No. 49819-7-II

Court of Appeals, Div. II,
of the State of Washington

Jerry Porter and **Karen Zimmer**,

Appellants,

v.

Pepper E. Kirkendoll and **Clarice N. Kirkendoll,**

Respondents

Brief of Appellants

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1. Introduction

Pepper Kirkendoll caused his loggers to cut 51 landscape trees from Jerry Porter and Karen Zimmer's (collectively, "Porter") land. Kirkendoll misrepresented the property boundary to the loggers, who relied on Kirkendoll's description. On the eve of trial, Porter settled with the loggers, obtaining an assignment of the loggers' indemnity/contribution claims against Kirkendoll.

The trial court erroneously dismissed Porter's direct claims against Kirkendoll, reasoning that release of an agent also releases the principal. However, Kirkendoll had admitted that the existence of an agency relationship was a disputed issue of material fact. This Court should reverse dismissal of the direct claims.

The trial court also erroneously dismissed Porter's assigned claims, reasoning that the Tort Reform Act applied, abolishing any indemnity claim. The trial court further reasoned that because the loggers did not request a reasonableness hearing, their contribution claims were lost. However, the Tort Reform Act does not apply to intentional torts and could not bar the indemnity claims where Kirkendoll admitted that his intent was a disputed issue of material fact. The Act also does not bar a

contribution claim for lack of a reasonableness hearing. This Court should reverse dismissal of the assigned claims.

This Court should also reverse the trial court's denial of Porter's motion for summary judgment. Porter is entitled to judgment on the assigned claims. Kirkendoll's admitted conduct makes him liable for triple damages under the waste statute, RCW 4.24.630 and/or the timber trespass statute.

2. Assignments of Error

Assignments of Error

1. The trial court erred in granting Kirkendolls' motion for summary judgment and denying Porter's motion for partial summary judgment.
2. The trial court erred in dismissing Porter's direct claims against Kirkendoll under *Glover*.
3. The trial court erred in dismissing Porter's assigned claims for lack of a reasonableness hearing.
4. The trial court abused its discretion in excluding rebuttal testimony by a duly qualified expert, Galen Wright.

Issues Pertaining to Assignments of Error

1. In contrast to direct liability, which is liability for breach of one's own duty, vicarious liability is liability for the breach of another. Under *Glover*, settlement with an agent releases the vicarious liability of the principal, but not the principal's direct liability. Porter settled with the loggers. Did the trial court err in releasing Kirkendoll from his own, direct liability for ordering the trees cut? (assignments of error 1 and 2)

2. The party wishing to prove the existence of a principal-agent relationship bears the burden of proving that the principal had the right to control the manner of the agent's performance. Kirkendoll admitted that the existence of an agency relationship was a disputed issue for the jury. Did the trial court err in finding that the loggers were Kirkendoll's agents? (assignments of error 1 and 2)

3. The Tort Reform Act abolishes the right of indemnity between tortfeasors in those cases to which it applies. The Act does not apply to intentional torts. Kirkendoll admitted that his intent was a disputed issue for the jury. Did the trial court err in dismissing the assigned indemnity claim on summary judgment? (assignments of error 1 and 3)

4. The Tort Reform Act replaces the right of indemnity with a right of contribution, based on comparative fault. The statute requires the court to determine the reasonableness of a settlement, but does not bar a contribution claim for lack of a reasonableness hearing. Did the trial court err in dismissing the assigned claims for lack of a reasonableness hearing? (assignments of error 1 and 3)

5. The doctrine of equitable indemnification (the "ABC Rule") allows a party, B, to recover attorney's fees from A when A's conduct caused B to become involved in litigation with C. Kirkendoll's misrepresentation of the property boundary caused the loggers to become involved in this litigation with Porter. Did the trial court err in dismissing the assigned equitable indemnification claim? (assignments of error 1 and 3)

6. The waste statute, RCW 4.24.630, applies to cases where there is damage to land as well as trees, or to the removal of timber. The destruction of Porter's landscape was damage to the land and involved

removal of timber. Is Kirkendoll liable under the waste statute? (assignment of error 1)

7. The waste statute and the timber trespass statute both provide for triple damages for wrongful damage caused when the person has reason to know that the damaged property was not his own. Kirkendoll caused the loggers to cut Porter's trees even though he had reason to know the trees were on Porter's land. Is Kirkendoll liable for triple damages? (assignment of error 1)

8. At trial, a party is entitled to present expert testimony in rebuttal to the opinions offered by opposing experts. A party is entitled to use a new expert for rebuttal. The trial court granted Kirkendoll's motion in limine to exclude Porter's rebuttal expert, Galen Wright, on the grounds that Porter already had an expert arborist, Patrick See. Did the trial court abuse its discretion? (assignment of error 4)

3. Statement of the Case

3.1 Kirkendoll caused his loggers to cut and remove Porter's landscape trees.

Porter owns forested residential property served by a private access road called Madison Drive. CP 2, 290. Madison Drive is located within a 60-foot easement that follows the western edge on Porter's property. CP 290, 313. Kirkendoll owns the property bordering to the west of Porter. CP 289, 313. There is a vegetated strip on Porter's land, ranging from 10 to 40 feet wide, between the Drive and the property boundary. *See* CP 49,

51-52 (describing the location of corner monuments relative to the edge of the road).

Kirkendoll hired Kyle Peters of G&J Logging (collectively, "Peters") to harvest the trees from Kirkendoll's lot. CP 93, 290-91. Peters hired Boone's Mechanical Cutting ("Boone") to assist in cutting the trees. CP 94. Kirkendoll knew where the surveyed corner monuments were located, from 10 to 40 feet west of the edge of the road. CP 38, 49, 51-52. But Kirkendoll told Peters that all of the trees west of Madison Drive were his. CP 53, 186. Relying on Kirkendoll's description, Peters and Boone harvested all of the trees west of the road edge, including 51 trees on Porter's land. CP 139, 188, 332.

3.2 Porter sued Kirkendoll and the loggers for statutory waste and timber trespass/conversion.

Porter sued Kirkendoll and the loggers, alleging that they intentionally, recklessly, or negligently trespassed and destroyed Porter's landscape by cutting the trees, then carried off the resulting logs. CP 2-3. Porter sought relief under the waste statute, RCW 4.24.630, and/or the timber trespass statute, RCW 64.12.030. CP 3.

Kirkendoll's answer admitted that he "caused timber to be harvested" from Porter's property. CP 5. Peters also admitted cutting Porter's trees under Kirkendoll's direction. CP 9. Peters raised cross-claims against Kirkendoll for contribution and

indemnity. CP 11-12. Boone admitted to cutting the trees where instructed. CP 584. Boone raised cross-claims against Kirkendoll for indemnity. CP 587-88.

3.3 Porter settled with the loggers on the eve of trial, obtaining an assignment of the loggers' claims against Kirkendoll.

On the eve of trial, Porter settled with Peters and Boone in exchange for $125,000 and an assignment of the loggers' contribution/indemnity claims against Kirkendoll. CP 43, 65-71. After this settlement, Porter brought a summary judgment motion to resolve the indemnity claims and otherwise simplify the issues for trial. CP 27. Kirkendoll responded with a cross-motion asking the trial court to dismiss all of Porter's claims. CP 72. The trial court granted leave to hear both motions. RP 8.

Porter argued that he was entitled to judgment as a matter of law on the assigned indemnity claims. CP 30, 134, 591-93. Porter argued that Kirkendoll was liable under the waste statute because the destruction of his landscape was "wrongful waste or injury to the land," or, alternatively, because Kirkendoll "remove[d] timber." CP 30-32, 593-96. Porter argued that Kirkendoll was liable for triple damages as a matter of law, under either the waste statute or the timber trespass statute because his conduct was intentional or at least reckless. CP 32-33, 597-98.

Kirkendoll responded that "the issue of Kirkendoll's intent is a factual issue for the jury to decide." CP 79. Kirkendoll argued that the waste claim must be dismissed under *Gunn v. Riely* and that the loggers had no indemnity claims to assign. CP 80-81, 83-84.

Kirkendoll's counter-motion argued that the Tort Reform Act, Chapter 4.22 RCW, required dismissal of all of Porter's claims. CP 81. Kirkendoll argued that the loggers' indemnity claims had been abolished by Tort Reform and that any contribution claim had been lost for lack of a reasonableness hearing. CP 83-84. While acknowledging that Tort Reform does not apply to intentional torts, Kirkendoll argued that "a variety of jury findings would be possible" as to whether the parties acted intentionally or negligently. CP 82-83. Finally, Kirkendoll argued that Porter's waste and trespass claims should be dismissed because release of an agent (loggers) also releases the principal (Kirkendoll). CP 85-87.

Porter responded that the loggers were not Kirkendoll's agents and, even if they were, Kirkendoll would not be released from liability for his own misconduct in directing the trespass. CP 136-37. Porter pointed out Kirkendoll's admission that there were issues of material fact central to Kirkendoll's arguments. CP 135-36 (citing CP 82). Porter demonstrated the divergent results that would flow from a finding of negligence (applying

Tort Reform and comparative negligence) as opposed to intent (applying common law joint and several liability). CP 128-35.

3.4 The trial court erroneously dismissed all of Porter's claims on summary judgment.

The trial court dismissed all of Porter's claims. CP 236. The trial court reasoned that Tort Reform applied, and because there had been no reasonableness hearing, the loggers lost their contribution rights and had no claims to assign to Porter. RP 39. The trial court further reasoned that, under *Glover v. Tacoma Gen. Hosp.*, Porter obtained a full settlement from the loggers and thereby released Kirkendoll from the claims of waste and trespass. RP 39.

Porter moved for reconsideration. CP 241. Porter argued that *Glover* did not apply to dismiss the waste and trespass claims because Kirkendoll failed to prove that he had the requisite control over the manner of the loggers' performance to make them agents. CP 242-44. Porter noted that Kirkendoll had admitted that the applicability of respondeat superior was a "jury question." CP 244 (quoting RP 37). Porter argued that Kirkendoll's liability for waste and trespass was direct, not vicarious, because Kirkendoll directed the trespass. CP 245-46.

Porter also argued that Tort Reform did not apply to dismiss the assigned indemnity/contribution claims. CP 246-47. The torts were intentional, either as a matter of law or as a

material issue of fact, precluding summary judgment. CP 247-49. Even if Tort Reform applied, a reasonableness hearing was not required to preserve the loggers' claims. CP 249-51. The trial court denied the motion. CP 275.

4. Summary of Argument

This Court should 1) reverse summary judgment dismissal of Porter's direct and assigned claims; 2) grant partial summary judgment in favor of Porter on the assigned claims, including indemnity/contribution and equitable indemnification; 3) grant partial summary judgment in favor of Porter on Kirkendoll's liability for triple damages under the waste statute and/or the timber trespass statute; 4) reverse the trial court's exclusion of rebuttal testimony by Galen Wright; and 5) award Porter attorney fees on appeal.

Part 5.2, below, demonstrates that the trial court erred in dismissing Porter's direct claims of statutory waste and timber trespass. *Glover* cannot release Kirkendoll from liability for his own misconduct. Part 5.3 shows that the trial court erred in dismissing Porter's assigned claims on the basis of the Tort Reform Act. The Act does not apply, therefore the loggers' indemnity claims remained intact. Part 5.4 explains that, even if the Tort Reform Act did apply, it would not be a bar to the

assigned claims. This Court should reverse dismissal of Porter's direct and assigned claims.

Part 5.5 asks this Court to reverse and grant summary judgment in favor of Porter. Porter is entitled to judgment on the assigned claims. Kirkendoll is liable under the waste statute, RCW 4.24.630. Kirkendoll's liability, under either the waste statute or the timber trespass statute, is for triple damages. Part 5.6 asks the Court to address the trial court's pre-trial exclusion of rebuttal testimony by Galen Wright, a matter that is likely to recur on remand. Part 5.7 requests an award of Porter's costs and attorney fees on appeal.

5. Argument

5.1 This Court reviews summary judgment de novo.

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). The court views the facts in a light favorable to the nonmoving party. *Failla*, 181 Wn.2d at 649.

5.2 The trial court erred in dismissing Porter's direct claims against Kirkendoll under Glover.

The trial court dismissed Porter's direct claims against Kirkendoll for statutory waste and timber trespass by reasoning that under *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 723, 658 P.2d 1230 (1983), Porter's settlement with the loggers operated to release Kirkendoll, as a principal, from liability for the acts of the loggers. RP 39. The trial court was wrong.

First, *Glover* only applies to vicarious liability for the acts of another; it does not release a party from liability for the party's own, culpable acts. Second, *Glover* does not apply because the loggers were not Kirkendoll's agents. Kirkendoll is directly liable for his own intentional or reckless conduct in causing the loggers to cut Porter's trees. Finally, even if comparative fault applied, Kirkendoll would still be liable for his own direct share of fault. This Court should reverse the trial court's dismissal of Porter's claims against Kirkendoll for statutory waste and timber trespass.

5.2.1 *Glover* does not release a principal from liability for his own culpable acts.

Glover was a case of vicarious liability. Vicarious liability "is based on the conduct of one individual [the agent,] and the liability is imposed [on the principal] as a matter of public policy to ensure that the plaintiff has the maximum opportunity to be

fully compensated." *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 723, 658 P.2d 1230 (1983). The principal, who had the right to control the manner of the agent's performance, is held liable for the agent's negligence, even though the principal was not directly at fault. *See* David K. DeWolf and Keller W. Allen, *Tort Law and Practice*, 16 Wash. Prac. § 4:1 (2013). The *Glover* court held that when a plaintiff obtains a full release from a solvent agent, the vicarious liability of the principal is also released. *Glover*, 98 Wn.2d at 722-23.

However, the *Glover* court also carefully distinguished vicarious liability from claims of direct liability against multiple, joint tortfeasors: "This situation is unlike that created by joint tortfeasor claims." *Id.* at 722. In contrast to vicarious liability, claims of direct liability against a principal are not affected by release of an agent. *See Seattle W. Indus. v. David A. Mowat Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1988) (rejecting a *Glover* argument where there were direct claims against the alleged principal).

This distinction has been decisive in timber trespass cases, where a landowner who directs a trespass is universally held directly liable. As a rule, a person who hires loggers and directs them where to cut is personally liable for any resulting trespass. *E.g.*. *Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495 (2002). The landowner's liability for the trespass arises from **his**

own culpable misfeasance in directing the contractor to enter the land of another. *Ventoza v. Anderson*, 14 Wn. App. 882, 895-96, 545 P.2d 1219 (1976).

Kirkendoll is directly liable for causing the loggers to cut Porter's trees. Kirkendoll admitted to having contracted with the loggers to cut all of the trees on his land, which he told them went up to the edge of the road. CP 45, 53. Peters testified that he relied on Kirkendoll's description of the boundaries and, as a result, ended up cutting Porter's trees. CP 140. Kirkendoll admitted that he caused the loggers to cut Porter's trees. CP 5. But for Kirkendoll's misrepresentation of the property boundary, the loggers would not have cut Porter's trees.

This is not a case of vicarious liability. Kirkendoll was not a passive principal whose agent was negligent. Quite the opposite: Kirkendoll actively caused the loggers to cut Porter's trees. As a result, Kirkendoll is directly liable for his own culpable misconduct. Even if the loggers were Kirkendoll's agents, Porter's settlement with the loggers would not have released Kirkendoll from his own, direct liability for the trespass. The trial court was wrong to dismiss Porter's claims of Kirkendoll's direct liability. This Court should reverse.

5.2.2 *Glover* does not release Kirkendoll from any portion of his liability because the loggers were not Kirkendoll's agents.

Vicarious liability can only apply where an agency relationship exists. An agency relationship exists only where the alleged principal had the right to control the manner of the agent's performance. *O'Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004). This Court has previously explained how this rule applies to loggers in a timber trespass:

> The crucial factor is the right of control which must exist to prove agency. Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. Instead, control establishes agency only if the principal controls the **manner of performance, in this case the actual cutting [of trees].**

Bloedel Timberlands Dev. v. Timber Indus., 28 Wn. App. 669, 674, 626 P.2d 30 (1981) (emphasis added). The existence of a principal-agent relationship and of a right to control are questions of fact for a jury. *O'Brien*, 122 Wn. App. at 284. The burden of proof is on the party asserting the existence of the relationship. *Id.* Here, that burden was on Kirkendoll.

Kirkendoll failed to point the Court to any evidence in the record that demonstrates he had any right to control the manner of the actual cutting of the trees. Kirkendoll's written arguments did not cite a single fact in the record related to control or

agency. CP 85-87. Kirkendoll's statement of facts asserted only that Kirkendoll contracted the logging to G & J Logging, that G & J Logging subcontracted a portion of the work to Boone's Mechanical Cutting, and that Kirkendoll told the loggers "that all that timber that was on the west side of that Madison Drive I thought was mine." CP 73-74. These facts do not show any degree of control over the manner of the loggers' performance. Kirkendoll directed the **scope** of the contract—where to cut—but not the **manner** in which the loggers cut, yarded, loaded, or hauled the trees. The loggers were, therefore, **not** Kirkendoll's agents.

Boone's contract even expressly stated that Boone was not an agent and was independent of the control of G & J or Kirkendoll in regards to the manner of performance:

> 5. CONTROL: Logging Subcontractor [Boone] retains the sole and exclusive right to control and direct the manner and means by which the work, services and labor described in this agreement are performed. Contractor [G & J] retains the right to control the ends to insure the final work product is in conformity with the work specifications required by this Agreement.
>
> 6. LOGGING SUBCONTRACTOR IS INDEPENDENT CONTRACTOR: Logging Subcontractor is and agrees to continue to be an independent contractor. Logging Subcontractor is not an agent or employee of Contractor. Logging Subcontractor shall have no authority to

> contractually obligate Contractor in any way. Logging Subcontractor has its own business and performs work for other contractors.

CP 95.

At the hearing on the motion, Kirkendoll argued that he had control by virtue of the fact that he told the loggers which trees to cut. RP 30:1-6. This is not control of the manner of the cutting as in *Bloedel*; this is merely determining whether the loggers performed the contract. It does not establish an agency relationship.

In the end, Kirkendoll admitted that whether an agency relationship existed was a **jury question:**

> Either he told them where to cut, they had an independent duty to verify what they were doing, but the jury finds that they didn't breach that duty, and so based upon apportionment of fault, the apportionment is 100 and zero; or based on respondeat superior, which was they were following his orders. **I think that's a jury question.** It may be somewhat of a subtle jury question, **but it's a jury question.**

RP 37:15-23 (emphasis added). Kirkendoll argued, "the jury should be instructed and should make a determination as to the elements of agency." CP 203-04.

Viewed in a light favorable to Porter (the nonmoving party on this issue), there was no agency relationship. Kirkendoll even admitted that the existence of an agency

relationship was a disputed issue of fact. Without an agency relationship, there were no grounds on which to dismiss Porter's direct claims against Kirkendoll. The trial court should have denied Kirkendoll's motion. This Court should reverse.

5.2.3 Under comparative fault, a principal can be released from vicarious liability but still be directly liable for its own misconduct.

Even assuming, only for the sake of argument, that comparative fault could apply and that the loggers could be found to be Kirkendoll's agents, the jury's allocation of fault would be a genuine issue of material fact as to whether Kirkendoll had any direct liability. The trial court should have denied Kirkendoll's motion.

Under comparative fault, the jury allocates percentage shares of fault to each entity. RCW 4.22.070. On the facts that were before the trial court, viewed in a light favorable to Porter (the nonmoving party on this issue), a reasonable fact finder could determine that Kirkendoll was, for example, 60 percent at fault for directing the trespass and that the loggers were, together, 40 percent at fault for failing to verify the property boundary before they cut the trees.

Under RCW 4.22.070(1)(a), a principal is vicariously liable for the fault of its agent. In this example, this would result in Kirkendoll being jointly and severally liable with the loggers

for their 40 percent share, as well as being directly liable for his own 60 percent share. The loggers would have no liability for Kirkendoll's 60 percent share.

Under *Glover*, a full release of the loggers would release Kirkendoll from his vicarious liability for the loggers' share, but it could have no effect on Kirkendoll's own 60 percent share—Kirkendoll would still be liable for his own direct fault. Thus, even assuming comparative fault and an agency relationship, a jury could have found facts under which Kirkendoll would have been liable for the trespass despite Porter's release of the loggers. Genuine issues of material fact should have precluded summary judgment dismissal of Porter's direct claims against Kirkendoll. This Court should reverse.

5.3 The trial court erred in dismissing Porter's assigned claims because the Tort Reform Act does not apply to intentional torts.

The trial court dismissed Porter's assigned indemnity claims on the basis of failure to hold a reasonableness hearing under the Tort Reform Act (specifically, RCW 4.22.060). RP 39. This was error because the underlying torts in this case—statutory waste under RCW 4.24.630 and timber trespass under RCW 64.12.030—are classified as intentional torts, and the Tort Reform Act does not apply to intentional torts. Even if, as Kirkendoll himself argued, a jury could have found that

Kirkendoll or the loggers acted negligently rather than intentionally (*see* CP 79, 82-83), it is a genuine issue of material fact that should have precluded summary judgment.

Kirkendoll's entire argument was built on the faulty premise that the torts at issue in this case were fault-based, as defined in RCW 4.22.015 (that is, negligent or reckless). *E.g.,* RP 26:19-25. According to Kirkendoll, because the torts were fault-based, the loggers' indemnity claims were abolished by RCW 4.22.040 and replaced with a statutory right of contribution. *E.g.*, RP 27:3-10. According to Kirkendoll, the loggers lost their statutory right of contribution when they failed to hold a hearing to determine the reasonableness of the settlement. *E.g.*, RP 27:20-28:1. Each of these points is incorrect.

First, the torts at issue are not fault-based, either as a matter of law or as a matter of disputed fact. Second, as a result of this material factual dispute, the trial court could not apply the Tort Reform Act to the potentially intentional torts. Third, because the common law could apply, the loggers' claims of indemnity remained valid, at least for purposes of summary judgment. Finally, the trial court should not have even considered Kirkendoll's Tort Reform arguments because he had waived them by not raising comparative fault as an affirmative defense.

5.3.1 Timber trespass and statutory waste are classified as intentional torts as a matter of law or could have been found intentional by a jury as a matter of fact.

The trial court erred when it applied the Tort Reform Act to dismiss the assigned indemnity claims. The indemnity claims were based on the loggers being compelled to defend and eventually pay Porter's claims of statutory waste and timber trespass because Kirkendoll misrepresented the boundaries of his property. Porter's Amended Complaint alleged the defendants acted "**intentionally,** recklessly or negligently" (CP 2 (emphasis added)), leaving open a legal or factual question as to whether the torts were intentional and therefore excluded from the fault-based framework of the Tort Reform Act.

As an issue of law, violations of the timber trespass statute (RCW 64.12.030) and the waste statute (RCW 4.24.630) have both been treated as intentional torts. In regards to timber trespass, the Washington Supreme Court has held, "The timber trespass statute sounds in tort. Trespass is an **intentional tort.**" *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 115, 942 P.2d 968 (1997) (emphasis added). As for the waste statute, this Court has held, "as the plain language of RCW 4.24.630(1) envisions wrongful conduct, any violation of that statute **is analogous to an intentional tort.**" *Standing Rock Homeowners v. Misich*, 106 Wn. App. 231, 246, 23 P.3d 520 (2001) (emphasis added).

As an issue of fact, Kirkendoll himself argued that summary judgment was inappropriate because a jury could find that some or all defendants had acted either negligently **or intentionally:**

> It is possible a jury could conclude (1) all Defendants acted willfully; (2) all Defendants acted negligently; or (3) one or more acted willfully while others did not.

CP 82:23-83:1.

> At a minimum, the issue of Kirkendoll's intent is a factual issue for the jury to decide. **Summary judgment is premature and inappropriate.**

CP 79:21-24 (emphasis added).

Whether these were intentional torts is material because, as shown below, parties who are jointly and severally liable for intentional torts retain their common law claims of indemnity from one another. *See Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 589-91, 5 P.3d 730 (2000). Because the torts at issue in this case were intentional, either as a matter of law or as a disputed material fact, summary judgment dismissal of the assigned indemnity claims was improper.

5.3.2 The Tort Reform Act does not apply to intentional torts.

Applicability of the Tort Reform Act swings on whether the tort at issue is based on "fault," as defined in RCW 4.22.015.

> "Fault" includes acts or omissions … that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.

RCW 4.22.015. The centerpiece of the Tort Reform Act is RCW 4.22.070, which applies "in all actions involving fault." When it applies, the trier of fact must apportion percentage shares of fault to every entity that caused the claimant's damages. RCW 4.22.070(1). Under this comparative fault scheme, a defendant can reduce its share of the total liability by demonstrating that some other entity was at least partly at fault for the damages.

The legislature deliberately excluded intentional torts from this definition of "fault." *Tegman v. Accident & Med. Inves., Inc.*, 150 Wn.2d 102, 110, 75 P.3d 497 (2003); *Honegger v. Yoke's*, 83 Wn. App. 293, 297, 921 P.2d 1080 (1996). The legislature did not want one who intentionally harms another to be able to allocate any portion of his liability to other parties. Comment, *Contribution Among Tort-feasors in Washington: the 1981 Tort Reform Act*, 57 Wash. L. Rev. 479, 483 (1982) (citing Wash. State Senate Select Comm. on Tort & Product Liability Reform, Final Report, 47th Leg. Reg. Sess. at 47 (1981), reprinted in 1981 Wash. S. Jour. 635).

Kirkendoll argued that RCW 4.22.040 abolished the common law right of indemnity and replaced it with a statutory right of contribution. *E.g.*, RP 27:3-10. However, that provision

of the Tort Reform Act is only triggered when there is fault-based joint and several liability under RCW 4.22.070(1)(a) or (b):

> If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

RCW 4.22.070(2). Where RCW 4.22.070(2) does not apply, RCW 4.22.040, .050, and .060 also do not apply. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 296, 840 P.2d 860 (1992). The right of indemnity is not abolished here because that provision of the Tort Reform Act is not triggered.

Additionally, by the plain language of RCW 4.22.040, the right of contribution is based on the comparative fault of the liable parties. *See* RCW 4.22.040(1). This provision, based on fault, cannot apply to intentional torts, which are, by definition, **not** based on fault. Where the right of contribution does not apply, the right of indemnity remains. *Sabey*, 101 Wn. App. at 589-91.

The provision of the Tort Reform Act that abolishes the common law right of indemnity is only triggered for fault-based torts. Because the torts at issue here were intentional, either as a matter of law or as a disputed material fact, the trial court

was wrong to dismiss the assigned indemnity claims on summary judgment. This Court should reverse.

5.3.3 Under the applicable law, Porter's claims were viable.

The Tort Reform Act makes comparative fault the general rule of tort liability. Stewart A. Estes, *The Short Happy Life of Litigation Between Tortfeasors: Contribution, Indemnification and Subrogation After Washington's Tort Reform Acts*, 21 Seattle U. L. Rev. 69, 76 (1997). However, common law joint and several liability continues to govern in circumstances where the Tort Reform Act does not apply. *Id.* at 77; RCW 4.22.030.

Under common law joint and several liability, a "passive" tortfeasor who was compelled to pay damages can seek full reimbursement from the "active" tortfeasor, who, as between the two tortfeasors, is the one who ought to bear the entire loss. *Stevens v. Sec. Pac. Mortg. Corp.*, 53 Wn. App. 507, 517, 768 P.2d 1007 (1989); *Olch v. Pac. Press & Shear Co.*, 19 Wn. App. 89, 93, 573 P.2d 1355 (1978). As noted above, where Tort Reform does not apply, this right of indemnity remains valid.

Where the right of indemnity remains, there is no need or requirement for a reasonableness hearing. The purpose of a reasonableness hearing is to make sure that a non-settling party does not get stuck paying more than its "fair share" (based on comparative fault) of the total liability because the plaintiff let a

settling party go for too little. *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 778-79, 287 P.3d 551 (2012) (Wiggins, J., dissenting) (explaining the history and purposes of reasonableness hearings in the context of comparative fault tort claims). As noted above, where there is no "fault," the requirements of RCW 4.22.060, including reasonableness hearings, are not triggered.

This makes sense because under common law joint and several liability, there is no need for a reasonableness hearing. Each defendant's "fair share" is 100 percent of the total. *See Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978). When one defendant settles, the total liability is reduced by that dollar amount. With this offset, there is no way for the non-settling party to be stuck with more than its fair share, and therefore there is no need for a reasonableness hearing. The loggers' indemnity claims could not be lost for lack of a reasonableness hearing.

Porter presented evidence from which a trier of fact could conclude that the loggers' indemnity claims were valid. Kirkendoll knew where the surveyed corner monuments were located, from 10 to 40 feet west of the edge of the road. CP 38, 49, 51-52. Despite this knowledge, Kirkendoll told Peters that all of the trees west of Madison Drive were his, including those on Porter's strip. CP 53, 186. Peters relied on Kirkendoll's

representation of the boundary and later testified that Kirkendoll was 100 percent responsible for the trespass. CP 139-40. The loggers were passive tortfeasors reacting to Kirkendoll's active misrepresentation of the boundary.

Viewed in a light most favorable to Porter (the nonmoving party on this issue), the Tort Reform Act would not apply to Kirkendoll's intentional conduct. The loggers would be passive tortfeasors entitled to claim indemnity from Kirkendoll, the active tortfeasor whose conduct caused Porter's damages. The loggers' indemnity claim would not be abolished by the Tort Reform Act.

Whether Kirkendoll acted intentionally or merely negligently was a material fact that affects the outcome of the assigned indemnity claim. Kirkendoll himself admitted it was a fact in dispute. The trial court should have denied Kirkendoll's motion for summary judgment. This Court should reverse.

5.3.4 Kirkendoll waived Tort Reform by not pleading it as an affirmative defense.

The Tort Reform Act is not self-executing; that is, a party seeking to allocate fault to another must affirmatively invoke the procedures of the statutes. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993). A defendant seeking to allocate fault away from itself must plead

fault of others as an affirmative defense. *Henderson v. Tyrrell*, 80 Wn. App. 592, 623, 910 P.2d 522 (1996); *see* CR 8; CR 12(i).

Kirkendoll never pled allocation, fault of a nonparty, or fault of others as an affirmative defense to Porter's claims. *See* CP 5-7. Kirkendoll never pled RCW 4.22.040(3) as an affirmative defense to the logger's indemnity claims. *See* CP 22, 24-25. In fact, Kirkendoll asserted that **he** was entitled to claim indemnity from the loggers. CP 25. In failing to plead these affirmative defenses, Kirkendoll waived them. The trial court should have denied Kirkendoll's motion. This Court should reverse.

5.4 Even if Tort Reform applies, the trial court erred in dismissing Porter's assigned claims.

Assuming, for the sake of argument, that the trial court could have concluded as a matter of law that comparative fault applies, it would still have been error to dismiss Porter's assigned indemnity/contribution and equitable indemnification claims.

First, the Tort Reform Act does not bar a contribution claim for failure to obtain a reasonableness hearing. Second, the Tort Reform Act does not abolish a claim for equitable indemnification for litigation expenses (the "ABC Rule"). Finally, there were material facts in dispute as to the assigned ABC Rule claim. The trial court erred in dismissing the assigned claims on summary judgment. This Court should reverse.

5.4.1 The Tort Reform Act does not terminate a contribution claim for lack of a reasonableness hearing.

Contribution claims are governed by RCW 4.22.040 and .050. Neither statute requires a reasonableness hearing as a prerequisite to recovery on the claim. In the case of a settling party seeking contribution, there are three requirements: 1) payment of more than the party's share of comparative fault (RCW 4.22.040(1)); 2) the settlement extinguished the liability of the other person (RCW 4.22.040(2)(a)); and 3) the amount of the settlement was reasonable at the time of the settlement (RCW 4.22.040(2)(b)). While this requires **reasonableness,** it does not require a **hearing** under the procedures of RCW 4.22.060. The court hearing the contribution claim—whether as a part of the underlying action or in a separate action (*see* RCW 4.22.050)—is capable of determining the reasonableness of the settlement at the time it was entered, even if no reasonableness hearing was held at the time of the settlement.

Even RCW 4.22.060, which sets forth the requirement of a reasonableness hearing, does not set forth any **consequences** for failure to hold a hearing. Nowhere do the statutes bar a claim for contribution on the basis of lack of a reasonableness hearing. *See* RCW 4.22.040, .050, and .060. Where a hearing is not held, or is held improperly, the reasonableness of the settlement

remains at issue in the contribution action. *Fraser v. Beutel*, 56 Wn. App. 725, 733-34, 785 P.2d 470 (1990).

> Since Sunset did not utilize the reasonableness hearing in the manner in which the Legislature intended, the issue of reasonableness was a viable issue in the contribution action. *See* Restatement (Second) of Torts § 886A, comment d (1979), which states: "The reasonableness of the settlement is always open to inquiry in the suit for contribution, and the tortfeasor making it has the burden of establishing the reasonableness of the payment he has made."

Id. at 734.

Kirkendoll cannot be heard to complain of the lack of a reasonableness hearing when he, the non-settling party, failed to request one himself. After a settling party to gives notice of the settlement, it is incumbent on the **non-settling party**—for whose benefit the hearing exists—to ensure that the hearing takes place and that evidence is presented that favors the non-settling party's interests. *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 523-25, 527-28, 901 P.2d 297 (1995); *Id.* at 538 (Talmadge, J., dissenting).

The correct remedy for the loggers' failure to request a reasonableness hearing was not to eliminate their rights of contribution—a remedy that does not appear anywhere in the statute or case law—but to **hold a reasonableness hearing,** per Kirkendoll's request, prior to entry of judgment. Alternatively,

the reasonableness could have been determined as a part of the court's consideration of the contribution claim.

Because neither the statutes nor the applicable case law extinguish a contribution claim for lack of a reasonableness hearing, the trial court erred in dismissing the assigned contribution claim. This Court should reverse.

5.4.2 The Tort Reform Act does not terminate a claim for equitable indemnification for litigation expenses.

In addition to the indemnity/contribution claim for the amount paid in settlement, the loggers had asserted claims for equitable indemnification for litigation expenses incurred in defending against Porter's claims. Equitable indemnification (also known as the "ABC Rule") is a recognized equitable grounds for recovery of attorney's fees. Under the rule, when A acts wrongfully toward B, causing B to become involved in litigation with C, and C was not privy to A's wrongful act, A is liable to B for B's attorney's fees and litigation costs incurred in defending C's claims. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123-24, 330 P.3d 190 (2014).

As discussed in Part 5.3.2, above, the Tort Reform Act abolishes "the common law right of indemnity between active and passive tortfeasors." RCW 4.22.040(3). The right of indemnity between active and passive tortfeasors relates to who, among the tortfeasors, should pay the plaintiff's damages.

Abolishing that right preserves the role of comparative fault as the basis of allocating liability for the plaintiff's damages between multiple tortfeasors.

The ABC Rule, in contrast, is an equitable ground for recovery of a party's attorney's fees and litigation costs when that party is forced to defend against a claim because of the misconduct of another. It is a separate claim from indemnity for damages and is not addressed or affected by the Tort Reform Act. The statute does not abolish claims under the ABC Rule.

The Tort Reform Act is very specific in abolishing only the right of indemnity relating to liability for the plaintiff's damages. The loggers' ABC Rule claim remains, regardless of whether the Tort Reform Act applies to this case. The trial court was wrong to dismiss this assigned claim. This Court should reverse.

5.4.3 There is at least a disputed issue of material fact as to whether equitable indemnification applies.

The required elements of the ABC Rule claim are all met. First, Kirkendoll admitted he told the loggers to cut everything up to the road. This was a misrepresentation of his property boundaries—a wrongful act by Kirkendoll (A) toward the loggers (B). Second, the loggers (B) relied on the misrepresentation, and thereby became involved in this litigation with Porter (C). Third, Porter (C) was not involved in Kirkendoll's wrongful act. Under

the ABC rule, Kirkendoll is liable for the fees and costs the loggers incurred in defending themselves against Porter.

Kirkendoll argued that the loggers' ABC Rule claim fails if they were directly at fault for Porter's damages. CP 203. But, as Kirkendoll argued elsewhere, it was possible for a jury to conclude from the evidence that the loggers were not at fault. RP 37:16-18 ("…they had an independent duty to verify what they were doing, but the jury finds that they didn't breach that duty…"). Viewed in a light favorable to Porter (the nonmoving party on this issue), the evidence could support the ABC Rule claim. The trial court was wrong to dismiss it on summary judgment. This Court should reverse.

5.5 The trial court erred in denying Porter's motion for partial summary judgment.

Not only did the trial court err in granting Kirkendoll's motion, it also erred in denying Porter's motion. Porter's motion for summary judgment sought judgment in Porter's favor on three issues: 1) the assigned indemnity/contribution and ABC Rule claims; 2) Kirkendoll's liability for violating the waste statute, RCW 4.24.630; and 3) that Kirkendoll's liability would be for triple damages, under the waste and/or timber trespass statutes. CP 30-33.

5.5.1 Porter is entitled to judgment in his favor on the assigned indemnity/contribution and equitable indemnification claims.

As discussed above, the assigned indemnity/contribution and ABC Rule claims survive, regardless of whether the Tort Reform Act applies to this case. Porter presented evidence that satisfies the elements of these claims. Kirkendoll was 100 percent at fault for the trespass. CP 139-40. Kirkendoll admitted that he caused the loggers to cut Porter's trees. CP 5.

A motion for summary judgment should be granted when the evidence supports only one reasonable conclusion. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). Here, the only reasonable conclusion is that Kirkendoll was 100 percent at fault. He was the active tortfeasor while the loggers were passive. The loggers were only involved in this litigation because Kirkendoll misrepresented his property boundaries, causing them to cut Porter's trees. The trial court erred in not granting summary judgment in favor of Porter on the indemnity and ABC Rule claims. This Court should reverse and grant summary judgment to Porter.

5.5.2 Kirkendoll is liable for violating the waste statute, RCW 4.24.630.

The waste statute provides, "Every person who goes onto the land of another and who removes timber, … or wrongfully causes waste or injury to the land … is liable to the injured

party for treble the amount of the damages caused by the removal, waste, or injury." RCW 4.24.630. A defendant who does not personally commit the trespass but directs another to do so is still liable. *Standing Rock Homeowners v. Misich*, 106 Wn. App. 231, 246, 23 P.3d 520 (2001).

The statute has an exception: where the damage alleged is only to trees and not to land, the waste statute does not apply and the plaintiff's remedy is under the timber trespass statute, RCW 64.12.030. *Gunn v. Riely*, 185 Wn. App. 517, 527, 344 P.3d 1225 (2015). However, the *Gunn* court also noted that the waste statute could appropriately apply in a case involving both damage to trees and damage to land. *Id.* at 525 n. 6. Here, Kirkendoll destroyed Porter's valuable landscape amenity: the scenic, forested canopy over the road that served as Porter's driveway.

Kirkendoll's expert admitted that this constitutes landscape damage. CP 332-33 (applying the "trunk formula method" to estimate landscape damage). This destruction is not merely damage to trees—it is wrongful waste or injury to the land. When the trees are cut, the real property is damaged because the landscape is destroyed. Because there is both damage to trees and damage to land, the waste statute applies.

Alternatively, under the first prong of the waste statute, the statute must apply to "every person who goes onto the land

of another and who removes timber." By the plain language chosen by the legislature, the statute must apply despite the exception for timber trespass.

The court's interpretation of a statute must give effect to every provision. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Statutory exceptions "are narrowly construed in order to give effect to legislative intent underlying the general provisions." *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013). Any doubt should be resolved in favor of the general provisions. *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974).

In order to give meaning to all of the statutory language, the Court should harmonize the provisions. This can be done by interpreting the exception narrowly to mean that the additional remedies of RCW 4.24.630 would apply generally to "[e]very person who goes onto the land of another and who removes timber," *except to the extent that the statute duplicates remedies already available under RCW 64.12.030.* Duplicated remedies would only be available under RCW 64.12.030. Such an interpretation allows the exception to operate narrowly without rendering the general provisions meaningless.

Gunn does not preclude this result because *Gunn* dealt only with the second, "wrongful waste or injury to the land," prong of the statute; it did not address the first, "removes

timber" prong or the conflict between that first prong and the waste statute's exception for timber trespass. *See* CP 221-22.

The legislature deliberately added the "removes timber" language. *See* CP 206-220, 595-96. The legislature intended the statute to apply to "every person who goes onto the land of another and removes timber." The exception in RCW 4.24.630(2) cannot be allowed to render those words meaningless. Instead, this Court should interpret the exception as preserving timber trespass law, while also allowing for the additional remedies the legislature intended to provide under the waste statute.

Kirkendoll either wrongfully caused waste or injury to Porter's land or caused the loggers to go onto Porter's land and remove timber. He admitted that he caused the loggers to cut Porter's trees. CP 5. His own expert admits this was landscape damage. CP 332-33. Destruction of the landscape is damage to land. Kirkendoll is liable under either the first or second prong of the waste statute. The trial court erred in not granting Porter's motion. This Court should reverse and grant summary judgment in Porter's favor.

5.5.3 Kirkendoll is liable for triple damages under either the waste statute or the timber trespass statute.

Porter sought summary judgment that damages would be tripled. Under the "removes timber" prong of the waste statute, damages are tripled in all cases. Under the "waste or injury to

the land" prong, the plaintiff must prove that the defendant acted "wrongfully" in order to recover triple damages. Under the timber trespass statute, damages are tripled unless the defendant can prove mitigation by showing the trespass was "casual or involuntary" or done with probable cause to believe the land was his own. RCW 64.12.040.

A defendant acts "wrongfully" under the waste statute if they acted intentionally and unreasonably, while knowing, or having reason to know, that he or she lacked authorization to so act. RCW 4.24.630. Kirkendoll intentionally and unreasonably ordered Porter's trees cut, while having reason to know that he was not authorized to cut the trees because they were on Porter's land. Kirkendoll knew where the surveyed corner monuments were located, from 10 to 40 feet west of the edge of the road. CP 38, 49, 51-52. Despite this knowledge, Kirkendoll told Peters that all of the trees west of Madison Drive were his, including those on Porter's strip. CP 53, 186.

On summary judgment, any factual issue can be resolved as a matter of law if there is only one reasonable conclusion. *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014) ("[W]here reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law."); *e.g.. Hill v. Cox*, 110 Wn. App. 394, 406, 41 P.3d 495 (2002) (affirming summary judgment of treble damages in a

timber trespass case), *rev. denied*, 147 Wn.2d 1024, 60 P.3d 92 (2002).

The only reasonable conclusion from the evidence is that Kirkendoll did not have probable cause to believe the land was his own. Kirkendoll's actions were wrongful under the waste statute and cannot qualify for mitigation under the timber trespass statute. As a matter of law, the only reasonable conclusion is that Kirkendoll is liable for triple damages. The trial court erred in not granting Porter's motion. This Court should reverse and grant summary judgment in Porter's favor.

5.6 The trial court abused its discretion in excluding rebuttal testimony by Galen Wright.

Prior to the final summary judgment decision, the trial court heard motions in limine in preparation for trial. Despite Porter's best efforts, Kirkendoll and the loggers did not produce in discovery the complete files of their experts on damage appraisal until after the discovery cutoff date. CP 325, 360. The day after receiving the late disclosures, Porter disclosed that he expected to call Galen Wright as a rebuttal expert to critique the other experts' methods. CP 373. Kirkendoll moved to exclude Wright's testimony, arguing that it was late and that Porter already had a testifying expert, Patrick See, who could provide rebuttal. CP 368-69. The trial court granted Kirkendoll's motion, reasoning that the disclosure of Wright was untimely and that

See could provide any rebuttal that was necessary. The trial court abused its discretion. Because this issue is likely to arise again on remand, this Court should address it.

Admission of rebuttal testimony is a matter of discretion of the trial court. *W. E. Roche Fruit Co. v. N. P. R. Co.*, 184 Wash. 695, 699, 52 P.2d 325 (1935). A trial court abuses its discretion when a decision is based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An errant interpretation of the law is an untenable reason for a ruling. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010).

Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. *State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968). Rebuttal evidence frequently overlaps to some degree with the evidence in chief. *Id.* at 395. Generally, a court cannot determine whether rebuttal evidence will be necessary until the defendant's expert testimony is presented at trial. *Bede v. Overlake Hosp. Med. Ctr.*, No. 68479-5-I, 2013 Wash. App. LEXIS 2389, at *94 (Ct. App. Oct. 7, 2013).[1] Where the rebuttal testimony answers

[1] Under recently amended GR 14.1, "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

matters presented by the defense, a trial court does not abuse its discretion in allowing the rebuttal testimony. *White*, 74 Wn.2d at 395; *Bede*, 2013 Wash. App. LEXIS 2389, at *95-96. Indeed, rebuttal testimony is even permitted when the rebuttal witness was not identified prior to trial. *White*, 74 Wn.2d at 395

The disclosure of Wright was not untimely. It was a direct result of the actions of Kirkendoll and the loggers, who willfully and unreasonably delayed production of their experts' opinions and depositions of their experts until after the cut-off date for identifying rebuttal witnesses. Porter could not have identified Wright as a rebuttal witness until Porter obtained complete information about the expected testimony of Defendants' experts. After receiving the last of the Defendants' experts' files on October 13 at the experts' depositions, Porter determined that expert rebuttal testimony would be necessary and fully disclosed Wright as a rebuttal witness the very next day. Porter did not unreasonably delay disclosure.

Additionally, there is no statute, case law, or court rule that would prevent Porter from choosing a different expert witness to present rebuttal testimony than the expert witnesses presenting his case in chief. In fact, this is a common and accepted practice. *E.g.*. *Bede*, 2013 Wash. App. LEXIS 2389, at *9-27 (plaintiff's rebuttal witness, Dr. Loeser, was not one of the

testifying experts in plaintiff's case in chief). Porter validly chose to hire a different expert witness to present rebuttal.

Kirkendoll argued that the disclosure of Mr. Wright as a rebuttal witness is a "subterfuge" for a last-minute switch of primary experts. This is untrue. Patrick See remained Porter's primary expert in his case in chief. After the defense rested, Wright would have offered rebuttal to Defendants' appraisal methods. The proper time to test whether any of Wright's testimony would be cumulative is at trial, when the testimony is known, not before. The trial court abused its discretion when it pre-emptively excluded Wright before hearing the testimony. This Court should reverse.

5.7 Porter requests attorney fees on appeal.

Porter requests an award of costs and attorney fees on appeal, pursuant to RAP 18.1. Under the ABC Rule, addressed above, Porter should be awarded his attorney fees and litigation costs for pursuing the assigned claims on appeal. As noted above, the loggers were brought into this litigation solely due to Kirkendoll's misconduct in misrepresenting the boundaries of his property. Not only were the loggers forced to defend against Porter's claims, but they (through Porter) have been forced to pursue this appeal in order to obtain their remedy. The elements

of the ABC Rule are met. This Court should award Porter his attorney fees on appeal.

Additionally, Porter is entitled to recover litigation costs and attorney fees under the waste statute, RCW 4.24.630. To the extent that claim is still alive on remand, Porter is entitled to an award of fees and costs incurred on appeal.

6. Conclusion

The trial court erred in dismissing Porter's direct claims. The loggers were not Kirkendoll's agents, and the settlement did not release Kirkendoll from his own, direct liability. The trial court also erred in dismissing Porter's assigned claims. The Tort Reform Act does not apply and therefore could not abolish the loggers' indemnity claim. Even if it did apply, the Tort Reform Act does not bar claims for lack of a reasonableness hearing.

The trial court also erred in denying Porter's motion for partial summary judgment. Porter was entitled to judgment in his favor on the direct and assigned claims. The waste statute applies to Porter's landscape damage. Kirkendoll's wrongful conduct makes him liable for triple damages.

This Court should 1) reverse summary judgment dismissal of Porter's direct and assigned claims; 2) grant partial summary judgment in favor of Porter on the assigned claims, including indemnity/contribution and equitable indemnification;

3) grant partial summary judgment in favor of Porter on Kirkendoll's liability for triple damages under the waste statute and/or the timber trespass statute; 4) reverse the trial court's exclusion of rebuttal testimony by Galen Wright; and 5) award Porter attorney fees on appeal.

Respectfully submitted this 24th day of April, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on April 24, 2017, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 24th day of April, 2017.

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