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

**Audrey B. Webster, Trustee of the Audrey
Webster Revocable Living Trust, UTD
7/20/06 and Mary J. Hodge,**

Appellants,

v.

**Murphy Resources, Inc., a Washington
corporation; Sean M. Murphy and Jill A.
Murphy, husband and wife Greg Murphy and
Jolynn Murphy, husband and wife,**

Respondents

Brief of Appellants

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1. Introduction

Sean Murphy owned five acres of land next to Audrey Webster's and Mary Hodges' five acre parcel. Sean Murphy decided to clear cut his parcel. Three times he contacted Audrey Webster to ask if she wanted to have her trees cut at the same time. Each time she declined. She was stunned when she looked at an aerial image of her land and saw that in fact the clear cut Sean Murphy did, crossed onto her property and cut many of her trees along her and her sister's boundary line.

Sean Murphy hired his brother Greg Murphy to arrange to cut Sean's trees. Sean Murphy lives in Hawaii, and his brother runs a business called Murphy Resource Management in Lewis County, where the land is located. Neither brother knew where the boundary line was. Neither brother knew how to survey. Both brothers knew the only way to be certain to avoid cutting a neighbors' trees was to get a survey or reach an agreement on the ground with the neighbor. They did neither.

Instead, Sean Murphy allowed his brother Greg Murphy to direct a logger to cut the trees up to a line Greg Murphy located by amateur and incorrect methods by himself, thus saving the cost of a survey. The result was that the logger, who cut to the line designated by Greg Murphy, ended up cutting

many (45) trees that belonged to Audrey Webster and her sister Mary Hodge.

Webster and Hodge sued both Murphy brothers and Greg Murphy's company, Murphy Resources. The complaint alleged that Defendants damaged Plaintiffs' land by destroying landscaping, and that thereafter, in a separate and subsequent tort, that the Defendants carried the resulting logs away. These two claims were pled as separate causes of action, the first under RCW 4.24.630 and the second under RCW 64.12.030. Landscaping is part of the land. When landscaping is destroyed, the land is damaged. The resulting logs are personal property which were converted.

On Defendants' first motion for summary judgment, the trial court erroneously dismissed Plaintiffs' claims under RCW 4.24.630, ruling that the exception at section 2 of that statute allowed Plaintiffs' relief only under RCW 64.12.030. This ruling was error because it ignored damage done to Plaintiffs' land.

On Defendants' second motion for summary judgment, the trial court erroneously dismissed Plaintiffs' claims against the landowner, Sean Murphy, ruling that only Greg Murphy and Greg Murphy's company, Murphy Resources, had liability. This ruling was error because Sean Murphy had direct liability based upon his own faulty action and inaction, and because Sean Murphy also had liability as the principal to his brother and

agent, Greg Murphy, who had done the amateur and incorrect boundary location. Sean Murphy had both direct and vicarious liability and it was error to dismiss him from the case.

Subsequent to these two rulings, Greg Murphy and his company were the only two Defendants and the only claims were under RCW 64.12.030. Greg Murphy and his company offered to submit to judgment. Plaintiffs accepted their offer and took a judgment against Greg Murphy and his company. While Greg Murphy and his company are not at issue in this appeal, Sean Murphy is.

This Court should reverse the trial court's dismissal of Plaintiffs' claims under RCW 4.24.630, because there was damage to Plaintiffs' land, and reverse the dismissal of Sean Murphy because he had both direct and vicarious liability.

2. Assignments of Error

Assignments of Error

1. The trial court erred in granting Defendants' motion for summary judgment dismissing claims under RCW 4.24.630.
2. The trial court erred in dismissing Sean Murphy.

Issues Pertaining to Assignments of Error

1. The waste statute, RCW 4.24.630, applies to cases where Defendants wrongfully damage land as well as to cases where Defendants remove timber. Defendants' destruction of Plaintiffs' landscape was wrongful

damage to the land. Defendants also removed timber. Are Defendants liable under the waste statute, RCW 4.24.630, for wrongful damage to land and for removing timber? (Assignment of error 1)

2. The timber trespass statute, RCW 64.12.030, applies to cases where Defendants carry off logs from the land of another. Are Defendants liable under the timber trespass statute, RCW 64.12.030, for carrying off logs belonging to Plaintiffs as a subsequent and separate tort, after having damaged Plaintiffs' landscape, for which liability lies under RCW 4.24.630? (Assignment of error 1)
3. The waste statute, RCW 4.24.630, and the timber trespass statute, RCW 64.12.030, both provide for triple damages. Are Defendants liable for triple damages regardless of which statute applies: RCW 4.24.630 or RCW 64.12.030? (Assignment of error 1)
4. A person can have both direct liability, which is liability for breach of one's own duty, and vicarious liability, which is liability for the breach of duty by an agent. Did the trial court err in dismissing Sean Murphy, who had both direct liability for his own errors and omissions, and vicarious liability for his agent's torts committed within the scope of his agency? (Assignment of error 2)

3. Statement of the Case

3.1 Plaintiffs' land was damaged when their landscape was cut down, and they were then damaged a second time when the resulting logs were carried away.

A trespass occurred in which 45 trees belonging to Plaintiffs located along the edge of their five acre property were cut down. CP 94, CP 210-212.

Defendants admit that. CP 363, 367. The damage done to the landscape was valued at \$78,345. CP 164. The delivered log price for the logs taken from Plaintiffs' land by Defendants, using Defendants' expert, was \$8,993. CP 219. Thus, the total damage suffered by Plaintiffs was \$87,338, which should have been tripled. CP 3.

3.2 Sean Murphy's errors and omissions caused his loggers to cut Plaintiffs' landscape and carry away Plaintiffs' logs, for which he is directly liable.

Plaintiffs own a five acre forested property in a residential area. CP 158, 159, 195, 196, 235. Sean Murphy owns an adjacent five acre parcel, which he decided to clear cut, and he called Plaintiff Audrey Webster three times in the year preceding the clear cut to ask if he could also cut her trees at the same time, to which she always emphatically said "NO". CP 236, 359.

Sean Murphy knew he did not know where the boundary line between his property and Plaintiffs' property was located. CP 359, 360. He knew that he did not know where the boundaries were located, did not discuss it with his brother, did not try to locate the boundaries himself, would not know how to do that anyway, knew of no monuments marking the boundary, did not know how to read a legal description, did not give his brother a copy of the deed, or legal description, and knows that if he had hired a survey done, the trespass, which he admits, would have been avoided. CP 358-364.

Instead, he retained his brother Greg as an agent to have his property logged. CP 362, 366. Greg had his brother's authority to do whatever was necessary to cut his trees. CP 360, 366. They had no contract between them. CP 360, 366. Sean simply gave Greg authority to act for him, but in doing so, he did not instruct his brother to act properly, and in particular, even though he knew that neither he nor his brother knew where the boundary was located, he did not instruct his brother to get a survey, although Sean knew that as a former real estate agent, he had often advised his clients to get surveys to know where their boundaries were. CP 358-364. He avoided that cost in this case. CP 361.

3.3 Greg Murphy, acting within the scope of his agency for his principal, Sean Murphy, recklessly marked an incorrect boundary line to which he directed the hired logger to cut, for which Sean Murphy was vicariously liable.

Sean Murphy's brother, Greg Murphy, knew he did not know where the boundary line between his brother Sean's property and Plaintiffs' property was located. CP 366. He knew that he personally was not a professional surveyor, and knew that only a professional survey or an agreement with a neighbor could locate a boundary. CP 366-369, 374-376. He did neither. CP 374.

Greg Murphy conducted an incorrect amateur boundary location using a compass, without regard to a legal description, and without knowing course, bearing, distance or starting point. CP 365-378. He began from a bent piece of rusted wire a few inches long on a dilapidated fence running east and west along what he took to be his brother's north boundary line, and assumed, without any basis, that it was a corner between his brother's piece and Plaintiffs' piece, and then proceeded magnetic south, setting a cutting line through the woods. CP 369-373. He was off many feet, and as a result, the logger he hired, who cut to the line he set, cut at least 45 of Plaintiffs' trees. CP 94, 150.

3.4 Plaintiffs sued Defendants for statutory waste for damage to land and for carrying off Plaintiffs' logs.

Plaintiffs sued Defendants, alleging that they intentionally, recklessly, or negligently trespassed and destroyed Plaintiffs' landscape by severing the trees from the ground, then carried off the resulting logs. CP 2-3. Plaintiffs sought relief under the waste statute, RCW 4.24.630, and under the timber trespass statute, RCW 64.12.030. CP 2-3.

The Complaint states:

“9. The acts of Defendants are actionable under two statutes, neither of which provides complete relief for the damages suffered by Plaintiffs: RCW 4.24.630 and RCW 64.12.030.

The acts of Defendants are actionable under RCW 4.24.630 as those acts damaged Plaintiffs' land, and are not entirely compensable in an action under RCW 64.12.030, which does not allow a recovery for damage to land ordinarily incident to a logging operation. *Henricksen v. Lyons*, 33 Wn.App. 123, 127, 652 P.2d 18 (1982).

RCW 4.24.630 provides:

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

(1) **Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.** For

purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

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

When defendants cut Plaintiffs' trees, Defendants damaged Plaintiffs' land, and the proper measure of those damages is a landscape measure by an arborist. The damage was complete as to any tree when that tree was cut. Landscape damage occurred before the logs that resulted from the timber cutting were converted and carried off the land.

When the logs which were laying on Plaintiffs' land after the landscape damage was complete were carried away, a second tort actionable under RCW 64.12.030 occurred: Plaintiffs' logs were carried away.

RCW 64.12.030

Injury to or removing trees, etc. — Damages.

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree,

including a Christmas tree as defined in RCW 76.48.020, 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.**

Under RCW 4.24.630, Plaintiffs are entitled to the landscape damages they suffered when the trees were cut, and to all expert costs, and to attorney's fees, none of which are recoverable under RCW 64.12.030. However, such a recovery does not make them whole, for the Defendants, in independent subsequent tortious acts, then carried off Plaintiffs' logs, for which Plaintiffs are entitled to a recovery under RCW 64.12.030.

Both recoveries are for triple damages: RCW 4.24.630 provides for a recovery in an amount triple the damage to Plaintiffs' land, which is a damage unavailable under RCW 64.12.030; and RCW 64.12.030 provides for triple damages for the value of Plaintiffs' logs carried away."

3.5 The trial court erroneously dismissed all of Plaintiffs' claims under RCW 4.24.630 on summary judgment.

Defendants brought a motion to dismiss all of Plaintiffs' claims under RCW 4.24.630, and leave Plaintiffs with only a remedy under RCW 64.12.030. CP 94-104. Defendants own

expert had calculated damages as **restoration damages**, not stumpage value damages. CP 220. That expert forgot to adjust the restoration value for the time it would take to grow back equivalent-aged trees, and when that calculation was done, the **restoration damages** were virtually the same as Plaintiffs' landscape damages. CP 244, 245. Plaintiffs provided authority and evidence on waste to land caused by damage to landscape. CP 149-170, 171-234, 235-237, 238-251. Argument was had on December 2, 2016. Plaintiffs raised all points and preserved all issues. VRP 12-2-16. The trial court granted the motion and dismissed all Plaintiffs' claims under RCW 4.24.630. CP 285-286, 466-467. Plaintiffs moved for reconsideration. CP 287-297. The trial court denied the motion. CP 468-469.

3.6 The trial court erroneously dismissed Sean Murphy despite evidence of his direct liability and vicarious liability (as he admitted to be Greg Murphy's principal).

Defendants next brought a motion to have Sean Murphy and Jill Murphy dismissed. CP 320-326. Plaintiffs responded with authority and deposition testimony from both Sean Murphy and Greg Murphy. CP 349-357, 358-378. That evidence showed that Sean Murphy had both direct and vicarious liability, and

that liability could only be for triple damages, regardless of which statute applied. CP 348-357. Argument was had on May 26, 2017. Plaintiffs raised all points and preserved all issues. VRP 5-26-17. The trial court granted the motion and dismissed Sean and Jill Murphy. CP 470-471. Plaintiffs moved for reconsideration. CP 425-430. The trial court denied the motion.

4. Summary of Argument

This Court should 1) reverse summary judgment of dismissal of plaintiffs' claims under RCW 4.24.630, as there was evidence of damage to Plaintiffs' land; 2) grant partial summary judgment to Plaintiffs for triple damages regardless of which statute applies (RCW 4.24.630 or RCW 64.12.030 or both); 3) grant partial summary judgment for liability of Defendants Sean and Jill Murphy for damage to land, under RCW 4.24.630, and for carrying off logs under RCW 64.12.030; 4) reverse the trial court's dismissal of Sean Murphy who had both direct liability for his own error, and liability as principal for the errors of his agent, Greg Murphy.

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 most favorable to the nonmoving party. *Failla*, 181 Wn.2d at 649.

5.2 The trial court erred in dismissing Sean Murphy (and Jill Murphy) as Sean Murphy had direct liability for his own bad acts and omissions, as well as vicarious liability for his brother’s errors.

The trial court dismissed Sean and Jill Murphy months after it dismissed all Plaintiffs’ claims under RCW 4.24.630. Thus at the time Sean and Jill Murphy were dismissed the only claims left in the case were under RCW 64.12.030.

The evidence presented at that second summary judgment hearing showed that Sean murphy was liable as principal for his agent brother’s errors, but also directly liable

for his own errors and omissions which contributed to the trespass. CP 351-357; 358-378.

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

After the trial court dismissed Sean and Jill Murphy, Plaintiff accepted an offer of judgment made by Greg Murphy and his company, and the case was thus concluded as to Greg Murphy and his company. The offer of judgment was made after the trial court had dismissed all claims against all defendants under RCW 4.24.630, and after the trial court had dismissed Sean and Jill Murphy.

Offers of judgment and acceptance thereof are interpreted under contract principles. By accepting the offer of judgment of the agent, Plaintiffs arguably released the principal from vicarious liability, under *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 723, 658 P.2d 1230 (1983). *Glover* dealt only with 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, supra at 723*. 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 defendants: “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 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 loggers to proceed while knowing no one had determined the boundary location, which he, the owner, did not know. Sean Murphy knew he did not know where the boundary was, and that it had never been surveyed. What Sean also knew was that three times Ms.

Webster had declined his invitation to cut her trees for her. CP 235-237. He did not know where the boundary was and proceeded to have his land clear-cut anyway, in disregard for the risk of proceeding without a survey. CP 358-378. He did not even give his brother a legal description or the deed. CP 358-378. If a jury could conclude that Sean Murphy, the owner of the land being cut, was culpable for neglecting to proceed prudently and properly seeing his boundary located, he should have stayed in the case for his own liability. *Ventoza v. Anderson*, 14 Wn. App. 882, 895-96, 545 P.2d 1219 (1976).

At the time Sean Murphy was dismissed, this was a case of both direct and vicarious liability. It was an error for the trial court to dismiss on either count. Since an offer of judgment thereafter made by the agent was later accepted by Plaintiffs (when only agent remained in case and when only RCW 64.12.030 claims were alive), arguably all vicarious liability of Sean Murphy was extinguished upon Plaintiffs' acceptance of that offer, but not his direct liability. The trial court was wrong to dismiss Plaintiffs' claims for Sean Murphy's direct liability. This Court should reverse.

5.3 It was error to dismiss Plaintiffs' claims under RCW 4.24.630.

Defendants' first motion for summary judgment was for dismissal of all Plaintiffs' claims under RCW 4.24.630. The trial court erred in dismissing all claims under RCW 4.24.630.

The trial court stated it dismissed Plaintiffs' RCW 4.24.630 claims because *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015), requires that RCW 4.24.630 cannot apply in any case in which the timber trespass statute (RCW 64.12.030) applies.

However, as noted in Plaintiffs' response brief, *Gunn* is distinguishable from the present case on both legal and factual grounds.

5.3.1 Genuine issues of material fact should have precluded summary judgment.

Defendants' motion made a single, legal argument: that the waste statute cannot apply in any case in which the timber trespass statute applies. However, the *Gunn* court noted that the waste statute **could appropriately apply** in a case involving both damage to trees and damage to land. *Gunn*, 185 Wn. App. at 525 n. 6. Webster presented evidence that there was, in fact, damage to her land. CP 145-170; 210-212; 235-237. Defendants destroyed Webster's valuable landscape amenity: the boundary

trees that would have created a visual screen for a future residence. This destruction of landscape was not merely damage to trees—it was wrongful waste or injury to the land.

Galen Wright, Plaintiffs’ damages expert, testified as follows:

Q. Okay. So not to put too fine a point on it, when you do a timber value appraisal, you’re appraising the stumpage value of each log that left the property, aren’t you?

A. Yes.

Q. And when you do a landscape value, you’re looking at what the reduced value to the landowner is of having lost those live and standing trees?

A. Essentially that’s it, yes.

Q. All right. So looking one more time at your report, in the last sentence, you say: “The total damages to the Webster property were determined to be \$80,345.” Do you see that?

A. Yes.

Q. **So what you’re talking about is damage to the Websters’ real property, to their land, correct?**

A. That’s –
[objection]

A. **That’s correct.**

(Wright Dep. at 84:23-85:8 (emphasis added)). CP 211, 212. In other words, destruction of landscape **is damage to land**. The

real property itself was damaged by the destruction of this landscape feature. If accepted by a jury, this testimony would establish that there was damage to land as well as damage to trees, placing this case within the class of cases identified in *Gunn* in which the waste statute could properly apply. Because the trial court cannot judge the credibility of the witness and must view the evidence in a light most favorable to Webster as the nonmoving party, this testimony creates a genuine issue of material fact that requires resolution by a jury, not by summary judgment.

As a backup argument on reply, Defendants baldly asserted that there was no evidence that the waste or injury to the land was “wrongful.” However, the wrongfulness element was not raised in Defendants’ original motion and therefore was not properly before the Court. Plaintiffs were under no obligation to present evidence of wrongfulness in response to the issues presented in Defendants’ motion. Defendants’ motion only addressed the legal question of whether the waste statute could apply at all. As a matter of law, the waste statute **can** apply where there is damage to both trees and land. *Gunn*, 185 Wn. App. at 525 n. 6. Defendants conceded as much in their Reply. Reply at 3 n. 2 (“There may be some instances where a plaintiff’s trees are cut and his/her property intentionally damaged allowing the plaintiff to recover all his/her damages under the

waste statute.”). CP 263. Plaintiffs presented evidence that there was damage to both trees and land, placing the case within the operation of the waste statute. This evidence was sufficient to raise genuine issues of material fact to defeat Defendants’ motion.

5.3.2 The waste statute, RCW 4.24.630, should apply as a matter of law to “Every person who goes onto the land of another and who removes timber.”

The very first provision of the statute, “Every person who goes onto the land of another and who removes timber,” is rendered entirely meaningless if the exception at RCW 4.24.630(2) is misapplied.

Under the first prong of the waste statute, liability for triple damages, costs, and attorney’s fees applies to “Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land.” RCW 4.24.630(1). Because the statutory language is disjunctive, it applies if any one of the prongs is met. Additionally, the first prong, “removes timber, crops, minerals, or other similar valuable property from the land” is also disjunctive, meaning that removal of any one thing on the list subjects the person to liability. Given this plain language, it is

clear that the legislature intended the statute to apply to a person who “removes timber” from land of another.

Timber trespass applies “Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree ... on the land of another person ... without lawful authority.” RCW 64.12.030. Thus, **every time** a person goes onto the land of another and removes timber (the language of the first prong of the waste statute), liability for damages would **always** be available under timber trespass because the person has cut or carried off a tree on the land of another person (the language of timber trespass). Applying the RCW 4.24.630(2) exception incorrectly would, **in every case**, nullify the first provision of RCW 4.24.630; re: “removes timber”.

As a matter of statutory interpretation, courts cannot allow such a result. Courts must presume that the legislature intended each word and phrase to have some effect. *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). Surely the legislature intended “removes timber” to have some operative effect within the waste statute. But applying the timber trespass exception blindly results in the words “removes timber” never having any effect.

It does no good to say, as Defendants did, “There may be some instances where a plaintiff’s trees are cut and his/her property intentionally damaged allowing the plaintiff to recover all his/her damages under the waste statute.” Reply at 3 n. 2. CP 263. That would require language other than the plain language of the “removes timber” prong. The only thing required under the “removes timber” prong is that a person goes onto the land of another and removes timber. No additional damage is required. No intent to cause such damage is required.

Damage for removing timber is **always** covered by the timber trespass statute. The result of applying the exception blindly is no different from removing the word “timber” from the statute altogether. This, the courts cannot do. The legislature purposefully used the words “removes timber.” The courts must give effect to those words, not write them out of the statute.

Gunn involved saplings that were cut, but not removed. It was not a “removes timber” case. It was a “wrongful waste or injury to the land” case, where the trial court had before it no evidence of damage to the land. The court did not deal with the “removes timber” prong.

5.3.3 This Court has recently articulated the principles of statutory construction.

“Statutory interpretation is a matter of law that we review de novo. *Janetsky v. Olsen*, 179 Wn.2d 756, 317 P.3d

1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislature’s intent. *Id.* at 762. To determine legislative intent, we first look to the plain language of the statute. *Id.* We consider the language of the provision in question, the context of the statute in which the provision is found, and related statutes. *Ass’n of Wash. Spirits & Wire Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015).

If the statute defines a term, we must apply the definition provided. *Nelson v. Duvall*, 197 Wn.App. 441, 452, 387 P.3d 1158 (2017). To discern the plain meaning of undefined statutory language, we give words their usual and ordinary meaning and interpret them in the context of the statute in which they appear. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014). And “[r]elated statutory provisions must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statute.” *Koenig v. City of Des Moines*, 158 Wn.2d 173, 184, 142 P.3d 162 (2006).

If a statute is unambiguous, we apply the statute’s plain meaning as an expression of legislative intent without considering other sources of such intent. *Jametsky*, 179 Wn.2d at 762. If the language of the statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. *Id.* We

resolve ambiguity by considering other indications of legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Id.*

We generally assume that the legislature meant precisely what it said and intended to apply the statute as it was written. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). When interpreting a statute, each word should be given meaning. *Id.* And when possible, statutes should be construed so that no clause, sentence, or word is made superfluous, void, or insignificant. *Id.* However, in special cases we can ignore statutory language that appears to be surplusage when necessary for a proper understanding of the provision. *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 859, 774 P.2d 1199 (1989); *see also Am. Disc. Corp. v. Shepherd*, 160 Wn.2d 93, 103, 156 P.3d 858 (2007).

In addition, when construing two statutes, we assume that the legislature did not intend to create an inconsistency. *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 793, 357 P.3d 1040 (2015). Whenever possible, we read statutes together to create a harmonious statutory scheme that maintains each statute's integrity. *Id.* at 792.

Finally, we can avoid a literal reading of a statute if it leads to strained, unlikely, or absurd consequences. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 443, 395

P.3d 1031 (2017). “We may resist a plain meaning interpretation that would lead to absurd results.” *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 834, 399 P.3d 519 (2017); *see also Chelan Basin Conservancy v. GBI Holding Co.*, 188 Wn.2d 692, 705-08, 399 P.3d 493 (2017) (avoiding an absurd interpretation that would render a statute practically meaningless).” *State v. Evergreen Freedom Foundation*, COA No. 50224-1-II at 8-9 (2017).

5.3.4 Applying this Court’s principles of statutory construction requires reversal of the trial court’s order dismissing claims under RCW 4.24.630.

RCW 4.24.630

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

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

reasonable attorneys' fees and other litigation-related costs.

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

The plain meaning of the first phrase of the first sentence of this statute could not be clearer. “Every person who goes onto the land of another and who removes timber ... is liable to the injured party for treble the amount of the damages caused by the removal...”

There is no wrongful element required in the first phrase of the first sentence that defines the remedy for removing timber. This is a strict liability statute that does not require fault. In fact, that is why the exception found at subpart (2) makes sense, as a triple damages remedy is required under RCW 64.12.030 (the mitigation statute, RCW 64.12.040 is not cited in RCW 4.24.630(2) as it is in RCW 64.12.035. which states: An electric utility is immune from liability under RCW 64.12.030, **64.12.040**, and 4.24.630 . . .).

More on that below, but suffice it to say that the Legislature knows how to refer to other statutes. If any remedy

but a triple damages remedy was allowed under the exception, found at RCW 4.24.630(2), RCW 64.12.040, the mitigation provision of the historic timber trespass statute would be cited at that subpart (2), and it is not.

Following this Court's instruction from *State v. Evergreen Freedom Foundation*, the plain language is clear: RCW 4.24.630 applies to removing timber. That term is not defined, but the plain meaning is clear: it means trees. RCW 64.12.030 uses "tree" and "timber" interchangeably. It also requires triple damages.

RCW 64.12.030

Injury to or removing trees, etc.—Damages.

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

So when the legislature provided a strict liability remedy for removing timber in RCW 4.24.630, it was not treading new

ground, in a sense, it was simply denying the opportunity for mitigation of any sort, as no “wrongful” element applies to that part of the statute, and RCW 64.12.040 is not cited in the exception. That frankly harmonizes the two statutes: 4.24.630 and 64.12.030: they both provide the same remedy: triple damages for cutting timber.

RCW 4.24.630 is unambiguous in so far as it imposes a triple damages remedy without possibility of mitigation under the first phrase of the first sentence. We shall see below that subpart (2) does not introduce an ambiguity. So, we assume the legislature meant what it said, and intended the statute to be applied as written. Each word should be given meaning, and no part should be made superfluous.

So how do we account for RCW 4.24.630(2)? Does RCW 64.12.030 provide the same remedies as RCW 4.24.630? NO!! Although as we have shown above, they both require a triple damages remedy for cutting trees, RCW 4.24.630 provides much more remedies than RCW 64.12.030.

RCW 4.24.630 also provides “Damages recoverable under this section include, but are not limited to, damages for the

market value of the property removed or injured, and for injury to the land, including the costs of restoration.” (Emphasis added). Defendants own expert first offered restoration damages as appropriate. CP 220.

The case law interpreting RCW 64.12.030 denies a recovery for restoration damage to land ordinarily incident to a logging operation. Hello? Have we ever seen a clear cut? The ground is ruined, and the landscape is destroyed. But the case law prohibits a remedy under RCW 64.12.030 for such damage. *Henricksen v. Lyons*, 33 Wn.App. 123, 127, 652 P.2d 18 (1982). RCW 4.24.630 thus provides remedies not available under RCW 64.12.030.

RCW 4.24.630 also provides “In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.” None of these remedies are available under RCW 64.12.030. And these are stated as liability of the tortfeasor: damages for which the injured party must be reimbursed. This is not the ordinary cost shifting remedy to the prevailing party,

or even the remedial remedy of a one way street fees award as in RCW 19.86. This is a substantive remedy not available under RCW 64.12.030.

Gunn was decided correctly to the extent that this Court stated that if there was damage to land, RCW 4.24.630 applied, and in this case that was shown to be true. The landscape was destroyed, but *Gunn* is being wrongly applied by trial courts by the blind and categorical application of the exception at (2), which renders much of RCW 4.24.630 meaningless.

5.3.5 Resort to the exception results in triple damages under RCW 64.12.030.

Even if a court declines to apply the waste statute, a defendant's resort to the waste statute's exception should result in a triple damage remedy under RCW 64.12.030. The exception in the waste statute states, "This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035." By invoking the exception, a defendant must concede that liability for damages is tripled, as provided under RCW 64.12.030: "any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed."

The exception in the waste statute at RCW 4.24.630 does not mention 64.12.040. When RCW 64.12.040 applies, “judgment shall only be given for single damages.” However, RCW 64.12.040 is not mentioned in the exception to the waste statute. Thus, either RCW 64.12.030 applies, with its triple damages remedy, or the waste statute applies, with its remedies of triple damages, costs, and attorney’s fees.

It is of note that the legislature knows how to cite RCW 64.12.040 if that is what it wanted to do. In RCW 64.12.035, which provides immunity for electric utilities removing vegetation in close proximity to electric facilities, the legislature declares, “An electric utility is immune from liability under RCW 64.12.030, **64.12.040**, and 4.24.630.” (emphasis added). Thus, an electric utility is immune from triple damages under RCW 64.12.030 **and** from single damages under RCW 64.12.040. The legislature knows how to incorporate RCW 64.12.040.

If the legislature had desired to create an exception to the waste statute where liability for single damages was provided by RCW 64.12.040, it could have done so by adding RCW 64.12.040 to the list of statutes that apply under the exception. It is significant that the legislature did not do so. In order to invoke and apply the exception to the waste statute, a defendant must accept the result that their liability under RCW 64.12.030 is for triple damages.

5.3.6 There were facts that could have shown wrongfulness under RCW 4.24.630 as well.

As seen above, 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. Sean Murphy had no idea where the boundary was, and after three calls to Audrey Webster asking for permission to cut her trees, he should have known that such a cutting would not be permitted. Hence a correct location of the boundary was essential. Without it, and knowing that he did not know where the boundary was located, he had no reason to believe his loggers would stay on his land.

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 Sean Murphy did not have probable cause to believe the land his loggers cut was his own. Sean Murphy’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 Sean Murphy was liable for triple damages.

Timber trespass case law requires reasonable efforts to locate the property boundary with certainty. A review of timber trespass case law demonstrates that the mitigation defense fails as a matter of law where the defendant has not taken any reasonable steps to determine the property boundary with certainty, such as conducting a formal survey. For example, in *Smith v. Shiflett*, 66 Wn.2d 462, 466, 403 P.2d 364 (1965), the defendant, Shiflett, “never made any pretense of making a survey; nor did he attempt to find out who owned the land where he was cutting.” The court held that Shiflett “did not bring himself within the letter or the spirit of RCW 64.12.040.” *Id.* at 467. The court observed, “The best that can be said for Shiflett is that he didn’t deliberately cut the trees, knowing them to belong

to the plaintiffs; but he proceeded without making any survey, or any adequate investigation, and without probable cause to believe that the trees being cut were on land where he had authority to be.” *Id.* at 466.

The mitigation defense similarly failed in *Fredericksen v. Snohomish County*, 190 Wash. 323, 327, 67 P.2d 886 (1937), in which the county’s road crew “had never got permission from plaintiff or any other person to cut these shrubs across the line. No effort was made to determine the line before the cutting, except that they assumed that the telephone poles were 5 feet from the property line.” The court held, “It necessarily follows that the cutting of the trees and the slashing of the shrubs were done in disregard of the rights of the respondent, and that there was in it an element of willfulness.” *Id.*

In *Nethery v. Nelson*, 51 Wash. 624, 626, 99 P. 879 (1909), “The appellants made no effort whatever to locate the section line before cutting the timber, and found no difficulty whatever in marking the location after the trespass was committed. The claim that they mistook a blazed zigzag trail through the forest for a section line evidently did not impress the jury and does not impress this court.” The court held that this evidence “fully sustained” the conclusion that the trespassers did not have probable cause to believe that the land was their own. *Id.*

In *Sherrell v. Selfors*, 73 Wn. App. 596, 604, 871 P.2d 168 (1994), the court held that the trespassers, Selfors, had failed to meet their burden of proving mitigation. The court rejected Selfors' arguments that surveys were not customary in that area; that they tried to contact the plaintiff property owner; that they relied on the community manager's description of the line; and that they were acting in good faith without a profit motive. *Id.* Because Selfors failed to conduct a survey, failed to ascertain the boundary from existing markers, and failed to consult with the property owner, they had failed to meet their burden of proof. *Id.* In other words, none of Selfors' arguments were valid mitigating factors as a matter of law.

In *Longview Fibre Co. v. Roberts*, 2 Wn. App. 480, 481, 470 P.2d 222 (1970), "Two of defendant's employees, both hired as timber fallers and neither of whom had any knowledge, skill, training or experience in running boundary lines, attempted unsuccessfully to locate and run the south line." The defendant made no further efforts to locate the boundary before cutting. *Id.* The court reversed a trial court judgment of single damages, holding,

The essence of the element of willfulness in this case lies in the defendant's failure to locate a boundary; his failure to employ persons even reasonably skilled or experienced in running boundary lines; his ignoring the request of his own employees to employ persons so skilled; his failure to consult with plaintiff in any manner in an attempt to locate boundary corners; his decision to proceed with the logging operations without having any reasonable knowledge of the location of the corners or the line.... Those facts conclusively demonstrate to us that the defendant elected to proceed with the operations in reckless disregard of the probable consequences.

Id. at 483-84.

Even where a defendant conducted a survey, the mitigation defense failed where the survey was poorly done. In *Blake v. Grant*, 65 Wn.2d 410, 412, 397 P.2d 843 (1964), the mitigation defense failed because the defendants “attempt[ed] to establish the boundary line without locating a proper starting point; [failed] to talk to adjoining owners about the true line; [failed] to see a previously blazed dividing line; and [made] a major error in direction in running the east-west line.”

The takeaway from all of these cases is that, in order to prove mitigation under RCW 64.12.040, or avoid a finding of wrongfulness under RCW 4.24.630, a defendant must be able to show that he had knowledge of reliable facts creating probable cause to believe the land was his own. Anything less, under the case law, is willful or reckless and subject to treble damages. An

erroneous amateur survey of the kind Sean Murphy relied upon is not enough to prove mitigation. And Sean Murphy, charged with knowledge that his neighbor did not want her trees cut, and knowing that neither he nor his brother knew where the boundary was, makes Sean Murphy directly liable for the error.

The undisputed facts also establish that Defendants are liable for triple damages. Triple damages are the default rule under the timber trespass statute: “Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, ... any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.” RCW 64.12.030. Once the fact of trespass has been established—and here it is admitted—the only way for Defendants to escape treble damages is to prove that the trespass was “casual or involuntary” or done with probable cause to believe that the land was theirs. RCW 64.12.040; *Smith v. Shiflett*, 66 Wn.2d 462, 464-465, 403 P.2d 364 (1965) (“treble damages will be imposed ... unless those trespassing exculpate themselves under the provisions of RCW 64.12.040”). If Defendants meet their burden of proving mitigation, only single damages are imposed. *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 197-198, 570 P.2d 1035 (1977). Defendants never attempted to meet any burden of proof or production in either of their motions. They simply argued the exception swallowed the law, and Sean was in Hawaii.

Here, the undisputed facts demonstrate that the trespass was not casual or involuntary or done with probable cause. As with any question of fact, the mitigation defense can be disposed of on summary judgment. *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). “[W]here reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Wilkinson v. Chiwawa Cmty. Ass’n*, 180 Wn.2d 241, 250 (2014). The only reasonable conclusion from the evidence in this case is that Defendants’ trespass was reckless or intentional, not casual or involuntary.

As a matter of law, a timber trespass is reckless or intentional, requiring treble damages, where the defendant has not taken any reasonable steps to determine the property boundary with certainty, such as conducting a formal survey. The bottom line of all these cases is that timber trespass is reckless, requiring triple damages, if by the exercise of ordinary care the defendant could have ascertained the true ownership of the timber, but failed to do so. *See Bailey v. Hayden*, 65 Wash. 57, 58, 117 P. 720 (1911). Sean Murphy admitted a survey would have prevented this trespass, and he just did not do one. CP 363.

There are two basic ways, in the exercise of ordinary care, to obtain the required “probable cause” to establish the

mitigation defense: 1) have the boundary professionally surveyed, or 2) agree with the neighboring property owner on the location of the boundary. Under the case law, failure to do either of these makes the trespass willful or reckless and subject to treble damages. “A mere subjective belief in the right to cut trees is not sufficient for mitigation pursuant to RCW 64.12.040.” *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 96, 173 P.3d 959 (2007). Only a survey or an agreement with the neighbor can create certainty greater than “a mere subjective belief.” Sean Murphy did neither.

Defendants did not conduct a survey. Sean and Jill Murphy did not have the property surveyed when they bought it. S. Murphy Dep. at 20:19-23. CP 383. They did not have the property surveyed prior to harvesting timber. S. Murphy Dep. at 44:12-22. CP 389. Sean Murphy had contacted Audrey Webster multiple times and asked if she wanted her trees cut and she had repeatedly said “no”. CP 235-237, 360. Sean Murphy did not know where the boundary was located; had never had a survey done; didn’t know how to read a deed or locate a boundary; and never urged his brother to properly locate the boundary. CP 360, 359-365.

As a real estate agent, Sean Murphy frequently recommended clients have a survey done when they purchase property, yet he never had a survey done of his own parcel. S.

Murphy Dep. at 20:11-23. CP 363. He knows a survey would have prevented the trespass. S. Murphy Dep. at 29:1-21. CP 386. Yet, even in hindsight, Sean Murphy would not give Greg Murphy specific instruction to have a survey done prior to harvesting timber. S. Murphy Dep. at 47:7-22, 49:8-12. CP 390. He is unrepentant, and would apparently repeat his reckless disregard for his neighbors.

Defendant Sean Murphy did not do a survey. He did not consult with Webster. His only attempt at locating the true boundary line was a poorly done amateur “survey” done by his brother by compass without reference to the legal description of the parcel. The only reasonable conclusion from the evidence is that the trespass was reckless. It was not casual or involuntary. It was not done with probable cause. Based on this undisputed evidence, Webster was entitled to judgment as a matter of law that Defendant Sean Murphy cannot prove the mitigation defense under RCW 64.12.040, nor could Defendant Sean Murphy have avoided a finding of wrongfulness under RCW 4.24.630. This Court should reverse the dismissal of RCW

4.24.630 claims, and remand for instructions to hold a trial on damages only, which will be tripled.¹

6. Plaintiffs request attorney fees on appeal.

Plaintiffs request an award of costs and attorney fees on appeal, pursuant to RAP 18.1. Plaintiffs are entitled to recover litigation costs and attorney fees under the waste statute, RCW 4.24.630.

7. Conclusion

The trial court erred in dismissing Plaintiffs' direct claims against Sean Murphy. He had fault. A jury could have found so. The acceptance of the offer of judgment from Sean's agent, Greg, did not release Sean from his own, direct liability.

The trial court also erred in dismissing Plaintiffs' claims under RCW 4.24.630. The waste statute applies to Plaintiffs' trees carried away and to landscape damage. Sean Murphy's wrongful conduct makes him liable for triple damages.

This Court should 1) reverse summary judgment dismissal of Sean Murphy; 2) reverse the trial court's dismissal of Plaintiffs' claims under RCW 4.24.630; 3) grant partial summary judgment in favor of Plaintiffs on Sean Murphy's

¹ After summary judgment establishing liability for treble damages, the court can hold a trial to set the amount of single damages to the trees, which are then tripled by the court when it renders final judgment.

Hill v. Cox, 110 Wn. App. 394, 401, 41 P.3d 495 (2002).

liability for triple damages under the waste statute and/or the timber trespass statute; and 4) award Plaintiffs' attorney fees on appeal.

Respectfully submitted this 30th day of November, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on November 30, 2017, I caused 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 30th day of November, 2017.

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