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Court of Appeals
Division II
State of Washington
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No. 50843-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

AUDREY B. WEBSTER, TRUSTEE OF THE AUDREY WEBSTER
REVOCABLE LIVING TRUST, UTD 7/20/06 AND MARY 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 RESPONDENTS SEAN AND JILL MURPHY

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I. INTRODUCTION

This appeal should be summarily rejected for at least two reasons. First, because of choices made by appellants below, there were **no** appealable claims remaining when they filed their notice of appeal. As appellants readily acknowledge, they accepted a \$40,000 Offer of Judgment on August 4, 2017 and, as a result, judgment was entered below against defendants Greg and Jolynn Murphy and Murphy Resources, Inc. CP 472-473. Because a judgment was entered (and satisfied), appellants concede, as they must, that “Greg Murphy and his company [Murphy Resources, Inc.] are not at issue in this appeal.”¹

Given the judgment, appellants also concede, as they must, that their vicarious liability/agency claims against Sean and Jill Murphy² (who hired Sean’s brother, Greg Murphy, to handle the logging) are no longer at issue.³ It isn’t until page 16 of their brief that appellants clarify that their only allegedly remaining claims are direct negligence claims against Sean Murphy. There, they argue that “[t]he trial court was wrong to dismiss **Plaintiffs’ claims for Sean Murphy’s direct liability.**”⁴ However, in

¹ Appellants’ Brief at 3.

² For brevity’s sake, respondents will refer to themselves for the remainder of this brief as “Sean” or “Sean Murphy.”

³ Appellants’ Brief at 14 (“By accepting the offer of judgment from 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)”).

⁴ Appellants’ Brief at 16 (emphasis added).

making this argument, appellants omit the all-important facts that (1) there were no claims carved out when judgment was entered below; and (2) appellants didn't present any evidence or argument to the trial court that Sean Murphy should remain in the case on direct negligence claims.

During the May 26, 2017 summary judgment hearing below, appellants' attorney only argued that Sean Murphy should remain in the case on a vicarious liability/agency theory—because Greg Murphy was allegedly acting as Sean's agent when he hired a logging company and performed an imperfect property line determination. RP (Vol. 2) at 8:13-19 (“one of the facts that is not in dispute is that Sean Murphy gave his brother complete authorization to act on his behalf, even signing his name”) and 14:19-25 (“it was actual authority and it's – it is the clearest case of principal-agent relationship you can have where you actually authorize someone to act for you”). This approach was consistent throughout appellants' response brief below and throughout appellants' argument during the subject summary judgment hearing. In short, because appellants didn't present any evidence or argument below in support of direct negligence claims against Sean Murphy, there is no record upon which this Court could review a dismissal of such claims. *See* RAP 2.5(a).

Second, even if this Court were to ignore the absence of evidence and argument before the trial court in support of direct negligence claims

against Sean Murphy, Judge Lawler (the trial judge) correctly dismissed appellants' waste statute cause of action because, as this Court has repeatedly held, "the waste statute does not provide damages where the timber trespass statute does." *Gunn v. Riely*, 185 Wn. App. 517, 525, 344 P.3d 1225 (2015). In fact, in 2016, appellants' attorney (Mr. Cushman) filed an appeal with this Court and made the exact same arguments he's making in this case. *George v. Danielson*, 197 Wn. App. 1017 (Dec. 20, 2016), 2016 WL 7378832.⁵ In that very recent case, this Court rejected Mr. Cushman's arguments and held, once again, that "[w]e follow our precedent and the plain meaning of RCW 4.24.630(2) and conclude that when damages are provided for in the timber trespass statute, the waste statute's provisions on damages are inapplicable." *Id.* at *4. To summarize, approximately one year ago, this Court rejected the exact same arguments being made by the same attorney (Mr. Cushman) in this case. This Court got it right in the *Gunn* and *George* cases and there is no legitimate basis for asking this Court to rereview the same issue in this case.

⁵ Unpublished, but cited pursuant to GR 14.1(a). A copy of this Court's decision from the *George* case is attached as Ex. A to this brief—for the Court's convenience. It is surprising, to say the least, that Mr. Cushman didn't even mention this Court's December 2016 decision in *George* in his brief in this case.

II. STATEMENT OF ISSUES

1. Whether appellants' attorney presented evidence and argument to the trial court below that Sean Murphy should remain in the case based on direct (as opposed to vicarious) negligence claims?

2. Whether Judge Lawler erred below when he followed this Court's 2015 decision in *Gunn* (and this Court's December 2016 decision in *George*) and confirmed that "the long history of case law about Timber Trespass [sic] covers just exactly this type of thing, the cutting of trees, the logging of, and the incidental damage such as it is that occurs when somebody does do logging"?⁶

III. STATEMENT OF CASE

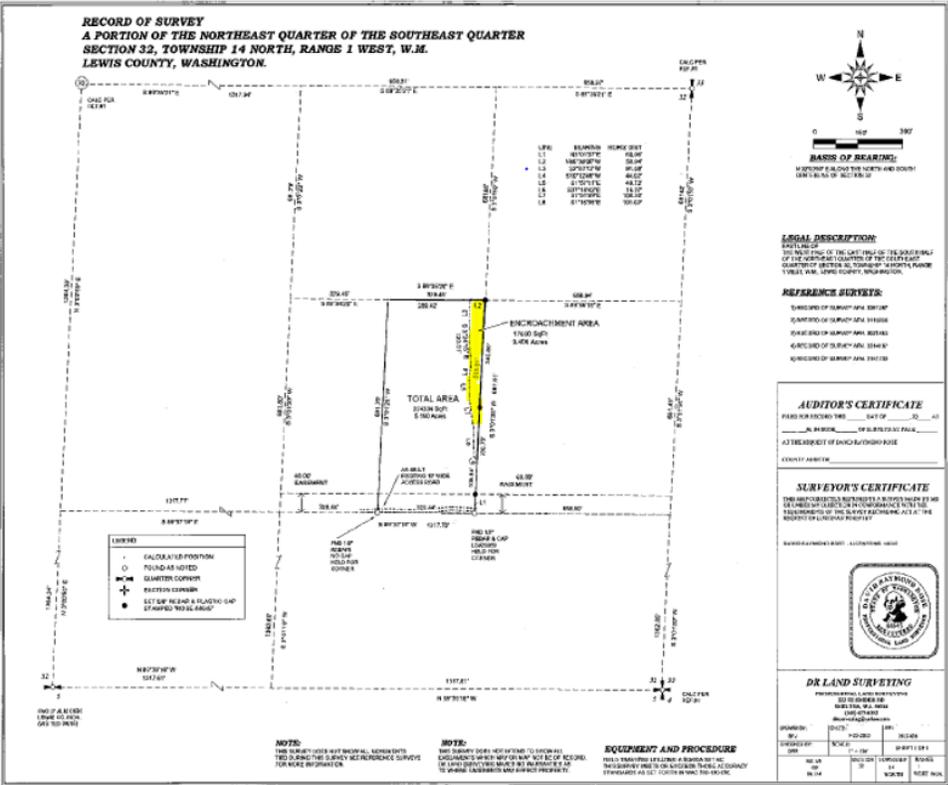
A. This case arises out of the cutting of approximately 45 trees on appellants' unimproved, 5-acre lot in rural Lewis County.

In 2007, appellants (sisters Audrey Webster and Mary Hodge) inherited a 5-acre undeveloped parcel, located in rural Lewis County. CP 110:6-20. Ms. Hodge never visited the property and Ms. Webster recalled being on the property twice: about 14 and 12 years ago, respectively. CP 111:1-18 and CP 119:10:11.

In 2012, respondent Sean Murphy hired his brother's logging company, Murphy Resources, to harvest all of the timber on his property,

⁶ RP (Vol. 1) 21:16-23.

which borders the appellants' undeveloped 5-acre parcel. During the harvest, the logging company retained by Greg Murphy accidentally cut 45 trees (out of a total of approximately 550 trees) belonging to appellants, along appellants' eastern property line. The highlighted section on the below map shows where the 45 trees were growing:



CP 127. Other than the cutting and removal of the 45 trees, there was no damage to appellants' property. CP 130:10-15; 131:2-10. All debris was removed and the logged property (including the small section on appellants' property) was cleaned and replanted with Douglas fir seedlings at a rate of over 400 seedlings per acre per WAC 222-34-010. CP 130:10-

15; CP 131:2-CP 132:10. It was undisputed below that there was no damage to appellants' property other than the removal of the trees at issue, i.e. there was no garbage dumping or excavation. CP 131:19-CP 132:7.

In February of 2015, without knowing about any trespass, appellants retained forester Jim Frost to sell their 5-acre parcel at auction. CP 112:8-CP 116:15. While preparing the appellants' property for sale, Mr. Frost noticed that some trees had been cut. CP 136: 22-CP 137:10. In July 2015, Mr. Frost suggested to appellants that a payment of \$4,000 to \$5,000 from the Murphys would be a fair settlement—and he conveyed that suggestion to Greg Murphy. CP 51:20-52:9; CP 53:1-21; CP 66. However, before Greg Murphy could respond to Mr. Frost's suggestion, Mr. Frost referred appellants to Mr. Jon Cushman and then appellants filed suit. CP 138:8-17. *See also* Complaint (CP 1-4).

B. Appellants' August 4, 2017 acceptance of defendants' offer of judgment changed everything.

Appellants concede that their August 4, 2017 acceptance of an offer of judgment extinguished all claims against the alleged agents of Sean Murphy, defendants Greg and Jolynn Murphy and Murphy Resources, Inc.⁷ Appellants also concede that taking judgment against the alleged agents of Sean Murphy precludes them from appealing Judge

⁷ Appellants' Brief at p. 3 ("Greg Murphy and his company are not at issue in this appeal").

Lawler's May 26, 2017 dismissal of all vicarious liability/agency claims against Sean Murphy.⁸

In other words, all parties to this appeal agree the only remaining claims that *might* be subject to appeal are appellants' direct negligence claims against Sean Murphy, the owner of the Murphy property. So, the first dispositive issue before this Court is whether appellants presented evidence or argued to the trial court (in response to Sean Murphy's summary judgment motion) that Sean Murphy should remain in the case on direct negligence claims. As outlined in detail below, they did not. *See* CP 348-357 and RP (Vol. 2) at 8-17.

IV. ARGUMENT

A. Appellants didn't argue below that Sean Murphy should remain in the case on a direct negligent theory.

On January 20, 2017, defendants Sean Murphy filed a summary judgment motion as to appellants' claims against him. CP at 320-326. Tellingly, in response to that summary judgment motion, appellants identified the issue before the trial court as whether "Sean and Jill Murphy [should be held] liable for their agent's timber trespass." CP 349:2-6. As

⁸ Appellants' Brief at p. 14 ("By accepting the offer of judgment from 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)"). In fact, the *Glover* case stands for the basic proposition that "[o]nce the plaintiff agrees to settle with a solvent agent for a reasonable amount, [] no principle of full compensation requires that she also be able to pursue a claim against the principal, since, presumably, she could have obtained full compensation from the agent." 98 Wn.2d at 722.

the table below demonstrates, throughout their opposition brief below, appellants argued that Sean Murphy should remain in the case on a vicarious liability/agency theory and not on a direct negligence theory:

APPELLANTS' ARGUMENT BELOW	CLERK'S PAPERS CITE
<p>“When a person chooses to do business through an agent, the person becomes liable for the consequences of the agent’s authorized acts, the same as if those acts were done by the person themself [sic].”</p>	<p>CP 351, lines 25-26.</p>
<p>“Sean and Jill Murphy are directly liable for the acts of their agent, Greg Murphy, who was acting with the authority they had given him.”⁹</p>	<p>CP 352, lines 24-25.</p>
<p>“Greg Murphy’s direction to Thomsen Timber was an act within his actual authority as the agent of Sean and Jill Murphy.”</p>	<p>CP 353, lines 13-14.</p>
<p>“Greg Murphy was the agent of Sean and Jill Murphy, with full</p>	<p>CP 357, lines 13-14.</p>

⁹ Appellants use of the phrase “directly liable for the acts of their agent” and similar phrases should not be confused with the direct negligence theory appellants are asking this Court to review. Before this Court, appellants are not arguing in support of a vicarious liability theory. Instead, because they cannot appeal any agency or vicarious liability theory, appellants are arguing that “[i]f 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.” Brief of Appellants at p. 16.

authority to do all acts necessary to accomplish the objective of harvesting the Murphy parcel.”	
“Sean and Jill Murphy are directly liable for the authorized acts of their agent.”	CP 357, lines 16-17.

On May 26, 2017, the parties appeared before Judge Lawler to argue Sean Murphy’s summary judgment motion. Consistent with his clients’ opposition brief, appellants’ attorney only argued that Sean Murphy should remain in the case on a vicarious liability/agency theory. *See* RP (Vol. 2) at 8:13-19 (“one of the facts that is not in dispute is that Sean Murphy gave his brother complete authorization to act on his behalf, even signing his name”) and at 14:19-25 (“it was actual authority and it’s – it is the clearest case of principal-agent relationship you can have where you actually authorize someone to act for you”).

Although one wouldn’t know it from reading their brief to this Court, appellants didn’t present any evidence or make any arguments to Judge Lawler that Sean Murphy should remain in the case on a direct negligence theory. *See* CP at 348-357. And, as the Washington Supreme Court held in the *Glover* case (cited by appellants on pages 14 and 15 of their brief), “[o]nce the plaintiff agrees to settle with a solvent agent for a

reasonable amount, [] no principle of full compensation requires that she also be able to pursue a claim against the principal, since, presumably, she could have obtained full compensation from the agent.” *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 722, 658 P.2d 1230 (1983).

Because appellants’ only argument below—in opposition to Sean Murphy’s summary judgment motion—was a vicarious liability/agency argument, appellants cannot now appeal a dismissal of direct negligence (non-agency) claims that were never presented or developed in opposition to Sean Murphy’s summary judgment motion. *See* RAP 2.5(a)(“[t]he appellate court may refuse to review any claim of error which was not raised in the trial court”).

B. This Court held in 2015 (and confirmed in 2016) that RCW 4.24.630(2) means what it says.

Because there are no appealable claims before this Court, this Court need not consider the waste statute issue that appellants present at pages 17-30 of their brief. However, if this Court were to find that appellants somehow did create a record below as to direct negligence claims against Sean Murphy, appellants’ appeal of Judge Lawler’s dismissal of their waste statute claim also should be rejected.

As this Court has repeatedly held—including as recently as December 2016 in an appeal filed by Mr. Cushman—the waste statute,

RCW 4.24.630, is inapplicable in any case for which liability for damages is provided under the timber trespass statute, RCW 64.12.030. This Court's decision in *Gunn v. Riely*, 185 Wn. App. 517, 525, 344 P.3d 1225 (2015) addressed that exact issue and this Court held, in *Gunn*, that a landowner may not recover under the waste statute when his/her claims fit within the timber trespass statute. *Id.*

In the *Gunn* case, the Gunns and Rielys owned adjoining properties, just as in this case. A company hired by the Rielys inadvertently removed 107 trees on the Gunns' property in connection with allowing access for well-drilling equipment. Just as in this case, the only damage to the Gunns' property was the removal of the trees. The Gunns sued the Rielys and asserted both timber trespass and waste statute claims. The trial court awarded the Gunns damages under the waste statute and the Rielys appealed. This Court then reversed the trial court on that issue—confirming that the Gunns' claims fell squarely within the timber trespass statute and that the trial court had erred by allowing the Gunns' waste statute claims to go forward. *Gunn*, 185 Wn. App. at 527. This Court confirmed, in 2015, that it was bound by legislative intent and that, after reviewing Washington's cases construing the timber trespass statute over the last 142 years, the Gunns could not assert a waste statute claim. *Gunn*, 185 Wn. App. at 525-526. This Court's holding in *Gunn*

was unequivocal: if a defendant enters a plaintiff's property and commits a trespass against the plaintiff's "timber, trees or shrubs, causing immediate, not collateral injury" the case falls within the timber trespass statute. *Gunn*, 185 Wn. App. at 526.

This same issue was addressed more recently by this Court in the unpublished opinion of *Bede v. Yorek*, 194 Wn. App. 1039 (June 21, 2016), 2016 WL 3514184.¹⁰ *Bede* involved a dispute between neighbors and a boxwood hedge that grew within a planter bed along the property line. *Bede*, 2016 WL 3514184 at *1. The Bedes removed a portion of the boxwood hedge they (mistakenly) believed was on their property. *Id.* The Yoreks were unable to replace the hedge, and, instead, built a six-and-a-half foot tall concrete fence near the property line. Although on the Yoreks' property, the fence protruded into the shared driveway by at least 16 inches which, due to its position, blocked 58 inches of the driveway the Bedes had historically used. *Bede*, 2016 WL 3514184 at *2.

The Bedes then sued the Yoreks and the Yoreks counterclaimed that the Bedes had committed trespass either under both the waste statute (RCW 4.24.630) and the timber trespass statute (RCW 64.12.030) when they cut the hedge—and requested attorneys' fees under the waste statute.

¹⁰ Unpublished, but cited pursuant to GR 14.1(a). A copy of this Court's decision from the *Bede* case is attached as Ex. B to this brief.

Id. The case proceeded to a bench trial and the trial court concluded, among other rulings, that the Bedes had intentionally trespassed onto the Yoreks' property and "committed waste under the waste statute (RCW 4.24.630) by removing the Yoreks' boxwood hedge." *Bede*, 2016 WL 3514184 at *4.

On appeal, the Bedes argued that the timber trespass statute, and not the waste statute, applied to the Yoreks' claims. Once again, this Court agreed the waste statute could not apply because the timber trespass statute did. Relying on *Gunn*, this Court reasoned that:

We held in *Gunn v. Riely*, 185 Wn. App. 517, 526, 344 P.3d 1225 (2015), *review denied*, 183 Wn.2d 1004 (2105) that the timber trespass statute "governs direct trespass against a plaintiff's timber, trees, or shrubs." In *Gunn*, the defendant cut down 107 trees on the plaintiff's property—an action that we found to "fit[] squarely within the bounds of the timber trespass statute." 185 Wn. App. at 527. Therefore, we held that the waste statute did not apply, because by its terms it does not apply when the timber trespass statute does.

In short, the timber statute governs direct trespass against timber, trees, or shrubs, and where it applies, it prevents application of the waste statute. *Gunn*, 185 Wn. App. at 526–27. This dispute now arises because the waste statute, but not the timber trespass statute, provides for an award of attorney fees. RCW 4.24.630. The trial court awarded attorney fees to the Yoreks under the waste statute.

...

Here, assuming the dead hedge plant was on the Yoreks' land, the Yoreks could obtain damages under the timber trespass statute; therefore, the waste statute does not apply.

The Yoreks' claim fits squarely within the timber trespass statute. They claimed that the Bedes trespassed onto their property and removed a shrub. These allegations, like those in *Gunn*, fall squarely within the timber trespass statute. RCW 64.12.030. Therefore, the waste statute does not apply. RCW 4.24.630(2).

...

The timber trespass statute applied to the Bedes' removal of the dead hedge plant on the Yoreks' side of the property line. RCW 64.12.030. **Because the waste statute does not apply when the timber trespass statute does, the trial court erred by awarding damages under the waste statute.**

Bede, 2016 WL 3514184 at *7-8 (emphasis added).

Finally, in December 2016, this Court issued its opinion in *George v. Danielson*, 197 Wn. App. 1017 (Dec. 20, 2016), 2016 WL 7378832.¹¹

In that very recent case, this Court considered and rejected the same arguments that appellants are making in this case. In the *George* case, Mr. Cushman's clients lost approximately 18 trees on their property and they tried to assert both timber trespass and waste statute claims. After the trial court in *George* rejected plaintiff's attempt to recover under both statutes, Mr. Cushman appealed the waste statute issue to this Court. So, only twelve months ago, this Court considered Mr. Cushman's statutory

¹¹ Unpublished, but cited pursuant to GR 14.1(a). A copy of this Court's decision from the *George* case is attached as Ex. A to this brief—for the Court's convenience. It is surprising, to say the least, that Mr. Cushman didn't even mention this Court's December 2016 decision in *George* in his brief in this case.

interpretation argument (the same argument he’s making in this case) and held, once again, that “[w]e follow our precedent and the plain meaning of RCW 4.24.630(2) and conclude that when damages are provided for in the timber trespass statute, the waste statute’s provisions on damages are inapplicable.” *Id.* at *4.

A review of the legislative history also confirms that the waste statute was not enacted as a surrogate for the timber trespass statute. The Washington legislature enacted RCW 4.24.630 out of the 1994 Senate Bill 6080. Senator Owen explained the purpose behind RCW 4.24.630:

[T]he idea is to deal with the tremendous amount of damage that we are having with people coming in and shooting up signs, shooting up restrooms. In the case of forest lands, shooting up trees, taking four-wheel drives and running them all over [agricultural] land and ripping up the ground. You know a variety of things like that is really what we are getting after in this situation.

Gunn v. Riely, 185 Wn. App. 517, 525 n.6, 344 P.3d 1225 (2015)(citing Senate Journal, 53rd Leg., Reg. Sess., at 154 (Wash.1994)); CP 142.

Indeed, the legislature made clear that the waste statute does not apply in cases in which damages are available under RCW 64.12.030, the timber trespass. RCW 4.24.630(2) provides as follows:

(2) This section **does not apply in any case where liability for damages is proved under RCW 64.12.030** [the timber trespass statute]. . . , or where there is immunity from liability under RCW 64.12.035. (Emphasis added).

RCW 4.24.630(2) (emphasis added). This is not an election of remedies provision, allowing a claimant to choose between RCW 4.24.630 and RCW 64.12.030. Instead, it is an express limitation on the scope of RCW 4.24.630, the waste statute. *See* 16 Wash. Prac. Tort Law & Practice §3:10 (4th ed.) n. 3 (trial court erroneously permitted recovery under waste statute when timber trespass applied, *citing Gunn v. Riely* 185 Wn. App. 517).

In this case, Judge Lawler correctly concluded below that appellants' claims fit squarely within the timber trespass statute. Appellants' expert admitted that there was no damage to appellants' property other than the removal of 45 trees. There was no vandalism, no dumping, and no excavation—no damage other than the direct trespass against 45 trees. CP 131:19-22; and 132:2-10. Appellants' expert testified as follows:

Q. Okay. And if you turn to Page 6 of the report, in the report, it indicates that the shrub damage was insignificant and cleanup had already been done. Is that what you observed -- is that consistent with your observation this past week?

A. Yes.

Q. Okay. And you didn't see -- there wasn't evidence of dumping or garbage on the property when you were out there, correct?

A. That's correct.

Q. Sure. Did you see any evidence of excavation work on the Webster property?

A. No. The Webster property had been cleaned, as was the property on the Murphy side of things, and the brush was stacked in piles. The stumps were left in, and most of the **understory was still intact**.

Q. But none of the piles were on the Webster property, correct; they were on the Murphy property?

A. That's correct.

CP at 130:10-15; 131:19-22; and 132:2-10 (emphasis added). At page 17 of their brief to this Court, appellants try to argue that there was damage to their property—separate and apart from removal of timber—because, in Mr. Cushman's words, “[d]efendants destroyed Webster's valuable landscape amenity: the boundary trees that would have created a visual screen for a future residence.”¹²

This argument, if accepted, would turn every timber trespass case into a case under both statutes—clearly contrary to the legislature's limitation at RCW 4.24.630(2). It's important to remember that appellants' property is an undeveloped 5-acre parcel and that we're talking about 45 trees out of a total of approximately 550 trees (less than 10%).

¹² Appellants' Brief at pp. 17-18.

There never has been a residence of any kind on appellants' timbered property and it is pure speculation that the trees at issue might somehow have been needed to provide a sight buffer between nonexistent homes. In fact, appellants' own expert testified that he had no idea what any prospective purchaser would do with the property. CP 203:15-20.

In the end, this case, like *Gunn* and *George*, is a simple timber trespass case with no harvest-related damage to the plaintiffs' property. If appellants' loss of "boundary trees" theory were accepted in this case, every timber trespass case would become a waste statute case—because timber trespass almost always happens at the border/edge of a plaintiffs' property. In the end, appellants' "boundary trees" argument is really a damages argument under the timber trespass statute—that the trees at issue had more value than simple stumpage value. See CP 211-212. However, that timber valuation issue is not before this Court.

In conclusion, appellants' claims below, like those in *Gunn* and *Bede*, fell squarely within the timber trespass statute. The only damage to appellants' property was the cutting and removal of the trees themselves. As appellants' own expert confirmed, the understory was still intact. This was a timber trespass case and Judge Lawler correctly held that "I think the long history of case law about Timber Trespass [sic] covers just exactly this type of thing, the cutting of the trees, the logging of, and the

incidental damage such as it is that occurs when somebody does do logging.” RP (Vol. 1) 21:12-23.

C. The last ten pages of appellants’ brief are directed to an issue that cannot be before this Court.

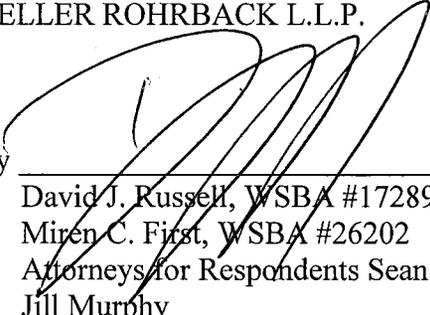
Finally, at pages 30-40 of their brief, appellants argue that they are somehow entitled to a finding of “wrongfulness” under the timber trespass statute from this Court—as if Judge Lawler ruled on that issue below, creating an appealable issue. However, on this issue too, appellants fail to inform this Court that (1) they tried to include a dispositive motion (on the “wrongfulness” issue) in a responsive declaration, but didn’t provide the requisite 28-day notice for such a dispositive motion; and (2) Judge Lawler informed appellants’ attorney (during the May 26, 2017 hearing) that, before he would consider such a motion, appellants’ would need to properly note it and give the requisite 28-day notice. RP (Vol. 2) at 18:4-17. Appellants never refiled or renoted a dispositive motion on the wrongfulness issue and, as a result, that issue cannot be before this Court either.

V. CONCLUSION

Among other reasons, because there were no appealable claims remaining when appellants filed their notice of appeal, this Court can and should summarily reject this appeal.

RESPECTFULLY SUBMITTED this 2nd day of January, 2018.

KELLER ROHRBACK L.L.P.

By 

David J. Russell, WSBA #17289

Miren C. First, WSBA #26202

Attorneys for Respondents Sean and
Jill Murphy

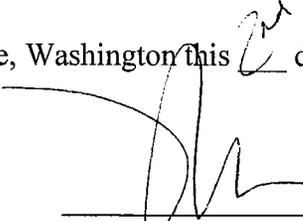
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused to be filed with Court of Appeals, Division II, and served via COA2 electronic filing, a true and correct copy of this document to:

Jon E. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

DATED at Seattle, Washington this 27 day of January, 2018.



Megan Johnston

Exhibit A

197 Wash.App. 1017

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

Ernest Kirk George, Appellant,

v.

John Danielsen, a single adult male; [Jim Morger Construction, Inc](#), a Washington corporation;
Dan Morger and “Jane Doe” Morger, and their marital community; John Does 1–3, Respondents.

No. 48222–3–II

|
December 20, 2016

UNPUBLISHED OPINION

[Melnick, J.](#)

*1 After filing a suit for timber trespass¹ and waste,² Ernest Kirk George appeals the trial court's orders denying his motion for partial summary judgment and granting John Danielsen's and Dan Morger's cross-motions for partial summary judgment.³ We do not consider the denial of George's motion for partial summary judgment regarding treble damages under the timber trespass statute because the trial court determined that issues of material fact remained and held a trial on the merits. We conclude that the trial court did not err by granting Danielsen's and Morger's motions for partial summary judgment regarding liability under the waste statute because the damages were provided for under the timber trespass statute, and therefore the waste statute did not apply. We affirm.

FACTS

In 2012, Danielsen purchased property adjacent to George's property. Danielsen did not hire a surveyor to establish the property line. Instead, he relied on a plat map to determine the property line location. In December,

Danielsen hired Morger to cut trees on what he believed to be his property.

Morger, without a surveyor or a map, marked with ribbons what he believed to be the property line. The line he marked was 25 to 30 feet north of a cattle containment fence. Morger cut the trees within the barrier of ribbons. However, Danielsen and his neighbor, John Brush, who lived immediately to the north, concluded that the marked boundary was not the actual property boundary. Brush identified a survey marker from a recent survey of his own property. He and Danielsen stretched the measuring tape from the survey marker and moved south until they found another stake. They observed several steel fence posts scattered around the area that they measured to, but the posts were not in a straight line. They observed the cattle containment fence approximately 5 or 6 feet inside the line they measured. The first steel fence post was about 25 to 30 feet farther north of the cattle containment fence. George believed that the cattle containment fence was about 6 to 10 feet from the property line on the east end and 40 to 50 feet from the property line on the west end. Danielsen believed the fence was on his property.

Danielsen instructed Morger to cut to the fence line and Morger asked, “Are you sure?” Clerk's Papers (CP) at 55. After receiving an affirmative answer, Morger cut the trees just to the fence line.

I. PROCEDURAL FACTS

George filed a complaint for timber trespass and waste against Danielsen and Morger. He sought treble damages. The complaint alleged that Danielsen and Morger “negligently, recklessly, or intentionally entered onto [George's] land and cut and removed trees” in violation of the timber trespass or the waste statutes. CP at 2. Danielsen denied the allegations.

*2 George filed a motion for partial summary judgment on the issue of whether Danielsen and Morger were jointly liable for treble damages and for conversion of the timber under the timber trespass statute. George argued that Danielsen and Morger were unable to prove that they mitigated damages under the timber trespass statute.

Morger responded to George's motion for summary judgment and filed a cross-motion for partial summary judgment. In his cross-motion, he argued that George

could not seek relief under the waste statute where a remedy was available under the timber trespass statute.

Danielsen also responded to George's motion for summary judgment and filed a cross-motion for partial summary judgment. In his cross-motion, he argued that the trial court should dismiss George's claims under the waste statute because the timber trespass statute expressly provides for damages to landowners whose trees are cut.

The trial court heard arguments on all of the motions for partial summary judgment. Regarding George's motion for partial summary judgment, the trial court denied the motion and found that material issues of fact existed as to whether treble damages under the timber trespass statute applied. The trial court granted George summary judgment on the issue that a trespass occurred. However, all damages issues were preserved for trial, as were all issues regarding "mitigation" under the timber trespass statute. CP at 281. The trial court granted Morger's and Danielsen's cross-motions for partial summary judgment, dismissing George's claims under the waste statute and for conversion.

II. TRIAL

After a trial, the jury found by special verdict that 18 trees were wrongfully cut by Danielsen or persons acting under his direction. The jury awarded damages of \$12,500 to George. The jury also found that when Danielsen directed Morger to cut down the trees, he was not liable under the waste statute, and he acted with probable cause to believe that the trespass occurred on his own land. The trial court entered judgment for George against Danielsen in the amount of \$12,500 and \$1,725.20 in costs and attorney fees.

George appeals.

ANALYSIS

I. GEORGE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

George argues that the trial court erred by denying his motion for partial summary judgment on the issue of treble damages because Danielsen did not present evidence that he had probable cause to believe the trees were on his land.

Where a trial court's denial of summary judgment is based on the existence of disputed material facts, we will not review it when raised after a trial on the merits. *Weiss v. Lonquist*, 173 Wn. App. 344, 354, 293 P.3d 1264 (2013). "Where the pretrial order denying summary judgment is premised on a question of law, however, the court can review that order even after a full trial on the merits." *Weiss*, 173 Wn. App. at 354.

Here, the trial court denied George's motion for partial summary judgment on damages because issues of material fact remained. Therefore, we do not review the trial court's denial of the motion.

II. CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

George argues that the trial court erred by granting the cross-motions for partial summary judgment and dismissing his claim under the waste statute because the statute's plain terms apply to anyone who removes timber from the land of another. We disagree.

A. Legal Standards

*3 We review an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300.

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516. If the nonmoving party fails to demonstrate that a material fact remains in dispute, and reasonable persons could reach but one conclusion

from all the evidence, then summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

In addition, we must determine the meaning of the waste and the timber trespass statutes. We review the meaning of statutes de novo. *Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012). Our “fundamental objective is to ascertain and carry out the legislature’s intent.” *Gunn v. Riely*, 185 Wn. App. 517, 524, 344 P.3d 517, review denied, 183 Wn.2d 1004 (2015). We must give effect to the plain meaning of the statute as an expression of legislative intent, if the statute’s meaning is plain on its face. *Gunn*, 185 Wn. App. at 524. Only if the statute is ambiguous should we look to interpretive aids, such as canons of construction and case law. *Gunn*, 185 Wn. App. at 524.

B. The Trial Court Did Not Err By Granting Partial Summary Judgment

The waste statute, provides:

(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 [the timber trespass statute].

[RCW 4.24.630](#).

The timber trespass statute, provides:

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.

*4 [RCW 64.12.030](#).

We held in *Gunn* that “the waste statute does not provide damages when the timber trespass statute does.” 185 Wn. App. at 524. The plain meaning of the waste statute excepts timber trespass from it. *Gunn*, 185 Wn. App. at 524–26. “[Section 2 of the waste statute] explicitly excludes its application where liability for damages is provided under [RCW 64.12.030](#), the timber trespass statute.” *Gunn*, 185 Wn. App. at 525. Because the plain meaning of the statute is evident, we follow it.

George argues that we should overrule *Gunn*, but he has not analyzed how that case is both incorrect and harmful. See *Deggs v. Asbestos Corp. Ltd.*, — Wn.2d —, 381 P.3d 32, 38 (2016).

We follow our precedent and the plain meaning of [RCW 4.24.630\(2\)](#) and conclude that when damages are provided for in the timber trespass statute, the waste statute’s provisions on damages are inapplicable. The trial court did not err by granting the cross-motion for summary judgment and dismissing George’s claim under the waste statute.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate

Reports, but will be filed for public record in accordance with [RCW 2.06.040](#), it is so ordered.

[Maxa, A.C.J.](#)

All Citations

Not Reported in P.3d, 197 Wash.App. 1017, 2016 WL 7378832

We concur:

[Johanson, J.](#)

Footnotes

[1](#) [RCW 64.12.030](#).

[2](#) [RCW 4.24.630](#).

[3](#) George also assigned error to the trial court denial of George's post-trial [CR 50](#) motion on treble damages under the timber trespass statute. But we do not address this assignment of error because George did not designate for the appellate record a transcript of the trial. Without knowing what evidence was presented at trial, we cannot determine whether the trial court erred in denying the [CR 50](#) motion based on that evidence. [Hernandez v. Stender, 182 Wn. App. 52, 59, 358 P.3d 1169 \(2014\)](#).

Exhibit B

194 Wash.App. 1039

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

W. Brandt Bede and Leslie K. McLaughlin
Bede, husband and wife, Appellants,

v.

Daryl W. Yorek and Kelly M. Yorek,
husband and wife, Respondents.

No. 47790-4-II

|

June 21, 2016

Appeal from Pierce County Superior Court, No. 13-2-15148-6, Honorable Katherine M. Stolz.

Attorneys and Law Firms

Mark Ronald Roberts, Roberts Johns & Hemphill, PLLC, 7525 Pioneer Way, Ste. 202, Gig Harbor, WA, 98335-1166, for Appellants.

Deidre Glynn Levin, Attorney at Law, 6039 43rd Ave., N.E., Seattle, WA, 98115, for Respondents.

UNPUBLISHED OPINION

Worswick, J.

*1 ¶ 1 Daryl and Kelly Yorek obtained a judgment against Brandt and Leslie Bede granting the Yoreks a prescriptive easement and awarding them damages and attorney fees. The Bedes appeal, arguing that insufficient evidence supports the trial court's findings of fact and that the trial court applied the wrong statute to award attorney fees. They also appeal the trial court's directed verdict dismissing their spite fence claim. We affirm in part and reverse in part. We (1) reverse the prescriptive easement in part, (2) reverse the award of attorney fees, (3) affirm the dismissal of the spite fence claim, and (4) reverse the trial court's findings and conclusions that the Yoreks' fence does not encroach into the easement and that the Bedes should pay for the partial removal of the fence. We remand for further proceedings consistent with this opinion.

FACTS

¶ 2 Brandt and Leslie Bede lived at a property adjacent to Daryl and Kelly Yorek's property. The two properties informally shared a paved driveway for ingress and egress to the city right-of-way for decades. There was no easement of record for the driveway.

¶ 3 The shared portion of the driveway ran east from the city right-of-way along the property line to a rounded radius curb. At this curb, the driveway split to form two private driveways toward each home. A planter bed was positioned between the private driveways and behind the radius curb. The property line ran through the planter bed. A cedar tree grew within the planter bed, primarily on the Bedes' side. The planter bed and common driveway was bordered by sandstone blocks, but the radius curb was concrete.

¶ 4 Central to this case is the disputed location of a boxwood hedge that grew within the planter bed along the property line. The hedge had been in that location since before 1979, and its precise history is unknown. It consisted of a group of individual boxwood hedge plants. It stood roughly four and a half feet tall. It appears to have once filled a large portion of the planter bed near the rounded curb, sitting both on the Bedes' and the Yoreks' side of the property line. The Bedes maintained the portion of the hedge on their property. It is unclear whether, and there was no evidence submitted at trial that, the Yoreks maintained any part of the boxwood hedge.

¶ 5 In recent years, the boxwood hedge did not thrive under the cedar tree. The Bedes believed the boxwood hedge had become an eyesore, and they removed a portion of it. Brandt Bede believed that he removed the hedge from his own property only, with the exception of one dead boxwood hedge plant that was on the Yoreks' side. He left the remainder of the boxwood hedge intact, including portions near the radius curb where the driveways split, and near the cedar tree, which portions he believed to be on the Yorek side.

¶ 6 The Yoreks were upset with how much of the hedge the Bedes had removed. The Yoreks later removed a large portion of the remaining hedge. Unable to replace it with another mature boxwood hedge, the Yoreks installed

a six-and-a-half-foot tall concrete fence at a cost of \$1,123.50. They placed the concrete fence on their side of the property line.

*2 ¶ 7 Although the side of the fence that faced the Yoreks was decorative, the side facing the Bedes was unattractive, unfinished concrete. The westernmost part of the fence sliced through the radius curb and protruded out into the paved portion of the driveway by at least 16 inches which, due to its position, blocked 58 inches of the driveway the Bedes historically used to swing their vehicles and trailers. Also, the Bedes believed that the fence's placement caused safety concerns for those exiting their driveway because they could not see vehicles around it.¹ Additionally, the Bedes owned two long boats that could no longer back into the south side of the driveway because the fence's encroachment onto the easement made this task impossible.

¶ 8 The Bedes sued the Yoreks requesting (1) a prescriptive easement over the shared driveway, (2) an injunction compelling the Yoreks to remove the fence because it was a “spite fence,” and (3) removal of the encroachments over the driveway—namely, the protruding portion of the concrete fence and certain overhanging vegetation. The Yoreks counterclaimed that the Bedes had committed trespass either under the waste statute (RCW 4.24.630) or the timber trespass statute (RCW 64.12.030). They requested attorney fees under the waste statute.

¶ 9 The case proceeded to a bench trial, during which the trial court took testimony and considered 98 exhibits, including many photographs, a survey, a survey map, and other documents. The Bedes and Kelly Yorek testified to the facts presented above. Brandt Bede testified that he removed one dead boxwood plant from the Yoreks' property, but that the rest of the plants he removed were on his property. By contrast, Kelly Yorek's testimony was ambiguous about where the hedge was. When her attorney asked her about exhibit 1 (showing the hedge before removal), she replied: “I can't attest to [the Bede's] side of it because I do not ever enter the Bedes' property.” Verbatim Report of Proceedings (VRP) (Apr. 15, 2015) at 39. She testified that her understanding was that the hedge was “*primarily* on our property.” VRP (Apr. 15, 2015) at 40 (emphasis added). In response to a question of if the boxwood hedge was co-located or located on her property, Kelly Yorek responded: “That's my understanding, yes.” VRP (Apr. 15, 2015) at 52.

¶ 10 After the Bedes rested, the Yoreks moved for a directed verdict dismissing the Bedes' spite fence claim. The court granted the motion. It made certain findings of fact, including in relevant part that the Yoreks' concrete fence “serves a useful and reasonable purpose in that it provides [the Yoreks] a privacy screen ... and fills the space left bare from [the Bedes'] unilateral removal of a mature boxwood hedge that was located previously where the concrete fence is now located.” Clerk' Papers (CP) at 119. It also found that there was no evidence that the Yoreks' motivation in installing the fence was spite or malice. It further found that there was no credible evidence that the Yoreks acted solely out of a desire to injure and annoy the Bedes. It found that the Bedes' “subjective opinion that [the Yoreks'] concrete fence is not aesthetically pleasing ... does not equate to a significant impairment of use and enjoyment of their property, and any such subjective opinions can be mitigated by [the Bedes] by planting vegetation” or otherwise altering the appearance of the side of the fence that faced them. CP at 120. Therefore, it found that the Bedes had failed to carry their burden of proving the elements of a spite fence.

¶ 11 At the conclusion of the trial, the trial court entered written findings of fact as follows in relevant part:

*3 1.9 At all times material to this lawsuit, the common driveway commenced at the City of Tacoma right-of-way on Madrona Drive and terminated at the location of a cedar tree at or near a concrete pad located on the Bede property.

1.10 The common driveway boundaries are depicted on the document attached to these Findings of Fact and Conclusions of Law as Exhibit “C,” which exhibit is incorporated herein by this reference as though fully restated.

CP at 138. Exhibit C was a map of the properties. The trial court further found that the each party had used the portion of the common driveway on the other party's land so as to establish a mutual prescriptive easement over the driveway as shown in exhibit C.² In addition to depicting a mutual easement over the paved driveway, exhibit C also showed that the Yoreks had an easement over a triangular area beyond the paved driveway in the planter bed. This area was on the Bedes' side of the property line, covering the area of the planter bed between the property line, the curb, and the cedar tree.

¶ 12 Regarding the boxwood hedge, the trial court found:

1.17 An established, mature boxwood hedge, including its root base and stems [,] existed on the inside of the Wilkerson [sic] sandstone curbing bordering the Yorek real property and the common driveway and occupied the space from the Yorek real property to the curb, and belonged to the Yoreks.

CP at 139. The trial court found that the Bedes intentionally trespassed onto the Yoreks' property when they removed the boxwood hedge. The trial court found that the Yoreks mitigated their damages from the removal of the boxwood hedge by replacing it with the concrete fence, because replacing it with a boxwood hedge was impracticable. Accordingly, it found that the Bedes owed the Yoreks damages equal to treble the cost of the concrete fence, as well as reasonable attorney fees under the waste statute.

¶ 13 Regarding the concrete fence, the trial court found that the fence was on the Yoreks' property, that it did not unreasonably impede the Bedes' use and enjoyment of the driveway easement, and that it did not create a hazard. However, the trial court incongruously ordered that the Bedes had the right to remove the last panel of the concrete fence, which protruded into the paved driveway, at their own expense.

¶ 14 The trial court made corresponding conclusions of law. Among these were that both parties had established a prescriptive easement over the portion of the other party's property shown in exhibit C. Exhibit C was a map that illustrated, among other things, the trial court's conclusion that the Yoreks had an easement over a triangular portion of the planter bed on the Bedes' side of the property line, beyond the paved driveway. The trial court concluded that the "boxwood hedge was the Yoreks['] and was located within the Yoreks' real property." CP at 144. The trial court also concluded that the Bedes intentionally trespassed and committed waste under the waste statute (RCW 4.24.630) by removing the Yoreks' boxwood hedge, so treble damages and attorney fees were appropriate.

*4 ¶ 15 The trial court entered a judgment of \$3,690.00, plus \$7,990.75 in attorney fees under the waste statute and \$551.00 in costs, for a total of \$12,231.75, to the Yoreks. The money judgment represented the roughly \$1,230.00 cost of the concrete fence, trebled. The judgment awarded each party a prescriptive easement over the driveway "commencing at the city of Tacoma right-of-way on Madrona Drive and terminating at the location of a cedar tree at or near a concrete pad located on the Bede property."³ The Bedes appeal.

ANALYSIS

I. PRESCRIPTIVE EASEMENT

¶ 16 The Bedes argue that the trial court erred by finding that the Yoreks had a prescriptive easement in the planter bed. We agree that the trial court erred when it found that the Yoreks owned the boxwood hedge and that the Yoreks' easement covered a portion of the planter bed.

A. Standard of Review

¶ 17 We review a trial court's decision following a bench trial to determine whether challenged findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003). Any unchallenged findings of fact are verities on appeal. *Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014).

¶ 18 The party claiming error must show that a finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). We will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). And we defer to the trial court on issues of witness credibility and persuasiveness of the evidence. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). We then review whether the findings of fact support the conclusions of law. *Proctor v. Huntington*, 146 Wn. App. 836, 844–45, 192 P.3d 958 (2008).

B. Location of Boxwood Hedge

¶ 19 The Bedes argue that the trial court erred by finding that the boxwood hedge was located on the Yoreks' property. We agree.

¶ 20 Brandt Bede testified that the portions of the boxwood hedge he removed, with the exception of one dead plant, were on his side of the property line. This uncontroverted testimony is consistent with exhibits that show the original extent of the hedge compared with the space after the hedge was removed. These exhibits show that the hedge once filled the space out to the Bedes' curb, but that Brandt Bede removed a thin portion of the hedge along his curb. That space, in turn, corresponds with the area of the Bedes' property just south of the property line within the planter bed. Indeed, even Kelly Yorek's testimony appeared to concede that a portion of the hedge on the Bedes' side was on the Bedes' property. By contrast, the only evidence in the record that the removed portion of the hedge was on the Yoreks' property is Kelly Yorek's ambiguous testimony that it was her understanding that the hedge was "co-located or located" on her property, and that she believed the hedge was "primarily" on her property. VRP (Apr. 15, 2015) at 40, 52.

*5 ¶ 21 There is not substantial evidence that the entire boxwood hedge was on the Yoreks' property. The trial court's finding of fact 1.17 and conclusions of law 2.6 are therefore erroneous.

C. Yoreks' Easement to Cedar Tree

¶ 22 The Bedes assign error to several findings of fact in which the trial court found that the Yoreks had a prescriptive easement over the shared driveway, and that the driveway extended to include a triangular portion of the Bedes' property in the planter bed. We agree, and hold that substantial evidence does not support the findings of fact and conclusions of law that form the basis for the Yoreks' prescriptive easement over the planter bed.

¶ 23 To establish a prescriptive easement, the person claiming an easement must use another person's land for 10 years and show that (1) he or she used the land in an open and notorious manner, (2) the use was continuous and uninterrupted, (3) the use occurred over a uniform route, (4) the use was adverse to the landowner, and (5) the use occurred with the knowledge of such owner at a

time when he was able in law to assert and enforce his rights. *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015). The person claiming a prescriptive easement bears the burden of proving each element. *Clark*, 183 Wn.2d at 43.

¶ 24 Whether a claimant satisfied the elements of a prescriptive easement generally is a mixed question of fact and law. *Clark*, 183 Wn.2d at 44. We review the question whether essential facts exist for substantial evidence, but we review whether the facts as found establish a prescriptive easement de novo as a question of law. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997). On review of a trial court's finding that an easement exists, substantial evidence must support the location and extent of the easement. See *Dunbar v. Heinrich*, 25 Wn. App. 10, 14, 605 P.2d 1272 (1979).

¶ 25 Here, the trial court found that the Yoreks and the Bedes mutually established a prescriptive easement over the paved driveway for ingress and egress. Neither party argues that the trial court erred by finding a prescriptive easement over the paved portion of the driveway. However, the Bedes argue that the trial court erred by finding that the driveway easement continued beyond the radius curb, through the planter bed, terminating at the cedar tree. We agree because no evidence existed to support any of the elements of a prescriptive easement over the Bedes' portion of the planter bed to the cedar tree.⁴

¶ 26 There was no evidence that the Yoreks established any of the elements of a prescriptive easement over the Bedes' side of the planter bed up to the cedar tree. To the extent the trial court found this easement because it considered this area part of the shared driveway, there is simply no evidence in the record that the part of the planter bed up to the cedar tree is part of the driveway or that the Yoreks ever used it as such.

¶ 27 Alternatively, the trial court may have believed the Yoreks established a prescriptive easement over the triangular portion of the planter bed because of their "use" of the property to grow and maintain the removed boxwood hedge. Setting aside the fact that this circumstance would implicate adverse possession rather than prescriptive easement, there was insufficient evidence that the Yoreks used the property in this manner.

*6 ¶ 28 Kelly Yorek testified generally that she gardened and maintained the hedges on her property. She testified that she was unfamiliar with the Bedes' side of the boxwood hedge at issue in this case. Thus, there was no evidence that the Yoreks ever used the Bedes' property to grow and maintain the boxwood hedge—let alone that any such use met the other elements of a prescriptive easement. Therefore, there was not substantial evidence that the Yoreks established a prescriptive easement over the triangular portion of the planter bed either by use as a driveway or by growing and maintaining the boxwood hedge that once stood there.

¶ 29 Because there is not substantial evidence to support the trial court's finding that the driveway terminated “at the location of a cedar tree at or near a concrete pad located on the Bede property,” finding of fact 1.9 is erroneous. CP at 138. Likewise, each finding of fact and corresponding conclusion of law that incorporates exhibit C (the map) showing the “Yorek Easement” over the planter bed is erroneous. CP at 135.

¶ 30 We reverse the prescriptive easement over the planter bed. There is not substantial evidence that the Yoreks owned the boxwood hedge that Brandt Bede removed, nor that the Yoreks established a prescriptive easement over the triangular area the trial court awarded them.

II. AWARD OF ATTORNEY FEES

¶ 31 The Bedes argue that the trial court erred by awarding attorney fees to the Yoreks under the waste statute, [RCW 4.24.630](#). They argue that the timber trespass statute, [RCW 64.12.030](#), applies instead—and no attorney fees are available under that statute. We agree.

A. Standard of Review

¶ 32 We review the legal basis for an award of attorney's fees de novo. *Hulbert v. Port of Everett*, 159 Wn. App. 389, 407, 245 P.3d 779 (2011). A trial court may award attorney fees only where there is a basis in contract, a statute, or a recognized equitable basis. *Riss v. Angel*, 80 Wn. App. 553, 563, 912 P.2d 1028 (1996). We review a trial court's decision to grant or deny an award of attorney fees for an abuse of discretion. *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 283–84, 279 P.3d 943 (2012).

B. Timber Trespass and Waste Statutes

¶ 33 To resolve whether attorney fees were properly granted, we must determine which of two statutes applies: the waste statute or the timber trespass statute. The waste statute imposes liability on one who wrongfully causes waste or injury to another's land:

(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.

[RCW 4.24.630](#). However, the statute cannot apply where the timber trespass statute applies:

(2) This section does not apply in any case where liability for damages is provided under [RCW 64.12.030](#).

*7 [RCW 4.24.630](#).

The timber trespass statute prohibits a person from cutting down, girdling, or otherwise injuring a tree, timber, or shrub on the land of another:

Whenever a person shall cut down, girdle, or otherwise injure, or carry off any tree, ... timber, or shrub on the land of another person, or on the street or highway in front of any person's house ... without lawful authority, in an action by the person ... against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

RCW 64.12.030. We held in *Gunn v. Riely*, 185 Wn. App. 517, 526, 344 P.3d 1225 (2015), review denied, 183 Wn.2d 1004 (2105) that the timber trespass statute “governs direct trespass against a plaintiff’s timber, trees, or shrubs.” In *Gunn*, the defendant cut down 107 trees on the plaintiff’s property—an action that we found to “fit[] squarely within the bounds of the timber trespass statute.” 185 Wn. App. at 527. Therefore, we held that the waste statute did not apply, because by its terms it does not apply when the timber trespass statute does.

¶ 34 In short, the timber statute governs direct trespass against timber, trees, or shrubs, and where it applies, it prevents application of the waste statute. *Gunn*, 185 Wn. App. at 526–27. This dispute now arises because the waste statute, but not the timber trespass statute, provides for an award of attorney fees. RCW 4.24.630. The trial court awarded attorney fees to the Yoreks under the waste statute.

¶ 35 We hold above that there was not substantial evidence that the entire boxwood hedge belonged to the Yoreks. The Bedes could commit waste or timber trespass only against plants that belonged to the Yoreks. RCW 4.24.630; RCW 64.12.030. Accordingly, only one plant is at issue: Brandt Bede testified that he removed one dead boxwood hedge plant on the Yoreks' side of the property line. Here, assuming the dead hedge plant was on the Yoreks' land, the Yoreks could obtain damages under the timber trespass statute; therefore, the waste statute does not apply. The Yoreks' claim fits squarely within the timber trespass statute. They claimed that the Bedes trespassed onto their property and removed a shrub.

These allegations, like those in *Gunn*, fall squarely within the timber trespass statute. RCW 64.12.030. Therefore, the waste statute does not apply. RCW 4.24.630(2).

¶ 36 The Yoreks argue to the contrary that the timber trespass statute applies only to “merchantable” shrubs or trees, and does not apply to “a neighbor's residential shrubbery.” Br. of Resp't at 14. They cite *Pendergrast v. Matichuk*, 189 Wn. App. 854, 873, 355 P.3d 1210 (2015), review granted, 185 Wn.2d 1002 (2016). In that case, Division One of this court wrote that one of three purposes of the timber trespass statute's treble damages was to “ ‘discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred.’ ” 189 Wn. App. at 873 (quoting *Guay v. Wash. Nat. Gas Co.*, 62 Wn.2d 473, 476, 383 P.2d 296 (1963)). But *Pendergrast's* discussion of the purpose of treble damages does not change the plain meaning of the timber trespass statute. The statute in no way limits its application to merchantable shrubs or trees. RCW 64.12.030. We avoid adding words to an unambiguous statute. See *Davis v. Cox*, 183 Wn.2d 269, 282, 351 P.3d 862 (2015).

*8 ¶ 37 The timber trespass statute applied to the Bedes' removal of the dead hedge plant on the Yoreks' side of the property line. RCW 64.12.030. Because the waste statute does not apply when the timber trespass statute does, the trial court erred by awarding damages under the waste statute. Findings of fact 1.35, 1.36, and 1.37 are not supported by substantial evidence, because they find that the boxwood hedge belonged to the Yoreks and that the Bedes intentionally trespassed to remove it. Accordingly, conclusions of law 2.7, 2.8, and 2.10 are erroneous, because they award the Yoreks damages and attorney fees under the waste statute for the removal of the entire boxwood hedge.

III. DISMISSAL OF SPITE FENCE CLAIM

¶ 38 The Bedes argue that the trial court erred by dismissing their spite fence claim. We disagree.

A. Standard of Review

¶ 39 Under CR 41(b)(3), the court in a bench trial may dismiss a claim at the close of the plaintiff's case either

as a matter of law or a matter of fact. *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937 (2009). Where, as here, the trial court dismisses the case as a matter of fact, we review whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law. *Padilla*, 149 Wn. App. at 762. This standard is deferential and requires us to view all evidence and inferences in the light most favorable to the prevailing party. *Lewis v. Dep't of Licensing*, 157 Wn.2d 466, 468, 139 P.3d 1078 (2006). We do not substitute our judgment for that of the trial court regarding the weight or credibility of evidence. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

B. Trial Court Found Elements Not Met

¶ 40 The “spite fence” statute, RCW 7.40.030, provides:

An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.

In *Baillargeon v. Press*, 11 Wn. App. 59, 66, 521 P.2d 746, review denied, 84 Wn.2d 1010 (1974), Division One of this court established the elements necessary to prove the erection of a spite fence:

[I]n order to apply the spite fence statute, RCW 7.40.030, to restrain the erection of a fence or other structure or to abate an existing structure, the court must find (1) that the structure damages the adjoining landowner's enjoyment of his property in some significant degree; (2) that the structure is designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowner; and (3) that the structure serves no really useful or reasonable purpose.

Each of these three requirements must be met. *Baillargeon*, 11 Wn. App. at 66. Here, the trial court found that the Bedes had presented no evidence to support any of these three elements. Because the trial court correctly found that the Bedes had failed to prove two of the three prongs of a spite fence claim, we affirm the dismissal of the claim.

1. Malice or Spitefulness

¶ 41 The Bedes argue that the trial court erred by entering findings of fact 4 and 5, which provided that there was no evidence of the Yoreks' malice or spitefulness in constructing the fence. We disagree.

¶ 42 A plaintiff need not prove the actual mental state of the owner of the alleged spite structure; instead, malice or spitefulness can be proved objectively from evidence including the “character and location” of a structure. *Karasek v. Peier*, 22 Wash. 419, 432, 61 P. 33 (1900).

¶ 43 Here, the trial court found that there was “no evidence” of the Yoreks' malicious or spiteful intentions, and that there was “no credible evidence” that the Yoreks were motivated by a desire to injure and annoy the Bedes. CP at 120. These appear to be findings that the trial court disbelieved the Bedes' opinion that the Yoreks intentionally constructed an ugly fence to spite the Bedes.

*9 ¶ 44 The Bedes presented no evidence of subjective malice or spitefulness on the part of the Yoreks when they constructed the spite fence. And there is substantial evidence supporting the trial court's finding that the Yoreks did not intend to injure and annoy the Bedes in constructing the fence. The Yoreks desired a screen between their property and the Bedes' property, and the concrete fence could fill that need immediately, unlike new boxwood hedge plants. The trial court apparently believed that the fence was not so aesthetically displeasing that its existence was evidence of malice. We do not substitute our judgment for the trial court's in considering the weight and credibility of this evidence. *Quinn*, 153 Wn. App. at 717. We hold that substantial evidence supports findings of fact 4 and 5, because the Bedes failed to present credible evidence that the Yoreks were motivated by malice or spite when they erected the fence.

2. No Useful or Reasonable Purpose

¶ 45 The Bedes argue that the trial court erred by entering finding of fact 3, which provides that the Yoreks' concrete fence serves the useful and reasonable purpose of providing a privacy screen between the two properties. We disagree.

¶ 46 The fence was seated between the two properties, and it served to provide the screening that the boxwood hedge once provided. We hold that this privacy and alteration of the Yoreks' view is a useful and reasonable purpose. The Bedes argue that screening cannot be a useful and reasonable purpose, because every fence provides screening. But the trial court is in a position to weigh the placement and context of a fence when considering whether any screening it provides is truly useful and reasonable. In other words, while we do not hold that the purpose of screening necessarily defeats a spite fence claim, we hold that the trial court here did not err by finding that this fence provided a useful and reasonable purpose in screening.

¶ 47 The trial court's findings support its conclusion that the Bedes failed to prove all of the elements of a spite fence. The Bedes failed to support the two *Baillargeon* factors that the fence was designed as the result of malice or spitefulness to injure and annoy the Bedes, and that the fence served no really useful or reasonable purpose. All three *Baillargeon* factors are required to sustain a spite fence claim. 11 Wn. App. at 66. Therefore, we affirm the trial court's conclusion that the Bedes failed to prove that the fence was a spite fence.

IV. ENCROACHMENT INTO EASEMENT

¶ 48 The Bedes also argue that the trial court erred by allowing the Yoreks' fence to encroach into the driveway easement, and by requiring the Bedes to pay to remove the encroaching portion. We agree.

¶ 49 Actions for prescriptive easements are actions in equity. See *Durrah v. Wright*, 115 Wn. App. 634, 643–44, 63 P.3d 184 (2003). A trial court sitting in equity has broad discretion to fashion remedies. *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. 384, 390, 220 P.3d 1259 (2009). Equity must be applied meaningfully to correct wrongs. *Cogdell*, 153 Wn. App. at 390. A court's choice of an equitable remedy must be based on tenable grounds or reasons. *Cogdell*, 153 Wn. App. at 391. Generally,

courts should order encroachers to remove encroaching structures. *Cogdell*, 153 Wn. App. at 391. Owners of the land burdened by an easement retain the right to use an easement area so long as they do not materially interfere with the easement holder's use of the land. *Veach v. Culp*, 92 Wn.2d 570, 575, 599 P.2d 526 (1979). When enforcing that rule, courts look to the actual use being made of the easement. *Veach*, 92 Wn.2d at 575.

¶ 50 Here, the Bedes and the Yoreks used the paved driveway easement for ingress and egress for decades. The Bedes used the area near the radius curb to move their vehicles and trailers. Accordingly, the trial court correctly found that both parties had established, through actual use, a prescriptive easement over the paved driveway for ingress and egress. See *Veach*, 92 Wn.2d at 575. The testimony and exhibits showed that the fence, by jutting into the driveway over the radius curb, prevented the Bedes from using the paved driveway as they had previously. Notwithstanding this evidence, the trial court found that the fence did not unreasonably impede the Bedes' use or enjoyment of the common driveway easement. Substantial evidence does not support this finding; to the contrary, the evidence established that the fence materially interfered with the Bedes' actual use of the paved easement. Thus, the fence constituted an illegal encroachment into the driveway easement.

*10 ¶ 51 The trial court abused its discretion by not requiring the Yoreks to remove the portion of the fence that encroached into the driveway easement. *Cogdell*, 153 Wn. App. at 390–91. There are no tenable grounds or reasons to require the non-encroaching party to pay to remove the encroachment. We hold that the trial court abused its discretion by finding that the Bedes should pay for the removal of the illegally encroaching portion of the Yoreks' fence. See *Cogdell*, 153 Wn. App. at 393.

¶ 52 In conclusion, we reverse the Yoreks' triangular prescriptive easement over the shared planter bed on the Bedes' side of the property line. We reverse the award of attorney fees because the Yoreks did not own the entire boxwood hedge and the timber trespass statute applies. We affirm the dismissal of the spite fence claim. We reverse the trial court's findings and conclusions that the Yoreks' fence does not encroach into the easement and that the Bedes should pay for the partial removal of the fence. We remand for further proceedings consistent with this opinion.

¶ 53 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with [RCW 2.06.040](#), it is so ordered.

[Bjorgen, C.J.](#)

[Johanson, J.](#)

All Citations

Not Reported in P.3d, 194 Wash.App. 1039, 2016 WL 3514184

We concur:

Footnotes

- 1** No injuries or damage had occurred from the sight obstruction the concrete fence posed.
- 2** Exhibit C shows, among other things, that part of the prescriptive driveway easement lay beyond the paved driveway and within the planter bed, under the location of the fence and boxwood hedge.
- 3** The judgment, as written, purports to grant both the Bedes and the Yoreks an easement over the driveway terminating at the cedar tree. However, from exhibit C, which was attached to the findings of fact, it is clear that both parties were awarded an easement over the driveway, but the Yoreks alone were granted an easement over an additional portion of the planter bed on the Bedes' side. That is the easement that terminated at the cedar tree in the planter bed.
- 4** This is the triangular easement area of the planter bed that the trial court awarded to the Yoreks.

KELLER ROHRBACK L.L.P.

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