while reserving all damages issues for trial, together with the issue of "mitigation" under RCW 64.12.030/.040.

As summarized above, Defendant Morger then settled with George and did not participate in trial, which proceeded with a jury on September

28, 2015 (CP 78). The jury returned its Special Verdict Form on October 1, 2015. (See APPENDIX A). Economic damage for the 18 trees was set at \$12,500, single-value. The jury was not asked, so it is indeterminate, whether they adopted landscape value of the trees, or compromised based on mill value; at any rate, they rejected the elements of treble damages (i.e., by mitigation), and although they accepted Mr. George's argument that he suffered emotional distress from the logging of his property, they set the damages for that at \$0.00.

Mr. George elected to proceed on this Appeal without a Verbatim Report of Proceedings from the two-day trial, or admitted exhibits, so it is not possible for this Court to weigh the evidence as the jury did, beyond its review of the evidence to support the pretrial Motion on Partial Summary Judgment.

Mr. George then filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial. CP 81. As he had in his Trial Brief (CP 55), Mr. George focused his argument on the contention that Mr. Danielsen ought to have been held as a matter of law (under RCW 64.12.030/.040) to have acted without probable cause to believe that his trespass was on his own land, because he had not obtained a new survey and had based his location of the boundary on an amateur measurement.

And, again, that Mr. George ought to have had the additional remedies of RCW 4.24.630 because it provides that it applies to “every person who goes onto the land of another and who removes timber - - -.” CP 81, p. 4 II. 20-22.

Mr. Danielsen’s Response to Motion for Judgment N.O.V. observed that he and knowledgeable neighbor Mr. Brush had relied on a recorded survey and known survey stake, on a line marked by at least one white wooden witness stake in addition to the formal surveyor’s pin, and simply measured a short known distance confirmed by his Deed and plat map, to find what appeared to be an existing fence inside his own property. He had confirmed the other three of his four boundaries (CP 82, p. 1 line 26) before instructing the logger to cut to the found fence inside his measured property line. CP 82, p. 2. Thus, he had reasons for the mitigation under the applicable statute.

And, as to the application of RCW 4.24.630, we simply noted that the then-new Gunn v. Riely case seemed to be conclusive as a matter of law, on the facts. Then, as now, the Appellant has not identified any Washington case applying RCW 4.24.630 where the only damage was to timber or, if to the land, directly related and stemming from the logging and removal of trees. CP 82, p. 8.

The trial court denied Mr. George's Motion for Judgment N.O.V./New Trial (CP 86), and entered its Judgment on Jury Verdict in Favor of Plaintiff, on November 13, 2015, for damages of \$12,500 with costs and statutory attorney's fees (CP 95), and this appeal followed.

Mr. George has not challenged the jury's valuation amount of damages.

4. ARGUMENT AND AUTHORITIES

Mr. George's Assignments of Error # 1, and #2 are obverse sides of the same argument. The trial court denied Mr. George's motion for partial summary judgment, that RCW 4.24.630 instead of RCW 64.12.030/.040 should be applied to the facts before the trial court on pretrial motions, as it granted co-defendant Morger's cross-motion (in which Danielsen had joined) for partial summary judgment to dismiss the claims under the "waste statute". CP 41. The motion and cross-motion on the same issue must be considered and analyzed together.

Further, Mr. George cites the trial court's granting of Morger's cross-motion, as Assignment of Error #2: that was a pretrial decision in favor of a defendant who won on that motion but later settled out and was not involved in the trial. Danielsen joined Morger in that cross-motion, prevailed with Morger in dismissal of the "waste statute" claim, went alone

to trial under the “timber trespass” statute, and is the only Respondent on appeal on that issue. We proceed as if Assignment of Error #2 refers to Danielsen as prevailing party in the pretrial statutory issues.

Mr. George’s repeated argument is that, because Mr. Danielsen did not obtain an new survey, but instead relied on a knowledgeable neighbor’s recent professional survey of the adjacent lot to the North, to measure Danielsen’s Eastern boundary a measured distance to the vicinity of an old fence, and did not rely on the logger’s tentative flagging of an unsurveyed line for the Danielsen-George boundary, the logging which followed before George had a new survey done was not, as a matter of law, subject to mitigation under RCW 64.12.040.

That is because, Mr. George contends, the 1995 “waste statute” contains in its first broad statement that “- - - every person who goes onto the land of another and who removes timber - - -” is liable for treble damages and other remedies not available under the “timber trespass” statute and, under the “waste” statute there is no mitigation provision as there is under the ancient “timber trespass” statute.

Mr. George correctly notes that the appellate court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court, viewing the facts in a light favorable to the nonmoving party (here,

Danielsen), and that such motions can be granted only when the moving party produces evidence which can support only one reasonable conclusion. Should the nonmoving party fail to make a showing sufficient to establish a claim or defense on which it bears the burden of proof at trial, the court should grant the summary judgment. App. Br. P. 6, sec. 5.1.

Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). A material fact is one upon which the outcome of a litigation depends. Eriks v. Denver, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

The moving party bears the burden of showing the absence of an issue of material fact and the entitlement to judgment as a matter of law. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If shown, the burden shifts to the nonmoving party to set forth facts showing there is a genuine issue of material fact. Ranger Ins. Co., 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

Mr. George's motion for partial summary judgment relied on his claim that "undisputed evidence" showed that Danielsen did not have probable cause to believe the cut trees were on his own property. Mr. George ignores that Danielsen relied on a recorded survey via his neighbor Brush, and measured a short distance from an existing capped survey stake from that survey, simple measurements which matched the plat map and

the recorded deed, producing the boundary line on which Danielsen relied. George's later survey contested that line, but cited the neighbor's survey without reconciling the distance differences (the earlier survey was not shown to be defective). George lost on the facts on summary judgment because of the substantial evidence that this was a "timber trespass" case with an arguable mitigation defense for the trier of fact, not a "waste statute" case.

As to George's claim that the "waste statute" indisputably, and as a matter of law, supplanted the "timber trespass" statute, he ignored, and ignores now, that his own expert forester noted that the logging occurred with minimal disturbance to the land itself, and all claimed damage for landscape value, etc., was directly related to the simple logging show.

There were three different expert opinions on valuation, therefore material disputed evidence on that issue, none of whom recited damage to the land other than the minimal disturbance from the logging.

There was no clear undisputed showing of facts involving primarily waste to the George property, with damage to timber as a consequence of the injury to property itself, to invoke RCW 4.24.630.

Defendants Morger and Danielsen, in summary judgment documentation, established material facts supporting Danielsen's "timber

trespass” theory instead of a “waste statute” theory, and arguable grounds for mitigation under the applicable statute.

While they carried their burden on summary judgment, Mr. George did not. This Court may consider the same evidence, on the same issue.

RCW 4.24.630(2) expressly states that the statute does not provide damages in cases where RCW 64.12.030 applies. To read the statute otherwise is to permit an absurd result, and these types of results must be avoided. State v. J.P., 149 Wn.2d 444, 450, 69 P. 3d 316 (2003). Courts should assume the legislature means exactly what it says; plain words do not need construction. Davis v. DOL, 137 Wn.2d 957, 963-64, 977 P. 2d 554 (1999). *See also* State v. Pesta, 87 Wn.App. 515, 521, 942 P.2d 1013 (1997): “The primary objective of statutory construction is to carry out the intent of the Legislature by examining the language of the statute.”

However, the argument presented by Mr. George, that the “waste statute” applies in all cases in which a person goes onto land of another and removes timber, subjecting the actor to treble damages without mitigation as in the “timber trespass” statute, requires that the Legislature intended to effectively supercede the “timber trespass” statute and render it useless.

That cannot be so, and we contend that the distinction between the two statutory schemes is as this Court defined it, fact-dependent, restated

perhaps as this: If the facts indicate that the injury was primarily to the land by a wrongful trespass as defined by RCW 4.24.630, such as a mining operation or excavation, resulting coincidentally in removal of timber, that statute could apply, and would be subject to pretrial fact-based arguments of summary judgment. However if, as in the facts of Gunn v. Riely, supra and the present case, disturbance to the land itself was only coincidentally related to and caused by the logging, the “timber trespass” statute could apply. That harmonizes the statutes as intended.

There is no direct conflict between the exception rule of RCW 4.24.630(2) and the general provision of RCW 4.24.630(1), read in the light of common sense.

RCW 64.12.030, the timber trespass statute, was adopted by the state legislature to punish voluntary offenders by trebling the actual present damages and to discourage a person from carelessly or intentionally removing another’s merchantable trees on the chance that the enterprise will be profitable if actual damages only are incurred. Happy Bunch LLC v. Grandview North LLC, 142 Wn.App. 881, 173 P.3d 959 (2007). As the statute is punitive in character, it must be strictly construed. Rayonier v. Polson, 400 F.2d 909, 922 (9th Cir. 1968). The relief it provides is exclusive and cannot be extended by implication. (Id., citing 22 Am.Jur.2d,

Damages sec. 267-268 (1965).

The mitigation statute, RCW 64.12.040, enacted as a companion to the timber trespass statute, reflects a legislative intent to withhold punitive damages if the trespass was an honest mistake or done under circumstances making unwarranted the imposition of exemplary damages. Rayonier v. Polson, supra, at 920-921. Therefore, a plaintiff can only recover single damages when a defendant shows his trespass was either casual or involuntary, or that he “had probable cause to believe that the land on which such trespass was committed was that of the person in whose service or by whose direction the act was done - - -.” RCW 64.12.040.

The determination as to whether the trespass was involuntary or made in good faith is for the jury to decide. Hawley v. Sharley, 40 Wn.2d 47, 49, 240 P.2d 557 (1952). In the context of a trespass to timber, the question of whether one acted “wilfully”, so as to impose treble damages, has always been treated as one of fact, and our Supreme Court has said the issue is for the finder of fact and has refused to disturb findings based on substantial evidence. Hendrickson v. Lyons, 33 Wn.2d 47, 49, 240 P.2d 557 (1952).

That rule applies, here, to both the pretrial rulings and the post-trial one.

No case cited by Appellant George stands for the proposition that any change in the law, or judicial construction of it, permits the premature termination of a defendant's ability to prove mitigation under RCW 64.12.040, rather than having to prove that the acts of trespass were not "wrongful" under RCW 4.24.630 (as Appellant would have us believe), in a case in which the damage to the land was only as a consequence of the removal of timber as discussed in Gunn v. Riely, supra. There is no reason to overrule that case. The statutes have distinguishable applications.

Parenthetically, if this case had been tried under the "waste statute" (assuming *arguendo* that the facts were of waste to the land with only incidental injury to trees), it would remain that the same facts would have been considered on the issue of Mr. Danielsen's "wrongfulness" under that statute, and Mr. George lost on that issue, by any statutory construction.

Mr. George did not have the facts for a successful "waste statute" case.

In Gunn v. Riely, the Court of Appeals based its decision that RCW 4.24.630 did not apply because of its determination that "there was no evidence or damages awarded related to waste or damage to the land." 185 Wn.App. at 527. In that case, as in this one, the value of the cut trees

even trebled was far less than the cost of restoration, survey work, costs and attorney's fees, but the Court held that where the damages are directly related to the removal of the trees, not waste to the land, RCW 54.12.030/.040 applies and RCW 4.24.630 does not by its own terms. Here, Plaintiff's own expert witness, Galen Wright, opined without contradiction from the other two experts in the written opinions, that the land was essentially undisturbed but for the removal of the trees.

This case was decided under then-recent Division II case of Gunn v. Riely, supra, which remains the controlling appellate decision. No reported case has since been published distinguishing, criticizing or reversing it or its reasoning.

Mr. George, however, quixotically continues to assert that (despite the clear and unambiguous statement of RCW 4.24.630(2) that the waste statute does not apply to cases of timber trespass under RCW 64.12.030/.040), this Court was wrong when it held that when there was no evidence of damage to the land, other than as resulting from the logging itself, the "timber trespass" statute applies and the "waste statute does not. He asks this Court to reverse that rule, because he contends that the language of the "waste statute" simply supercedes that of the "timber trespass" statute, and this Court failed to harmonize the overlapping

language of the two statutory schemes. This Court, he says, did not address the direct conflict of the waste statute's exclusion and its general provisions. App. Br. P. 16. We contend that it did, the law is sensible and correctly applied and need not deserve further construction by this Court, on these facts.

CONCLUSION:

On both the pretrial hearing on partial summary judgment, and on the post-trial motion for judgment notwithstanding the verdict and for new trial, there was a record of substantial evidence that the trespass of John Danielsen onto the land of Kirk George was inadvertent, involuntary, with probable cause to believe that the land and trees were his own, with his un rebutted statement of intent to hold back from the measured line to an old fence believed to be within Mr. Danielsen's own property.

The appellant chose not to send up the trial Report of Proceedings with testimony, and admitted exhibits, so elected to rely on his emotional statements that Mr. Danielsen should have had another survey (besides the one used, we note) although Mr. George did nothing to explain the apparent contradiction of known surveys and markers on the property at the time of the logging.

But for Mr. George's argument of a purported conflict between the

general and limiting provisions of the “waste statute”, this might properly be argued as a frivolous case on appeal, but with that we submit that the issues are properly resolved as is.

This Court should affirm the clear decision of the jury (APPENDIX B), and the trial court’s Judgment CP 95, without costs to either party.

Submitted this 11th day of April, 2016.



W.C. Henry, WSBA 4642
Attorney for Respondent
chenrvpt@qwestoffice.net
Henry & Allen, Attorneys
2000 Water Street
Port Townsend WA 98368
(360) 385-2229

Statutes on Timber Trespass / Waste

RCW 4.24.630

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

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

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

[1999 c 248 § 2; 1994 c 280 § 1.]

RCW 64.12.030

Injury to or removing trees, etc. — Damages.

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.021, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

[2009 c 349 § 4; Code 1881 § 602; 1877 p 125 § 607; 1869 p 143 § 556; RRS § 939.]

RCW 64.12.040 Mitigating circumstances - Damages

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

[Code 1881 § 603; 1877 p 125 § 608; 1869 p 143 § 557; RRS § 940.]

FILED

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

OCT - 1 PM 2:50
JEFFERSON COUNTY
RUTH GORDON, CLERK

ERNEST KIRK GEORGE,

Plaintiff,

v.

JOHN DANIELSEN, a single adult male;
JOES DOES 1-3,

Defendants.

No. 13-2-00098-8

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: How many of Plaintiff's trees were cut by Defendant or persons acting under his direction?

Answer: 18 (insert the number)

QUESTION 2: What do you find to be the amount of economic damages caused by Defendant's trespass and cutting of trees on Plaintiff's property?

\$ 12,500

QUESTION 3: (Only answer YES to one of the following choices) When Defendant directed Morger to cut Plaintiff's trees, did Defendant Danielsen act:

Willfully or recklessly?

YES _____

NO X

Casually or involuntarily?

YES _____

NO X

Or with probable cause to believe that Defendant's trespass was on Defendant's land?

YES X

NO _____

QUESTION 4: Did Plaintiff suffer ^{mental anguish and emotional distress} ~~emotional injury~~ as a result of Defendants' trespass and cutting of trees on Plaintiff's property?

YES X

NO _____

QUESTION 5: What do you find to be amount of noneconomic (emotional) damages caused by Defendants' trespass and cutting of trees on Plaintiff's property?

\$ 0

DATED this 1 day of October, 2015.



Presiding Juror

No. 48222-3-II
Jefferson County Cause No. 13-2-00098-8
IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

ERNEST KIRK GEORGE,
Appellant

v.

JOHN DANIELSEN,
Respondent.

2016 APR 13 AM 11:16
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE

I CERTIFY under penalty of perjury under the laws of the State of Washington that on April 11, 2016 I caused the original of the Brief of Respondent herein, and a copy thereof, to be filed and served by the method below, and addressed to each of the following:

Court of Appeals, Div. II 950 Broadway #300 Tacoma WA 98402	U.S. Mail, postage prepaid Original and copy
Kevin Hochhalter, Atty. At Law Cushman Law Offices P.S. 924 Capital Way South Olympia WA 98501	U.S. Mail, postage prepaid (copy)

Submitted this 11th day of April, 2016.



W.C. Henry, WSBA 4642
Attorney for Respondent
2000 Water Street // PO Box 576
Port Townsend WA 98368
(360) 385-2229
chenrypt@qwestoffice.net