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DIVISION II
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Court of Appeals No. 48786-1-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

OLIVIA HERRING and WILLIAM HERRING, husband and wife,
Plaintiffs/Respondents,

v.

JOSE PELAYO and BLANCA PELAYO,
Defendants/Appellants.

APPELLANTS' BRIEF

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III. ASSIGNMENTS OF ERROR

1. The trial court's findings do not support its conclusion that all the requirements of timber trespass have been met.
2. The trial court's erred in concluding there were no mitigating circumstances.
3. The trial court erred in awarding damages to plaintiffs.
4. The trial court erred in awarding attorney fees to plaintiffs.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the failure of the trial court to make findings on the issues of willfulness and lawful authority prevent the trial court from finding that actions of Defendants constituted timber trespass under RCW 64.12.030? (Pertains to Assignments of Error Nos. 1, 3, 4)
2. Did the failure of the trial court to make findings on the issues of willfulness and lawful authority prevent the trial court from concluding all of the legal requirements for the establishment of timber trespass on the part of defendants have been met? (Pertains to Assignments of Error Nos. 1, 3, 4)
3. Absent finding defendants acted willfully and without lawful authority, do plaintiffs fail to state a claim for timber trespass under RCW 64.12.030? (Pertains to Assignments of Error Nos. 1, 2, 3, 4).

4. Did defendants have probable cause to believe the land where they stood when they cut branches from the tree was their own?
(Pertains to Assignments of Error Nos. 2, 3, 4).
5. As the trial court made no finding of willfulness, must its award of treble damages against defendants be reversed? (Pertains to Assignments of Error Nos. 1, 3, 4).
6. By exercising their common law right to cut encroaching vegetation, did defendants exercise lawful authority? (Pertains to Assignments of Error Nos. 1, 3, 4).
7. Is the trial court's award of attorney fees to plaintiffs unsupported by either RCW 64.12.030, RCW 64.12.040 or RCW 4.24.630?
(Pertains to Assignments of Error No. 4).

V. STATEMENT OF THE CASE

1. Facts

Appellants (hereinafter referred to as defendants) are husband and wife residing at 15210 41st Ave NW in Gig Harbor.¹ Respondents (hereinafter referred to as plaintiffs) are defendants' neighbors residing at 15304 41st Ave NW in Gig Harbor.² Plaintiffs purchased their property in 1979.³ Defendants purchased their property in 1989.⁴ Plaintiffs and

¹ CP 2.

² CP 2; RP 2/20/26 p. 15. l. 14-17; l. 23-24 .

³ CP 3.

defendants share a common property line.⁵ Plaintiffs and defendants know each other but are not friends.⁶ Defendants feel plaintiffs do not like Mexicans.⁷ Defendant Jose Pelayo works as a maintenance man and a gardener.⁸

At the center of this controversy is a large, mature Douglas fir tree located on the parties' common boundary.⁹ The tree is approximately 60 feet tall.¹⁰ The tree was there when plaintiffs moved onto the property in 1979.¹¹

In December, 2011, plaintiffs hired Roger Nuttall to work on the tree.¹² Plaintiffs asked Mr. Nuttall to "sail" the tree to allow wind to blow through the tree to make it less likely to be blown over in a windstorm.¹³ The prevailing winds blow west to east toward plaintiffs' house.¹⁴

Mr. Nuttall runs a tree service.¹⁵ M. Nuttall trims, tops, and removes trees and does stump grinding.¹⁶ Mr. Nuttall has 30 years'

⁴ CP 3.

⁵ RP 2/20/16, p. 15, l. 25-p. 16 l. 1.

⁶ RP 2/20/16, p. 43, l. 13-21.

⁷ RP 2/20/16, p. 60, l. 21-25.

⁸ RP 2/20/16, p. 68 l. 5-7.

⁹ CP 3.

¹⁰ CP 3.

¹¹ RP 2/20/16, p. 19 l. 24-25.

¹² RP 2/20/16, p. 20 l. 11-16.

¹³ RP 2/20/16, p. 21 l. 7-16.

¹⁴ RP 2/20/16, p. 21 l. 17-20; p. 22 l. 12-18.

¹⁵ RP 2/20/16, p. 72 l. 12-13.

¹⁶ RP 2/20/16, p. 72 l. 14-15.

experience in his trade.¹⁷ Mr. Nuttall works mostly for himself.¹⁸ Mr. Nuttall has worked several times for plaintiffs over the past 20 years.¹⁹

Mr. Nuttall cut the tree on December 9, 11, 2011.²⁰ Mr. Nuttall cut the tree to let the wind flow more easily through the tree.²¹ The action performed by Mr. Nuttall on the tree is known as “*wind sailing*.”²²

Mr. Nuttall’s actions left no branches on plaintiffs’ side of the tree.²³ Mr. Nuttall normally takes a balanced approach to wind sailing a tree, taking branches from all around the tree.²⁴ Mr. Nuttall acknowledged that his actions left the tree unbalanced. “*She’s a little heavy on the one side there; that’s for sure.*”²⁵

Defendants took a photograph of the tree on December 9, 2011.²⁶ Defendants were of the opinion that the tree was dangerous and about to fall.²⁷ Defendant Jose Pelayo was fearful that the tree represented a danger to defendants’ house and family.²⁸ The tree was located about 25 to 30 feet

¹⁷ RP 2/20/16, p. 72 l. 20-21.

¹⁸ RP 2/20/16, p. 73, l. 5-11.

¹⁹ RP 2/20/16, p. 74, l. 1-2.

²⁰ RP 2/20/16, p. 74 l. 16-24; EX 13A, 13B.

²¹ RP 2/20/16, p. 75 l. 1-4.

²² RP 2/20/16, p. 75 l. 5-6.

²³ RP 2/20/16, p. 76 l. 20-23; EX 13E.

²⁴ RP 2/20/16, p. 83, l. 15-24.

²⁵ RP 2/20/16, p. 81, l. 9-14; EX 13A, 13B.

²⁶ RP 2/20/16, p. 54 l. 6-17; EX 13A.

²⁷ RP 2/20/16, p. 54 l. 18-22.

²⁸ RP 2/20/16, p. 59 l. 6-9.

from defendants' house.²⁹ As a result of the cutting by plaintiffs' tree trimmer, defendants observed the tree was leaning toward their house.³⁰ The tree was leaning toward defendants' property because all the weight had been taken off the other side of the tree.³¹

Therefore, defendants contacted a tree trimmer to cut the branches on their side of the property.³² Defendants contacted Timothy Jones on December 11, 2011.³³ Mr. Jones is a self-employed tree service worker.³⁴ Mr. Jones does tree preservation work, pruning and thinning trees.³⁵ Mr. Jones has been self-employed for four years.³⁶ Mr. Jones previously worked for Evergreen Tree Care for five years.³⁷ While working for Evergreen, Mr. Jones worked as a lead of a five man crew for three and one-half years.³⁸ Mr. Jones has a total of 25 years' experience doing tree work.³⁹

²⁹ RP 2/20/16, p. 59 l. 10-12

³⁰ RP 2/20/16, p. 66 l. 13-23; EX 13D

³¹ RP 2/20/16, p. 69 l. 21-p. 70 l. 6; EX 13A, 13B.

³² RP 2/20/16, p. 54 l. 25-p. 55 l. 9.

³³ RP 2/20/16, p. 60 l. 10-13; p.

³⁴ RP 2/20/16, p. 87 l. 6-22.

³⁵ *Ibid.*

³⁶ RP 2/20/16, p. 87 l. 23-25.

³⁷ RP 2/20/16, p. 88 l. 1-7.

³⁸ RP 2/20/16, p. 88 l. 7-12.

³⁹ RP 2/20/16, p. 88 l. 20-23.

Mr. Jones visited defendants at their house on December 9 and 11, 2011.⁴⁰ What Mr. Jones observed disturbed him. *“And I couldn’t believe it. It was the most ridiculous thing I ever seen. If it was a danger, all I know is I wouldn’t--where his house in in proximity of this tree. I wouldn’t have my family sleeping in there.”*⁴¹

Mr. Jones has wind sailed at least 1000 trees.⁴² According to Mr. Jones, the preferred method for wind sailing a tree is to cut the small vegetation from the tree branches to a three-foot diameter around the tree, thereby cleaning out the whole center of the tree, a process known as centering and balancing.⁴³

Mr. Jones has never wind sailed just one side of a tree.⁴⁴ Cutting just one side would result in the tree growing faster on that side.⁴⁵ Mr. Jones had never seen a one-sided wind sailing job on a tree before.⁴⁶

Mr. Jones was of the opinion that the entire tree had to come down because of its proximity to defendants’ house.⁴⁷ Mr. Jones also noted the

⁴⁰ RP 2/20/16. p. 90 l. 6-8.

⁴¹ RP 2/20/16. p. 89 l. 21-24.

⁴² RP 2/20/16. p. 96 l. 1-3.

⁴³ RP 2/20/16. p. 96 l. 6-14.

⁴⁴ RP 2/20/16. p. 96 l. 15-24.

⁴⁵ RP 2/20/16. p. 97 l. 3-6.

⁴⁶ RP 2/20/16. p. 97 l. 7-9; EX 13

⁴⁷ RP 2/20/16. p. 98 l. 14-24; EX 13.

root ball of the tree was elevated, increasing the possibility the tree would topple in the wind.⁴⁸

M. Jones offered to take down the entire tree.⁴⁹ Defendants were reluctant to cut down the tree entirely in view of plaintiffs' ownership of half of the tree.⁵⁰ Therefore Mr. Jones recommended to defendants to remove the remaining branches on their half of the tree.⁵¹

Mr. Jones was of the opinion defendants could remove the branches on their half of the tree. "*He could take the limbs off that were hanging over his property legally. I've run into this situation many times.*"⁵²

It took Mr. Jones 45 minute to an hour to cut the remaining branches from the tree.⁵³ Mr. Jones observed the tree was leaning when he started to cut it, and then straighten as he cut it.⁵⁴

⁴⁸ RP 2/20/16. p. 97 l. 24-p. 98 l. 13.

⁴⁹ RP 2/20/16. p. 104 l. 6-17.

⁵⁰ RP 2/20/16. p. 61 l. 10-15.

⁵¹ RP 2/20/16. p. 97 l. 13-20.

⁵² RP 2/20/16. p. 103 l. 12-14.

⁵³ RP 2/20/16. p. 61 l. 20-24.

⁵⁴ RP 2/20/16. p. 90 l. 15-24.

2. Procedural posture

Plaintiffs commenced this action on December 23, 2014, by filing a complaint for timber trespass under RCW 64.12.03, or in the alternative trespass under RCW 4.24.630.⁵⁵ Defendants answered.⁵⁶ The matter came on for trial on February 10, 2016.⁵⁷

On February 26, 2016, the trial court entered findings of fact and conclusions of law.⁵⁸ Therein, the trial court found, *inter alia*, that the actions of defendants constituted timber trespass under RCW 64.12.030.⁵⁹ The trial court also found RCW 64.12.040 (mitigating circumstances) did not apply.⁶⁰ The trial court also concluded all of the elements of timber trespass under RCW 64.12.03 had been established.⁶¹ The trial court also concluded there were no mitigating circumstances.⁶² The trial court awarded plaintiffs treble damages in the amount of \$2,970.00.⁶³ The trial court also awarded plaintiffs' attorney fees and costs in the amount of

⁵⁵ CP 2-5.

⁵⁶ CP 11-13.

⁵⁷ VRP 2/10/16.

⁵⁸ CP 101-104; App. 1.

⁵⁹ CP 102; App. 1.

⁶⁰ *Ibid.*

⁶¹ CP 103; App. 1.

⁶² *Ibid.*

⁶³ *Id.*

\$6,505.00.⁶⁴ Also, on February 25, 2016, the trial court entered judgment for plaintiff in the amount of \$10, 475.00.⁶⁵

On March 25, 2016, defendants filed a notice of appeal.⁶⁶

VI. ARGUMENT

A. Standards of Review

On review of a case tried before the court, the Court of Appeals reviews findings of fact for substantial evidence and whether the findings support the trial court's conclusions. *Landmark Development, Inc. v. City of Roy*, 138 Wn. 2d 561, 573, 980 P. 2d 1234 (1999); *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P. 3d 1081, (2006). Conclusions of law are reviewed *de novo*. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn. 2d 873, 880, 73 P. 3d 369 (2003); *Korst v. McMahon*, 136 Wn. App. 206.

B. The trial court's findings do not support its conclusion that all the requirements of timber trespass have been met.

Error is assigned to the trial court's failure to find Appellants' actions were willful.⁶⁷ Error is also assigned to Finding 12: "*The actions*

⁶⁴ CP 104: App. 1.

⁶⁵ CP 105-06: App. 2.

⁶⁶ CP 109-118.

⁶⁷ CP 101-104: App. 1.

*of the Pelayos constituted Timber Trespass under RCW 64.12.030.*⁶⁸

Error is also assigned to the trial court's failure to address RCW 64.12.030's requirement to establish defendants' actions were "without lawful authority." Error is also assigned to Conclusion 1: "All of the legal requirements for the establishment of Timber Trespass, on the part of Defendants, have been met."⁶⁹

RCW 64.12.030 provides as follows:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, 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.

The word "willful" does not appear in RCW 64.12.030, or in RCW 64.12.040, for that matter. Nevertheless, Washington courts have imposed an element of intent as part of the statute, in view of its penal nature.

⁶⁸ CP 102. Finding 12 is actually a conclusion of law, and should be addressed for what it is. *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P. 2d 968 (1978) ("The fact that a court designates its determination as a "finding" does not make it so if it is in reality a conclusion of law. Under Washington practice, a conclusion of law mislabeled as a finding, will be treated as a conclusion.").

⁶⁹ CP 103.

Gardner v. Lovergren, 27 Wash. 356, 362, 67 P. 615 (1902) (“...Being, then, of a penal nature, it must be construed as other penal statutes are construed: viz., the intent to commit the trespass must appear.”).

Accordingly, Washington courts require a plaintiff claiming a violation of this statute to prove willful conduct on the part of the defendant. *Blake v. Grant*, 65 Wn. 2d 410, 412, 397 P. 2d 843 (1964) (“The rule is well established in Washington that there must be an ‘element of willfulness’ on the part of the trespasser to support treble damages. (Citations omitted)”).

Plaintiffs have the burden of proving willfulness. In *Seattle First National Bank v. Brommers*, 89 Wn. 2d 190, 570 P. 2d 1035 (1977), the court held that once the plaintiff establishes a trespass and willfulness, the burden of proof shifts to the defendant to show the trespass was causal or involuntary or was done with probable cause to believe the land was his own or that of the person in whose service or by whose direction the act was done, so that single damages only would be awarded to the plaintiff. 89 Wn. 2d 197-98. Here, however, because the trial court never entered a finding of willfulness, the burden of proof never shifted to defendants.

The question of whether one acted “willfully” for purposes of trebling damages is a factual issue for the trier of fact. *Sherrel v. Selfors*, 73 Wn. App. 596, 604, 871 P. 2d 168, review denied, 125 Wash.2d 1002.

886 P.2d 1134 (1994); *Trotzer v. Vig*, 149 Wn. App. 594, 610, 203 P. 3d 1056, *review denied*, 166 Wash.2d 1023, 217 P.3d 336 (2009). The court must make a finding on every material issue in a case. *Federal Signal Corp., v. Safety Factors, Inc.*, 125 Wn. 2d 413, 422, 886 P. 2d 172 (1994); *Daughtry v. Jet Aeration Co.*, 91 Wn. 2d 704, 707, 592 P. 2d 631 (1979). The trial court therefore erred in failing to make a finding of fact on willfulness.

Without a finding of willfulness, the trial court's award of treble damages cannot stand, as punitive damages under the Timber Trespass Statute are narrowly construed. *Birchler v. Castello Land Co. Inc.*, 133 Wn. 2d 106, 110-11, 942 P. 2d 968 (1997).

Remand to the trial court for entry of a finding on willfulness is not required here, as in the absence of such a finding, the court will imply a finding against the party having the burden of proof on that issue. *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702, 754 P. 2d 1262, *review denied*, 111 Wash.2d 1014 (1988); *Rhodes v. Gould*, 19 Wn. App. 437, 441, 576 P. 2d 914, *review denied*, 90 Wash.2d 1026 (1978).

Here, because there is no finding of willfulness, the trial court's award of treble damages against defendants must be reversed. *Trotzer v. Vig*, 149 Wn. App. 610.

RCW 64.12.030 also requires plaintiffs to establish defendants acted “without lawful authority.” Neither the trial court’s findings nor its conclusions address this issue. In *Mustoe v. Ma*, 191 Wn. App. 161, 371 P. 3d 544 (2015), the Court of Appeals affirmed the dismissal of the plaintiff’s claims for negligence, nuisance and timber trespass in a case involving the defendant-neighbor’s severing of encroaching roots that extended onto the defendants’ property from two Douglas fir trees located on the plaintiff’s property. After rejecting the plaintiff’s negligence and nuisance claims, the court addressed the plaintiff’s timber trespass claim:

Finally, Mustoe argues she is entitled to damages under the timber trespass statute, RCW 64.12.030. The statute reads “[w]hensoever any person shall cut down, girdle, or otherwise injure, or carry off any tree, ... timber, or shrub on the land of another person, ... 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.” RCW 64.12.030. By its own terms, the statute only applies to persons acting without lawful authority. Because Mustoe has not shown that Jordan acted unlawfully when he removed roots that encroached onto Ma’s property, the claim fails.

371 P. 3d 548.

In *Mustoe*, the court reaffirmed *Gostina v. Ryland*, 116 Wash. 228 199 P. 298 (1921). In *Gostina*, the court recognized the rule that an adjoining landowner's remedy "is to clip or lop off the branches or cut the roots at the [property] line." 116 Wash. 233. In *Mustoe*, the court also rejected the plaintiff's arguments an adjoining landowner's right to cut encroaching vegetation was limited by a duty of good faith. 371 P. 3d 546-47.

Mustoe and *Gostina* compel a similar conclusion here, that absent a finding defendants acted without lawful authority, plaintiffs fail to state a claim for timber trespass under RCW 64.12.030.

The fact that the tree in question is located on the parties' property line does not alter the outcome here. Neither *Mustoe* nor *Gostina* recognize such a distinction. Nor should defendants' right to cut encroaching vegetation depend on whether the tree is located on the property line or not. Defendants' right to cut encroaching vegetation should not be less when the tree is on the property line than when it is on adjoining property.

Happy Bunch, LLC v. Grandview North, LLC, 142 Wn. App. 81, 173 P.3d 959 (2007) does not compel a contrary conclusion here. In *Happy Bunch*, the defendant ordered the trees on the parties' property line to be cut down. Here, in contrast, defendants did not cut down the tree.

Instead, defendants exercised their time-honored right to remove overhanging vegetation. In *Happy Bunch*, the defendant did not cross-appeal the trial court's judgment, and therefore could not challenge the judgment against defendant for timber trespass. Here, in contrast, defendants timely filed a notice of appeal of the trial court's judgment.⁷⁰

In light of the foregoing, Finding 12 is not supported by substantial evidence. Alternatively, Finding 12 is an erroneous conclusion. In either event, Finding 12 does not support Conclusion 1.

C. The trial court's erred in concluding there were no mitigating circumstances.

Error is assigned to the trial court's Finding 13: "*RCW 64.12.040 (Mitigating circumstances) does not apply.*"⁷¹ Error is also assigned to Conclusion 2: "*There are no mitigating circumstances.*"⁷²

At issue is RCW 64.12.040:

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 or her 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

⁷⁰ CP 109-118.

⁷¹ CP 102: App. 1.

⁷² CP 103: App. 1.

for single damages.

All of the tree branches cut by defendants were cut while they stood on their property.⁷³ Therefore, defendants had probable cause to believe the land where such actions were taken was their own. Under RCW 64.12.040, any judgment rendered against defendants should have been for single damages only.

D. The trial court erred in awarding damages to plaintiffs.

Error is assigned to the trial court's Conclusions of Law 3, 6 and 7.⁷⁴ Error is also assigned to paragraphs 1 and 2 of the Judgment.⁷⁵ Error is also assigned to the Judgment Summary.⁷⁶ Because plaintiffs have failed to establish the elements of willfulness and lack of lawful authority on their claim under RCW 64.12.030, and because mitigating factors exist under RCW 64.12.040, it follows that the court had no authority to award damages of any amount against defendants, let alone treble damages. Defendants incorporate herein the arguments and authorities in Paragraphs A-C, above.

⁷³ VRP 2/10/16, p. 61 l. 16-p. 62 l. 6; p. 63 l. 10-15.

⁷⁴ CP 103-04: App. 1.

⁷⁵ CP 105-06: App. 2.

⁷⁶ CP 99-100.

E. The trial court erred in awarding attorney fees to plaintiffs.

Error is assigned to Finding of Fact 18.⁷⁷ Error is also assigned to Conclusion 6.⁷⁸ Error is also assigned to paragraphs 1 and 2 of the Judgment.⁷⁹ Neither the trial court's Findings and Conclusions or its oral ruling reveal the authority for the trial court's award of attorney fees to plaintiffs. No support for the award of attorney fees can be found in either RCW 64.12.030 or 64.12.040.

The trial court had a short discussion during the recitation of its oral decision regarding the application of RCW 4.24.630 to the facts of this case:

These were a couple of statutes that were cited that might apply. RCW 4.24.630 talks about liability for damage to land. I note that subsection (2) of the statute says This section does not apply in a case where the liability for damages is provided under RCW 64.12.030, also I read that to mean the legislature means this is a more general statute. The more specific statute, RCW 64.12.030, would apply. 64.12.030 was mentioned a number of times at trial. It's relatively short.⁸⁰

Notwithstanding its recognition that RCW 4.24.630 was inapplicable, at the hearing on March 26, 2016, the trial court once again

⁷⁷ CP 103: App. 1.

⁷⁸ CP 104: App. 1.

⁷⁹ CP 105-06: App. 2.

⁸⁰ RP 02/16/16 p. 144. l. 25-p. 145 l. 9.

took the position that RCW 4.24.630 applied in this case. “*We’ve got a statute here that provides for attorney fees. ...*”⁸¹ The trial court apparently ignored the plain language of RCW 4.24.630 (2): “*This section does not apply in any case where liability for damages is provided under RCW 64.12.030...*”

RCW 4.24.630 has no application here, as the trial court’s findings and conclusions on damages were exclusively limited to damage to the tree.⁸² No award was given for waste or damage to the land. Therefore, RCW 4.24.630 is inapplicable to this case. *Gunn v. Riley*, 185 Wn. App. 517, 536-27, 344 P. 3d 1255, *review denied*, 183 Wash.2d 1004, 349 P.3d 857 (2015).

VII. CONCLUSION

The trial court’s failure to make findings on willfulness and lack of lawful authority is fatal to its conclusion that the elements of timber trespass under RCW 64.12.030 have been met. The trial court’s finding and conclusion there were no mitigating factors are erroneous, as defendants had probable cause to believe the land where such actions were taken was their own. Because the elements of timber trespass have not been met, the trial court erred in awarding damages to plaintiffs. There is

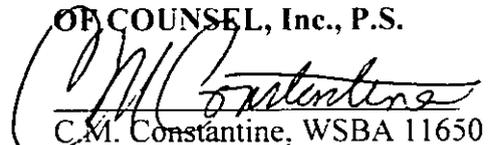
⁸¹ RP 02/66/16 p. 156, l. 24-25.

⁸² CP 102-03: App. I.

no legal basis for the trial court's award of attorney fees. The trial court's judgment should therefore be dismissed.

Respectfully submitted,

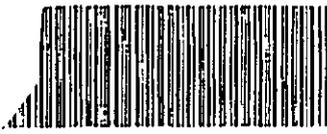
OF COUNSEL, Inc., P.S.



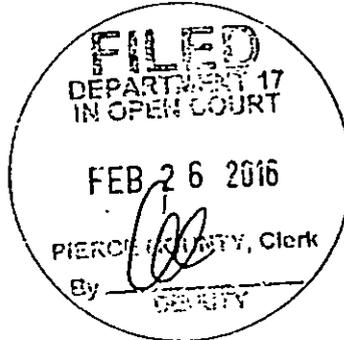
C.M. Constantine, WSBA 11650
Of Attorneys for Appellants

VIII. APPENDICES

1. Findings of Fact & Conclusions of Law
2. Judgment



46447215 FNCL 02-29-16



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

OLIVIA HERRING and WILLIAM HERRING,
husband and wife,

No. 14-2-15260-0

Plaintiffs,

FINDINGS OF FACT &
CONCLUSIONS OF LAW

vs.

JOSE PELAYO and BLANCA PELAYO,
individually, and as husband and wife, and the
marital community therein,

Defendants.

THIS MATTER having been duly and regularly brought before the Court for trial on
February 10, 2016, and the court having heard the testimony of the parties, having reviewed
the exhibits on file herein, having heard the arguments of counsel and therefore being fully
advised in the premises, now makes the following:

FINDINGS OF FACT

1. The parties in this action are neighbors with a common property line.
2. There is a boundary tree (large Douglas Fir) on the property line of these parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RICHARD P. PATRICK

Attorney at Law

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Gig Harbor, WA 98335

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3. The Herrings own a 66% undivided interest in the boundary tree.

4. The Pelayos own a 34% undivided interest in the boundary tree.

5. On or about December 2, 2011, the Herrings hired and instructed a tree trimmer to remove some of the branches off the boundary tree, in an effort to "wind sail" the tree.

6. The Herrings did not discuss their plan to remove branches from the tree, with the Pelayos.

7. The removal of the branches by the Herrings on or about December 2, 2011 did not kill the tree.

8. The Pelayos believed that due to the Herrings actions (the removal of some the branches) the tree was now unbalanced and created a danger to the Pelayos and their property, believing that the tree was going to fall on their home.

9. On or about December 31, 2011, the Pelayos hired and instructed a tree trimmer to remove all of the remaining branches from the boundary tree.

10. The Pelayos did not discuss their plan to remove all of the remaining branches from the boundary tree, with the Herrings.

11. The removal of all the remaining branches from the boundary resulted in killing the tree.

12. The actions of the Pelayos constituted Timber Trespass under RCW 64.12.030.

13. RCW 64.12.040 (Mitigating Circumstances) does not apply.

14. The Herrings did not seek remedy in this matter with unclean hands.

15. The boundary tree was not a timber tree, but was a privacy screen type tree.

16. The boundary tree had value other than timber or stumpage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
- 2

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17. The boundary tree had a value of One Thousand Five Hundred Dollars (\$1,500.00).

18. The Court awards reasonable attorney fees and costs to the Herrings as determined by this Court based on an attorney fee declaration filed herein.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

This Court has jurisdiction over the parties and the subject matter in this cause of action.

1. All of the legal requirements for the establishment of Timber Trespass, on the part of Defendants, have been met.

2. There are no mitigating circumstances.

3. That the Plaintiffs are entitled to a Judgment entered against Defendants, jointly and severally, in the amount of: 66% of the value of the tree, trebled; an amount equal to Two Thousand Nine Hundred Seventy Dollars (\$2,970.00):

derived from the algorithm: $(.66 \times \$1,500) \times 3 = \$2,970$

P.P. 

4. That the Plaintiffs are entitled to a Judgment entered against Defendants, jointly and severally, in the amount of Two Hundred Fifty Dollard (\$250.00) for Stipulated Order dated July 06, 2015, in this matter, which was to be paid within seven days of July 06, 2015 but continues to go unpaid.

5. That the Plaintiffs are entitled to a Judgment entered against Defendants, jointly and severally, in the amount of Seven Hundred Fifty Dollard (\$750.00) for Order on Motion to Compel Discovery dated July 17, 2015, in this matter, which was to be paid within seven days of July 17, 2015 but continues to go unpaid.

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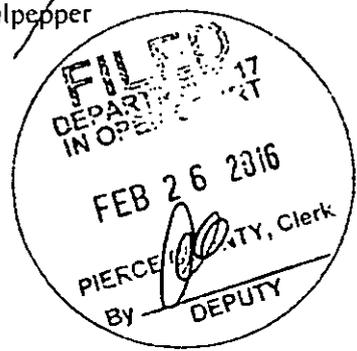
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6. That the Plaintiffs are entitled to a Judgment entered against Defendants, jointly and severally, in the amount of \$6,505.00 for attorney fees and costs. *q.r.* *[Signature]*

7. That the Judgment on file herein shall bear interest at a rate of 12% per annum.

DONE IN OPEN COURT this 26th day of February, 2016.

[Signature]
HONORABLE Ronald Culpepper
Judge



Presented by:

[Signature]

By: RICHARD P. PATRICK, WSB#36770
Attorneys for Plaintiff

Accepted for Entry, and
Notice of Presentation Waived by:

[Signature]
Eric Maughn #32704
Attorney for Defendants

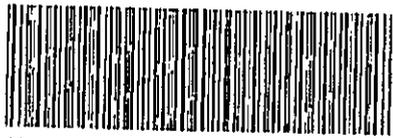
FINDINGS OF FACT AND CONCLUSIONS OF LAW
- 4

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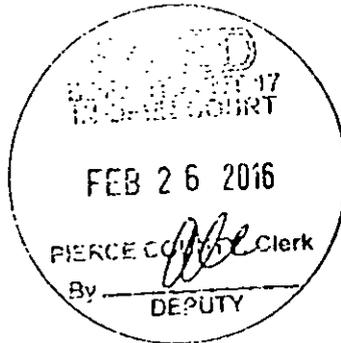
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SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

OLIVIA HERRING and WILLIAM HERRING,
husband and wife,

Plaintiffs.

vs.

JOSE PELAYO and BLANCA PELAYO,
individually, and as husband and wife, and the
marital community therein,

Defendants.

No. 14-2-15260-0

ORDER AND JUDGMENT

THIS MATTER having come on for entry of Judgment pursuant to those Findings of Fact & Conclusions of Law made by this Court herein and the Court having read the pleadings and papers on file herein and having presided at trial February 11, 2016, and having considered the testimony of the parties, the exhibits filed herein and the arguments of counsel and therefore being fully informed in the premises, ORDER as follows:

- The Plaintiffs, Olivia Herring and William Herring, are awarded Judgment against the defendants, Jose Pelayo and Blanca Pelayo, jointly and Severally, in the amount of

ORDER AND JUDGMENTN - 1

RICHARD P. PATRICK
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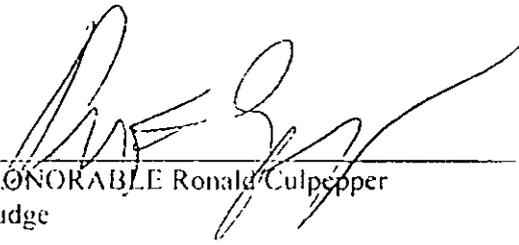
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\$ 10,475⁰⁰ as set forth in the above referenced Findings of Fact & Conclusions of Law filed herein;

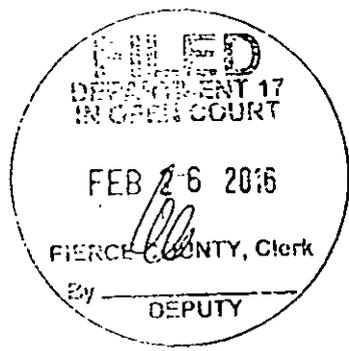
2. Said Judgment shall bear interest at the rate of 12% per annum commencing from the date of entry of this Order and Judgment.

DATED this 26th day of February, 2016

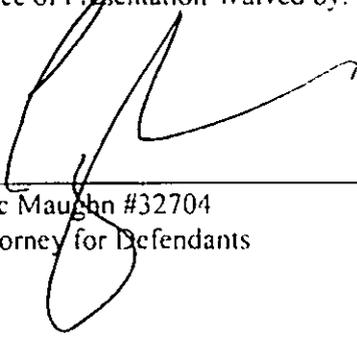

HONORABLE Ronald Culpepper
Judge

Presented by:


By: _____
RICHARD P. PATRICK, WSB#36770
Attorneys for Plaintiff



Accepted for Entry, and Notice of Presentation Waived by:


Eric Maughn #32704
Attorney for Defendants

ORDER AND JUDGMENTN - 2

RICHARD P. PATRICK
Attorney at Law
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DIVISION II
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STATE OF WASHINGTON
BY C. M. DEPT
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IX. CERTIFICATE OF MAILING

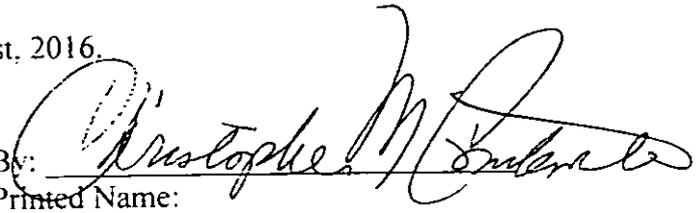
The undersigned does hereby declare that on August 29th, 2016, the

undersigned delivered a copy of APPELLANTS' BRIEF filed in the
above-entitled case to the following persons:

Clerk, Washington State Court of Appeals, Division II
950 Broadway, Suite 300 MS TB 06
Tacoma, WA 98402-4427 (In person)

Richard P. Patrick
5358 33rd Ave NW, Suite 102
Gig Harbor, WA 983359 Via U.S. Mail

DATED this 29th day of August, 2016.

By: 
Printed Name: