

Court of Appeals No. 48786-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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

v.

JOSE PELAYO and BLANCA PELAYO,  
Defendants/Appellants.

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RESPONSE BRIEF OF OLIVIA HERRING and WILLIAM HERRING

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Appeal from the Superior Court of Pierce County,  
Cause No. 14-2-15260-0  
The Honorable Ronald E. Culpepper, Presiding Judge

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## **I. RESTATEMENT OF THE CASE**

### ***A. Factual Background***

The Herrings and the Pelayos are neighbors with a common property line. CP 101. There is a large Douglas Fir tree on the property line between the properties. CP 101. The Herrings own a 66% undivided interest in the boundary tree and the Pelayos own a 34% interest in the boundary tree. CP 102.

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. CP 102. The Herrings did not discuss their plan to remove the branches from the tree with the Pelayos. CP 102. The removal of the branches from the tree by the Herrings did not kill the tree. CP 102.

The Pelayos believed that, due to the removal of the branches at the Herrings’ direction, the tree was now unbalanced and created a danger to the Pelayos and their property in that the tree might fall on the Pelayos’ home. CP 102.

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. CP 102. The Pelayos did not discuss their plan to remove all of the remaining branches from the tree with the Herrings. CP 102. The

removal of all the remaining branches from the boundary tree killed the tree. CP 102.

***B. Procedural Background***

On December 23, 2014, the Herrings filed a complaint alleging the Pelayos committed timber trespass in violation of RCW 64.12.030, or, in the alternative, in violation of RCW 4.24.630. CP 2-5.

A bench trial was held on February 10 and February 16, 2016. RP 5-153.

The trial court found that RCW 4.24.630 did not apply to this case (RP 144-145) and found that the Pelayos had committed timber trespass in violation of RCW 64.12.030. CP 102-103. The trial court also found that no mitigating circumstances existed and that RCW 64.12.040 did not apply. CP 102-103.

The trial court found that the Herrings were entitled to a judgment against the Pelayos and also were entitled to attorneys fees and costs. CP 103-104.

The Pelayos filed their notice of appeal on March 25, 2016. CP 109-118.

**II. ARGUMENT**

On appeal, the Pelayos argue that the trial court's findings were insufficient to support its conclusion that the Pelayos committed timber

trespass because the trial did not enter a specific finding that the Pelayos had “willfully” directed the branches of the tree to be removed. Appellants’ Brief, p. 9-12. The Pelayos also argue that the trial court’s failure to make a specific finding that the Pelayos acted without lawful authority combines with the trial court’s failure to make a finding that the Pelayos acted willfully to render Findings of Fact Number 12<sup>1</sup> unsupported by substantial evidence in the record and, therefore, erroneous. Appellants’ Brief, p. 13-15.

The Pelayos next assign error to Finding of fact Number 13 and argue that the trial court erred in finding that there were no mitigating circumstances.<sup>2</sup>

The Pelayos next argue that the trial court erred in awarding damages to the Herrings because the Herrings failed to establish the elements of willfulness and lack of authority under RCW 64.12.030 and mitigating factors existed under RCW 64.12.040. Appellants’ Brief, p. 16.

Finally, the Pelayos argue that the trial court erred in awarding attorney fees to the Herrings. Appellants’ Brief, p. 17-18.

For the reasons discussed below, except the argument about

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<sup>1</sup> Finding of Fact Number 12 reads, “The actions of the Pelayos constituted Timber Trespass under RCW 64.12.030.” CP 102.

<sup>2</sup> Finding of Fact Number 13 reads, “RCW 64.12.040 (Mitigating Circumstances) does not apply.” CP 102.

attorney's fees, all the Pelayos' arguments fail.

**A. Standards of Review**

When a trial court has weighed the evidence in a bench trial, we limit our review to whether substantial evidence supports its factual findings and, if so, whether those findings support the trial court's conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). We review only those findings to which appellants assign error; unchallenged findings are verities on appeal. *Hegwine*, 132 Wn.App. at 556, 132 P.3d 789. On appeal, we view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser v. Tacoma–Pierce County Health Dep't*, 123 Wn.App. 59, 65, 96 P.3d 460 (2004). We review questions of law and conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Further, we review conclusions of law erroneously labeled as findings of fact de novo. *Hegwine*, 132 Wn.App. at 556, 132 P.3d 789.

*Choi v. Sung*, 154 Wn. App. 303, 313, 225 P.3d 425, 431 (2010).

**B. The trial court's findings were sufficient to support its conclusion that the Pelayos had committed timber trespass because no specific finding of willfulness was necessary and the Pelayos failed to meet their burden of claiming and demonstrating mitigating circumstances.**

1. *Substantial evidence was introduced at trial to support the trial court's finding that the Pelayos had committed timber trespass.*

Other than Finding of Fact Numbers 12, 13, and 18,<sup>3</sup> the Pelayos have not assigned error to any of the trial court's findings of fact. Accordingly, all of the trial court's findings of fact are verities in this appeal other than the trial court's conclusions that the Pelayos had committed timber trespass (Finding of Fact No. 12) and not mitigating circumstances under RCW 64.12.040 applied (Finding of Fact No. 13).

RCW 64.12.030 provides, in pertinent part;

Whenever any person shall . . . injure . . . any tree . . . on the land of another person . . . without lawful authority, in an action by the person...against the person committing the trespasses. . . any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

Jose Pelayo testified that he hired Timothy Jones to trim the tree, told Mr. Jones to trim the branches from the tree, and watched Mr. Jones as Mr. Jones trimmed the tree. RP 55-56, 60-61. Mr. Pelayo testified that he knew the tree was partly on his land and partly on the land of the Herrings. RP 53-54. Mr. Pelayo testified that he knew cutting all the branches off the tree would kill it but he had them removed because he thought the tree was going to die anyway. RP 55-56, 65.

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<sup>3</sup> Finding of Fct 18 deals with the award of attorney fees and costs and will be discussed further below.

The fact that the tree was partially on the Pelayos property does not shield them from liability: “A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other.” *Happy Bunch, LLC v. Gandview North, LLC*, 142 Wn. App. 81, 93, 173 P.3d 959 (2007) (quoting *Patterson v. Oye*, 214 Neb. 167, 333 N.W.2d 389, 391 (1983) (quoting *Weisel v. Hobbs*, 138 Neb. 656, 294 N.W. 448 (1940))).

The trial court found that the Pelayos did not inform the Herrings that the Pelayos were going to remove the rest of the branches from the tree and, despite being alive before the Pelayos removed the branches, the tree did, in fact, die as a result of the removal of the branches by the Pelayos. CP 102.

The Pelayos admittedly injured a tree that was on the property of the Herrings. When viewed in the light most favorable to the Herrings, Jose Pelayo’s testimony combined with the evidence that the Pelayos did not discuss their plan to de-limb the tree with the Herrings and the tree died as a result of the de-limbing was a sufficient factual basis to persuade a fair-minded rational person that the Pelayos had committed timber trespass.

2. *No express finding on whether the Pelayos acted willfully was necessary since the willfulness of the Pelayos' actions was never disputed.*

“[RCW 64.12.030] makes the remedy available in the case of a “willful” trespass only; the court cannot impose treble damages for a “casual or involuntary” trespass or one based on a mistaken belief of ownership of the land.” *Pendergrast v. Matichuyk*, 189 Wn. App. 854, 873, 355 P.3d 1210 (2015), *affirmed* --- Wn.2d ---, --- P.3d --- (2016), 2016 WL 4939388 (2016).

Treble damages will be awarded under RCW 64.12.030 for the injury of a tree on the land of another if the trespass was “willful,” that is, “not casual or involuntary.” *Pearce v. G. R. Kirk Co.*, 22 Wn.App. 323, 325 n. 1, 589 P.2d 302 (1979), *review granted, affirmed* 92 Wn.2d 869, 602 P.2d 357 (1979).

In action for treble damages for willful trespass and malicious cutting of trees it is not necessary to prove intent beyond commission of act and its consequences. *Harold v. Toomey*, 92 Wn. 297, 298-299, 158 P. 986 (1916).

As discussed above, Mr. Pelayo freely testified that he knew the tree was partially on the Herrings' property and that he intentionally hired Mr. Jones to de-limb the tree and watched Mr. Jones perform the de-limbing despite knowing that it would kill the tree. Since both parties

knew that the tree sat on the boundary line between their property, there was no issue of a mistaken belief of ownership of the land. There was no dispute that the Pelayos' trespass was anything but voluntary. The branches were cut deliberately, and without the Herrings' consent, so the trespass was "willful." *See Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 110, 942 P.2d 968 (1997) ("This treble damage remedy is available when the trespass is "willful," because if the trespass is "casual or involuntary" or based on a mistaken belief of ownership of the land, treble damages are not available.").

"[T]here is no need to make findings of fact on every item of evidence introduced in the case." *In re Kennedy*, 80 Wn.2d 222, 231, 492 P.2d 1364, 1368–69 (1972).

Findings of fact consist of the judge's decision on the **controverted** issues of fact in the case, and "must cover all the material issues of fact which have been **controverted** on the trial." 2 L. Orland, *Trial Practice* § 307 (1972 & Supp.1983); *see also In re Kennedy*, 80 Wn.2d 222, 231, 492 P.2d 1364 (1972); *Williamson v. United Bhd. of Carpenters & Joiners*, 12 Wn.2d 171, 186, 120 P.2d 833 (1942)."

*Swanson v. May*, 40 Wn. App. 148, 158, 697 P.2d 1013, 1018 (1985)

(emphasis added).

Given that the fact the Pelayos' actions were willful was not a disputed issue of fact, the trial court was not required to enter a specific finding regarding the willfulness of the Pelayos' actions.

3. *No express finding on whether the Pelayos acted with lawful authority was necessary since the undisputed evidence established that the Pelayos removed the limbs from the tree without consulting the Herrings' while knowing removing the limbs would kill the tree.*

If it is proven “by a preponderance of the evidence” that “the defendant either intended to deprive the plaintiff of his property or, having knowledge of facts sufficient to put him on notice of the plaintiff's ownership, acted in reckless disregard of the probable consequences,” timber trespass is established. *Smith v. Shiflett*, 66 Wn.2d 462, 467, 403 P.2d 364, 367 (1965) (quoting *Grays Harbor County v. Bay City Lbr. Co.* (1955), 47 Wn.2d 879, 289 P.2d 975 (1955)) “Once a trespass is established . . . the burden shifts to the defendant to show it was not willful or reckless, but rather was casual or involuntary, or done with probable cause to believe the land was his own.” *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 594, 278 P.3d 157, 160 (2012) (quoting *Hill v. Cox*, 110 Wn.App. 394, 406, 41 P.3d 495 (2002) (citing *Seattle–First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 197–98, 570 P.2d 1035 (1977)).

Again, it was undisputed and Mr. Pelayo himself testified that Mr. Pelayo knew removing the branches would kill the tree and that the tree was partially on the Herrings' property. This clearly established that Mr. Pelayo acted with the intent to deprive the Herrings of their property- the tree. Under *Smith v. Shiflett* this establishes that the Pelayos committed timber trespass against the Herrings.

For example, in *Maier v. Giske*, 154 Wn. App. 6, 23, 223 P.3d 1265 (2010), the trial court awarded Giske treble damages for the value of plants on Giske's property the trial court found had been damaged by the Maiers. The Maiers appealed and argued that there was insufficient evidence that they cut a pine on Giske's property. The Maiers claimed to have merely cut branches overhanging their property. But the trial court found that they "intentionally cut down or caused to be killed the shore pine" and that while "they were entitled to cut back branches that overhang their property, they were not entitled to cut down the entire shore pine." There was conflicting testimony presented by the parties and the trial court found that the testimony of Giske, the owner of the tree ("just the stumps" were left) was credible and that the credibility of Maier, defendant (just cut branches overhanging his property) was questionable. The Court of Appeals ruled there was sufficient evidence in the record to support the

trial court's findings regarding treble damages for timber trespass regarding the shore pine. *Maier*, 154 Wn. App. at 22- 23, 223 P.3d 1265.

Because it was undisputed that Mr. Pelayo acted intentionally with knowledge that his actions would kill the tree, no express finding regarding acting with lawful authority was necessary. This was not a disputed issue of fact for the trial court to resolve.

4. *No express finding on whether the Pelayos acted with lawful authority was necessary since the undisputed evidence established that the Pelayos removed the limbs from the tree on their own property while knowing the tree was on the Herrings' property and removing the limbs would kill the tree.*

As stated above, where an issue of fact is not disputed, the trial court is not required to make findings regarding that fact.

“[I]n Washington...an adjoining landowner can engage in self-help and trim the branches and roots of a neighbor's tree that encroach onto his or her property.” *Mustoe v. Ma*, 193 Wn. App. 161, 371 P.3d 544, 545 (2016), *citing Gostina v. Ryland*, 116 Wn. 228, 233, 199 P. 298 (1921) (in such circumstances the adjoining owner's remedy “is to clip or lop off the branches or cut the roots at the [property] line.”).

The Pelayos cite *Mustoe v. Ma*, 191 Wn.App 161, 371 P.3d 544 (2015) in support of their argument that RCW 64.12.030 “requires

plaintiffs to establish defendants acted ‘without lawful authority.’”

Appellant’s Brief, p. 13.

In *Mustoe*, the Court of Appeals held that the plaintiff could not recover damages from her neighbor for timber trespass after the neighbor cut the roots and branches of several trees on Mustoe’s property that encroached the neighbor’s property and the cutting of the roots and branches required replacing the trees. The Court of Appeals reached this conclusion by reasoning that, “By its own terms, [RCW 64.12.030] only applies to persons acting without lawful authority” and finding that the defendant in *Mustoe* was engaged in his lawful self-help remedy of trimming encroaching roots and branches. *Mustoe*, 193 Wn. App. 161, 371 P.3d 544, 548.

*Mustoe* and *Gostina* are factually distinguishable from this case. Unlike this case that involves a tree growing squarely on the boundary line between the properties, *Mustoe* and *Gostina* both involved injury to trees that grew entirely on the property of the plaintiff and were encroaching the property of the defendant. This difference is key. As stated above, Division I of the Court of Appeals, the same division that decided *Mustoe*, has held that, “A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and

destroys it without the consent of the other.” *Happy Bunch, LLC*, 142 Wn. App. at 93, 173 P.3d 959.

*Mustoe* and *Happy Bunch, LLC* make clear that for purposes of establishing a timber trespass claim a tree that is located on the boundary line between the properties is treated differently than a tree that is located entirely on the property of the plaintiff. Because the tree at issue in this case was located on the boundary line between the properties, under *Happy Bunch, LLC*, the Herrings only had a burden to demonstrate that the Pelayos “cut and destroyed” a tree that straddled the boundary between the properties.

It was undisputed that the Pelayos could trim the branches of the tree on their own property. Accordingly, no factual finding on “lawful authority” was necessary. However, that the Pelayos acted with lawful authority in trimming the branches does not shield them from liability under RCW 64.12.030. Under *Happy Bunch, LLC* the Pelayos could not trim the tree to the point of killing the tree without committing timber trespass.

5. *Substantial evidence was introduced at trial to support the trial court’s finding that no mitigating circumstances applied to this case.*

RCW 64.12.040 provides, in pertinent part, “If upon trial of [a timber trespass] action it shall appear that the trespass was casual or

involuntary...judgment shall only be given for single damages.”

Whether trespass is willful or involuntary and in good faith is question for jury. *Gibson v. Thisius*, 16 Wn.2d 693, 695, 134 P.2d 713 (1943); *Hawley v. Sharley*, 40 Wn.2d 47, 49, 240 P.2d 557 (1952).

Mitigation of treble damages is possible under RCW 64.12.040...**However, the burden of proving mitigation is upon the one who caused the injury.** *Ventoza v. Anderson*, 14 Wn.App. 882, 894, 545 P.2d 1219 (1976), and cases cited. Nor is it necessary to prove intent on the part of the trespasser. *Fredericksen v. Snohomish County*, 190 Wn. 323, 326, 67 P.2d 886, 111 A.L.R. 75 (1937).

*Tatum v. R & R Cable, Inc.*, 30 Wn. App. 580, 583–84, 636 P.2d 508, 511 (1981), *overruled by Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 733 P.2d 960 (1987) (emphasis added).

Again, Mr. Pelayo testified that the removal of the limbs was intentional and knowing. The Pelayos had the burden of proving the existence of any mitigating circumstances yet presented no evidence suggesting that the removal of the limbs from the tree was casual or involuntary.

The trial court’s finding that there were no mitigating circumstances was supported by substantial evidence, or, rather, a lack of substantial evidence, introduced at trial. The trial court did not err in finding that no mitigating circumstances existed.

**C. The trial court did not err in awarding timber trespass damages to the Herrings.**

Again, the Pelayos assign error only to the trial court's findings that the Pelayos committed timber trespass and that no mitigating circumstances existed. Also as discussed above, the trial court's findings were more than sufficient to establish that the Pelayos had committed timber trespass and the Pelayos failed to meet their burden to establish the existence of any mitigating circumstance under RCW 64.12.040. The trial court's findings were supported by substantial evidence in the record and were sufficient to support its conclusions of law that the Pelayos had committed timber trespass and had failed to demonstrate any mitigating circumstances.

Treble damages are mandatory "when a defendant cuts down, girdles or otherwise injures, or carries off a plaintiff's trees." *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 594, 278 P.3d 157 (2012). RCW 64.12.030 mandates that if a plaintiff is successful in a claim of timber trespass, "any judgment for the plaintiff shall be for treble the amount of damages claimed." Once the court found that the Pelayos had committed timber trespass the court was required to award treble damages. The trial court did not err in awarding the Herrings damages.

**D. The trial court erred in awarding attorney's fees to the Herrings.**

Respondents Herring concede that the trial court erred in awarding attorney fees and costs.

**III. CONCLUSION**

For the reasons stated above this court should affirm the trial court's finding that the Pelayos committed timber trespass, affirm the trial court's judgment awarding the herrings damages for the timber trespass, but vacate the trial court's award of attorneys fees and costs.

Respectfully submitted this 20<sup>th</sup> day of September, 2016.



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**September 20, 2016 - 2:22 PM**

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