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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KIRT PHILLIPS and LYNN PHILLIPS

Respondents,

v.

EVELYN RHODA BENNETT, an individual and
WILLIAM J. BISHOP, an individual, ERIC
WISTI, an individual doing business as
ERIC WISTI LOGGING, a Washington Sole
Proprietorship and JOHN DOES 1-50

Appellants.

BRIEF OF APPELLANTS

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ASSIGNMENT OF ERROR AND ISSUES PRESENTED

The trial court erred in its ruling.

1. By applying the wrong legal standard for determination of timber trespass damages.

2. By finding defendant Bennett authorized the timber trespass, notwithstanding her uncontroverted testimony that she tried to stop it by telling the timber cutter not to cut trees on the north (Phillips') side of the survey line.

3. By imposing statutory 12% judgment interest, exceeding the rate mandated by RCW 4.56.110 (3) (b).

STATEMENT OF THE CASE

I. Facts That Are Substantially Agreed.

a. Description of Properties.

Bennett and Bishop own a five-acre lot neighboring four five-acre parcels owned by Plaintiff/Respondent Phillips. A shared easement cuts between the Bennett property and Phillips' Lot No. 1 which lies north of the Bennett/Bishop acreage. Said easement is sixty feet in width with a centerline on the common boundary between

the Phillips and Bennett properties. A graveled roadway known as 8th Street in Washougal runs within the easement at a somewhat lesser width. As determined by survey, 8th Street is wholly on the Phillips' property.

Eastbound 8th Street leads to Phillips' Lots 2, 3 and 4. Phillips' residence sits on Lot 3, which is some distance, and lower elevation, from the aforementioned stretch of 8th Street separating Bennett/Bishop's lot from Phillips' Lot 1.

The appendix to this brief includes a map of the aforementioned properties denoting ownership together with an aerial photograph. Both are part of the record. (Exhibit 16, 20)

Until Bennett/Bishop's recent timber harvest, their 5 acre lot contained a modest stand of Douglas Fir. (RP 62) The harvestable timber of Phillip's Lot 1, north across 8th Street from Bennett/Bishop's timber stand, was taken long ago and has been overgrown with Alder. (RP 5) A photo looking west, showing the logging operation, 8th Street and Phillips' Alder trees, is included in the Appendix to this brief. (Exhibit 26)

b. Location of the Trees in Question.

Three trees in question are Douglas Fir. They stood at the approximate mid-point along the north boundary of Bennett/Bishop's 5 acre parcel, within the parties' easement on the south side of 8th Street. (RP 4) Unfortunately, the trees were either partially or totally north of the parties' common property line. The precise proximity of the trees in question to the property line is shown on the surveyor's illustration attached in the Appendix of this brief (Exhibit 19) (CP 53).

While the three trees would be visible to a motorist on 8th Street, they could not be seen from Phillips' house on lot 3, situated to the east and over the hill. (RP 4-5) The trees occupied the shoulder of the gravel road, in a space unsuitable for recreational use. The trees did not provide a buffer from noise and dust, or provide a privacy screen for Phillips or anybody else. Verbatim Report of Proceedings, Page 8, Line 4. (CP 96) (Exhibit 26) (RP 6)

c. Removal of the Trees.

In late 2016 Bennett and Bishop endeavored to raise some funds for themselves by logging some of the timber on their five-acre property. They contacted Wisti Logging. (RP 62) At that time Bennett/Bishop believed that they owned everything south of 8th Street. (RP 73) That being the case, all the trees south of that road would be subject to being cut as designated by them. During a conversation with Eric Wisti, it became evident that the parties were not exactly sure where the boundary line was between their property and the Phillips' property. Therefore, Bennett/Bishop announced to Wisti that they were going to conduct a survey prior to his commencing logging. (RP 62)

Wisti put his timber falling crew on the Bennett/Bishop property in February of 2017 and commenced cutting timber designated by Bennett. Ms. Bennett marked a few to be spared by tying a pink ribbon around the trees. (RP 71, 80)

A survey was accomplished and the boundary line between the Phillips property and the Bennett property was marked with stakes, including orange

ribbons tied to the top. (RP 63-64) That survey and staking was accomplished the day before Wisti's tree faller, Royal, commenced to cut the trees on the northern edge of the Bennett/Bishop property. (RP 73-74)

Bennett testified that she told Royal to not cut the trees on the north side of the stakes; that they were on the Phillips' property. (RP 74) Wisti says no one so informed him, but no testimony controverted Ms. Bennett's statement.

Notwithstanding the placement of stakes, Royal felled two trees which were then on the Phillips' property without contacting his employer. He apparently relied on the earlier conversation where they believed that everything south of the road was fodder for this timber harvest. Royal also cut down a third tree only one-third on the Phillips' side of the property line. Findings of Fact No. 9 (CP 53)

II. Facts and Issues in Dispute.

There was no testimony disputing Bennett's statement that she instructed Royal, the timber faller, not to cut trees on Phillips' side of the

freshly placed markers. However, Phillips argued that it logically followed that Royal would not have cut the trees in question if he was affirmatively instructed not to do so. Findings of Fact No. 7&8 (CP 53)

Aside from Bennett's alleged survey and exculpatory instruction to Royal, there was little disagreement that a mistaken cutting of the three trees exposed Defendants to liability. Rather, computation of the value of the trees as a measure of damages is the fundamental point of contention, and the gravamen of Wisti's appeal. Defendants argued that "stumpage value"¹ is the proper standard. Plaintiffs successfully urged the court to find that "replacement cost"² was the proper

1

Generally, 'stumpage value' is the market value of a tree before it is cut, the amount that a purchaser would pay for a standing tree to be cut and removed. David H. Browser, *'Hey, That's My Tree!'-An Analysis of the Good-Faith Contract Logger Exemption from the Double and Treble Damage Provisions of Oregon's Timber Trespass Action*, 36 Willamette L. Rev. 401, 405 (2000).

Porter v. Kirkendoll, 5 Wn. App. 2d 686, FN 2, 421 P.3d 1036 (2018).

2

Generally, the trunk formula method is 'used to appraise the monetary

measure of damages because plaintiff was not "using the trees for either timber or fruit production, but was simply enjoying the trees for their aesthetic value". Conclusion of Law No. 19 (CP 53). The difference between stumpage value and replacement costs is disparate, especially after application of the statutory trebler. Stumpage Value x 3 = \$1,732.92 (Exhibit 23). Replacement Cost x 3 = \$32,100.00 (Exhibit 17) (CP 52).

ARGUMENT

Assignment of Error No. 1: The Trial Court Erred by Applying the Wrong Legal Standard for Determination of Timber Trespass Damages.

A. Stumpage Value is the Proper Measure of Damages Because the Property Was Not Used for Residential or Recreational Purposes and the Trees Provided No Visual, Noise or Dust Buffer.

value of trees considered too large to be replaced with nursery stock. Value is based on the cost of the largest commonly available transplantable tree and its cost of installation, plus the increase in value due to the larger size of the tree being appraised. ... [The value is] then adjusted for species, condition, and location ratings.' Barri Kaplan Bonapart, Understanding Tree Law: A Handbook for Practitioners 102 (2014).

Porter v. Kirkendoll, FN. 1.

1. Washington's Timber Trespass Statute RCW 64.12.030.

a. *Timber Trespass*

In Washington State a timber trespass occurs when a person cuts down, girdles, or otherwise injures or carries off any tree, including a Christmas tree, timber or shrub on the land of another. The purpose is to "(1) punish a voluntary offender, (2) provide treble damages, and (3) discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if only actual damages are incurred." *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 625, 278 P.3d 173 (2012).³

3

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

b. *Treble Damages*

The punitive aspect of the timber trespass statute - i.e. the treble damage (or triple the amount) provision - is mandatory and not left to the discretion of the courts. Unlike many other states, however, Washington "employs a very restrictive approach to punitive damages [and] prohibits the recovery of punitive damages as a violation of public policy unless expressly authorized by statute." *Pendergrast v. Matichuk*, 189 Wn. App. 854, 872, 355 P.3d 1210(2015). The treble damages provision has, therefore, been narrowly construed to only provide the remedy in cases of *willful* trespass and "the court cannot impose treble damages for a 'causal or involuntary' trespass or one based on a mistaken belief of ownership of the land." *Pendergrast*, at 873.

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.

An act will only be considered willful when it is direct and causes immediate injury. The statute does not require the actor to have intended any harm. To the contrary, being on notice that another person has an interest in the trees will be sufficient if the person cuts the timber down anyway. "[A] tree standing on a common property line is considered the property of both landowners as tenants in common" and trespass will lie if one destroys it without consent of the other. *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 93, 173 P.3d 959 (2007).

2. Stumpage Value is the Traditional Measure of Damages.

Damages are measured by "stumpage value" of the timber removed. Traditionally, it is not measured by market value or replacement cost. The willful cutting of timber allows the stumpage value to be trebled. Washington courts have long employed this standard as the proper measure of damages for timber trespass.

The next issue is the proper measure of damages under (RCW 64.12.030) which traditionally has been that of 'stumpage value.' (citation omitted).

'Stumpage' is the value of timber as it stands before it is cut, or put another way, the amount a purchaser would pay for standing timber to be cut and removed. (citation omitted).

Pearce v. G. R. Kirk Co., 22 Wn. App. 323, 328, 589 P.2d 302 (1979). (Stumpage value not applied in this case involving Christmas trees).

The measure of damages for a timber trespass is treble the 'stumpage value' at the time of the trespass.

. . . .

'Stumpage' is the value of timber as it stands before it is cut or, as otherwise defined, the compensation to be paid by a purchaser for standing timber to be cut and removed. (citations omitted).

The timber trespass statute, RCW 64.12.030, contemplates that the plaintiff whose merchantable trees are taken by the intentional, voluntary trespasser, or by one who has no cause to believe the land was his own, shall receive three times the compensatory measure of damages, which is 'what the trees would be worth on a sale in the condition in which they were at the time of the taking . . .'

Ventoza v. Anderson, 14 Wn. App. 882, 891-2, 545 P.2d 1219 (1976).

3. Exceptions to Application of Stumpage Value.

The rule has evolved to recognize circumstances warranting departure from stumpage valuation, i.e., Christmas trees, productive trees, and ornamental trees that function to enhance enjoyment of residential or recreational property.

The measure of damage to trees under RCW 64.12.030 is generally the stumpage value unless some other, greater fair market value is proven. *Sherrell v. Selfors*, 73 Wn. App. 596, 602, 871 P.2d 168, review denied, 125 Wn.2d 1002, 886 P.2d 1134 (1994). For example, lost profits may be recovered for injury to Christmas trees intended to be sold at a market price. (citations omitted). The measure of damage for loss of residential or ornamental trees is restoration or replacement cost. (citation omitted). Trees functioning as a buffer from wind, noise and dust, and proving a visual screen for the residence are considered ornamental. (citation omitted).

Hill v. Cox 110 Wn. App. 394, 404-5, 41 P.3d 495, (2002).

The Court has employed the term "ornamental" to "distinguish trees grown for production or timber from trees whose primary function and value is essentially noncommercial in nature. In general, something 'ornamental' served to 'adorn', 'embellish', or 'decorate'." *Sherrell v. Selfors*, 73 596, 603, 871 P.2d 168 (1994). However, it is not the tree's noncommercial nature alone that determines its valuation.

Here, in addition to 'adorning' or 'embellishing' Sherrells' property, the trial court found the trees cut by Selfors functioned as a buffer from noise and dust and provided a visual screen for their residence. In short, they were ornamental and, practically speaking, functional.

Sherrell v. Selfors, at 603.

The common law standard is predicated on functionality, not attractiveness. Native trees can be ornamental, even though they were not deliberately planted by the property owner, but replacement valuation is not appropriate unless

the trees function as a buffer from noise and dust, provide a visual screen on recreational or residential property, and enhance the property's aesthetic value. See *Hill*, 110 Wn. App. at 404-05; *Sherrell v. Selfors*, 73 Wn. App. 596, 871 P.2d 168 (1994); *Tatum v. R & R Cable, Inc.*, 30 Wn. App. 580, 582-83, 636 P.2d 508 (1981), overruled on other grounds by *Beckmann v. Spokane Transit Auth.*, 107 Wn. 2d 785, 733 P.2d 960 (1987).

While the Appellate Court has not stated that trees must possess all of these functional buffer qualities, it would appear that the Court's repeated and consistent recitation of these utilitarian qualities as a condition precedent to ornamental/replacement cost status, is not mere dicta.

4. Timber Growing on Isolated Property Does Not Warrant Departure from Stumpage Valuation.

Phillips trees occupied land that was neither residential nor recreational. These 2 1/3 trees stood south of Phillips' nearest wooded land at Lot 1, integrated with Bennett/Bishop's stand of Douglas Fir on the south side of 8th Street. Phillips has a rental house on Lot 1, but it is

situated far to the north, separated from the trees in question by 8th Street and several acres of Alder trees. (RP 4) Phillips' actual residence sits way east on Lot 3, "down over the hill" (RP 54) where distance and lower elevation prohibit the trees from being seen, much less providing a useful buffer on their residential lot. (RP 78, 40-41)

In *Hill v. Cox*, 110 Wn. App. 394, 41 P.3d 495 (2002), the Court discounted the distance of the trees from the residential cabin. Rather, the Court found that restoration value was the appropriate measure of damages because plaintiff "purchased the property for recreational purposes and that the trees . . . preserved a visual buffer enhancing privacy and aesthetic value." *Hill v. Cox*, at 405.

In the instant case, Phillips' 2 1/3 trees occupied the shoulder of a lonely access road, far away from their residence, hemmed in by a gravel road and his neighbor's lot.⁴ The trees provided

⁴ The trial court adopted the replacement value stated by plaintiffs' arborist, Jeff Day, who did not measure the distance from the dwelling to trees, but factored in a "subjective" distance-discount that was "just (his)

no functional purposes as a buffer or recreational enhancement.

B. The Trees' Failure to Meet the Sherrell Standard Did Not Warrant Resort to Unprecedented Criteria for Replacement Cost Valuation.

The trial court acknowledged that Phillips' 2 1/3 trees failed to meet the aforementioned functionality standard for replacement cost valuation. The trial court conceded, "I'm not finding that those trees provided any screening, noise, or dust. They just don't compare to the landscape and everything else that's out there." Verbatim Report of Proceedings, Page 8, Line 4. (CP 39)

Here is where the trial court's reasoning took a detour. "(In) this case, the use of these three Doug Firs was for aesthetics, for adorning and embellishing and decorating the Phillips' property . . ." Verbatim Report of Proceedings, Page 3 Line 22. (CP 96) Faced with its own conclusion that the 2 1/3 Phillips' trees failed to meet *Sherrell's* functionality standard, the trial court conjured a substitute standard, more

questimation; not based on any "chart" or "guide". (RP 37)

lyrical than legal: "Everybody can recognize, and we all know how when the wind blows and the Fir trees sway back and forth and it can have that sense of adorning and embellishing the aesthetics of the property." Verbatim Report of Proceedings, Page 4, Line 8. (CP 39) But, these qualities are common to all trees. Phillips' trees and those grown commercially sway in the wind. Nevertheless, the court found this universal quality warranted special treatment. The Court didn't stop there:

And, I guess the best evidence for me is that Mrs. Bennett felt strongly enough about these trees on her property that she would save them and destroy the Phillipse trees.⁵

⁵ Mrs. Bennett tied pink ribbons around a few trees to be excluded from harvest. The trial court's examination of Bennett disclosed several reasons for doing so, but drilled down to yield "aesthetics". (RP 80).

THE COURT: Those are trees to save. Why are you saving those trees.

THE WITNESS: Well, there were several different reasons. Some were smaller around and too small for Eric to have any value for him. There was some others that had - were good sized around that had some problems, the way the limbs grew out as they grew into the tree itself and it made - the cut wood would have been really poor quality and so I saved those. And, also, some that I just wanted to keep on our road.

That brings to mind that the most important thing for many of these people out here is to have some CO₂ (sic) producers growing up on their property and watching the wind blow in the wind (sic). So I believe that raises to the level of replacement.

Verbatim Report of Proceedings, Page 8, Line 16.
(CP 39) The tree's ability to sway in the wind and grow to stately heights has never been found to support imposition of replacement value. That is simply what Douglas Firs do.

These 2 1/3 Douglas Fir trees did not provide a buffer or screen or adorn the Phillips property in any meaningful way. The trees were located south of 8th Street, on Bennett's side of the road. They were not integrated into Phillips' landscaping. Moreover, they were not even observable from Phillips' home. (RP 4-7) The timbers' location would prompt an observer to conclude that, if anything, they "adorned" Bennett/Bishop's property, not Phillips'.

THE COURT: For aesthetics.

THE WITNESS: Yes.

The written Findings and Conclusions submitted by Plaintiff Phillips reduced the trial Court's aforementioned oral pronouncement to simpler, less lofty terms, to essentially say, "if the tree owner did not want the timber harvested then the tree is ornamental."

10. Phillips was not in the timber business, and he had no intention of selling these three Douglas Fir trees as timber. Instead, these three trees, although indigenous to the property, were 'ornamental' in that they added to the aesthetic quality of the Phillips property.

19. As to the proper measure of damages, it depends on the nature of the plaintiff's use or enjoyment of the trees in question. If the plaintiff is using the trees for timber, then 'stumpage' value would be appropriate. If the plaintiff is using trees to produce fruit, then the lost production value would be appropriate. And if the plaintiff is not using the trees for either timber or fruit production, but is simply enjoying the trees for their aesthetic value, then replacement costs, also known as restoration cost, would be appropriate measure of

THE COURT: For aesthetics.

damages. (citing *Sherrell v. Selfors*).

Findings of Fact and Conclusions of Law Nos. 10 & 19(CP 53).

The written findings down played the trial court's oral reasoning, grounded in the trees' aesthetics. While the legal standard set by case law focuses on functional qualities, the rule of the instant case failed to address the trees' lack of utilitarian qualities. Phillips devised Findings and Conclusions that dispensed with the need to examine the nature of the trees themselves, and substituted a more plaintiff-friendly test, i.e., if the tree's true owner says he wasn't using the tree for timber, then the tree is "ornamental", requiring replacement costs valuation.

The trial court applied the wrong legal standard, which is always an abuse of discretion. *State v. Gentry*, 183 Wn.2d 749, 765, 356 P.3d 714, 723 (2015) ("insofar as the trial court applied the wrong legal standard, it abused its discretion.")

Assuming arguendo the pared down standard adopted by the trial court was valid, there is absolutely no testimony by Plaintiff or anyone on Plaintiff's behalf, as to how those trees were viewed prior to their being cut. It is likely that Mr. Phillips and his family did not even know those trees were their property until the survey was done and the trees were cut. Phillips wasn't "using" these trees for anything. However, predictably, in time for trial, these trees became monuments to the Phillips' family.

Assignment of Error No. 2: The Trial Court Erred in Finding Defendant Bennett Authorized the Timber Trespass, Notwithstanding Her Uncontroverted Testimony That She Tried To Stop It By Telling the Timber Cutter Not To Cut Trees On the North (Phillips') Side of the Survey Line.

In the summer of 2016, Defendants Evelyn Rhoda Bennett and William Bishop, determined that they needed more money. They believed that they could obtain the cash they needed from a modest logging of trees on their five-acre parcel. Defendant Evelyn Rhoda Bennett met with Eric Wisti of Wisti Logging in November of 2016 to enter into a contract to allow Wisti Logging to do the logging they wanted. (RP Bennett, p. 62). At

that point in time, Ms. Bennett believed that her property was everything south of the improved roadway known as 8th Street. (RP Bennett, p. 73).

However, during the conversation between Eric Wisti and Evelyn Bennett, they concluded that the actual location of her northern boundary line was questionable. They agreed that she should have a survey done finding that northern boundary and having staked by a competent surveyor. (RP Bennett, p. 62).

The logging operation on the Bishop/Bennett property commenced in February of 2017. (RP Bennett, p. 62). The faller was Royal. Ms. Bennett took it upon herself to mark certain of her trees with a pink ribbon which she did not want to have cut, but selected largely trees that were not of much value at the sawmill. (RP Bennett, p. 80). That was confirmed by the Trial Court himself. (RP Bennett, p. 86).

Dan Redden of Minister-Glaeser Surveying, Inc. did a survey in the days and weeks leading up to the day in question when the subject trees were fallen. Mr. Redden staked the boundary with

stakes with orange flags easily identifiable. (RP Bennett, p. 64).

Ms. Bennett's testimony is that she observed the stakes being placed in the ground prior to the trees being fallen by Royal. (RP Bennett, pp. 62-64). The day he was to fall the trees, Ms. Bennett told Royal not to cut the trees on the north side of the staked boundary line. (RP Bennett, pp. 73-74). Her testimony is uncontroverted by any other testimony. Royal, therefore, knew before he cut the trees that the trees in question were on the north side, or the Phillips' side, of the boundary line. He knew that not only from the conversation he had with Ms. Bennett that day of the falling, but he also knew because he saw or should have seen the stakes in the ground.

There is no testimony that Royal was present at the meeting between Eric Wisti and Evelyn Bennett in November of 2016. He had no knowledge directly from Ms. Bennett what her belief was as to her ownership of property at that point in time.

After completing the evidentiary portion of the trial, Plaintiffs' counsel introduced a case of *Porter v. Kirkendoll*, 5 Wn2d 686, 421 P.3d 1036 (2018). Argument was made that "One who authorizes or directs a trespass is jointly and severally liable with the actual trespassers." That case cited *Bloedel Timberlands Dev., Inv. V. Timber Indus., Inc.*, 28 Wn.App. 669, 626 P.2d 30 (1981).

Appellants Bennett/Bishop do not dispute that principle of law, but argue that it is misapplied by the trial court in this case. Clearly, the facts are different. Mr. Kirkendoll did not have the survey done until after there was a complaint about the trees being cut on the wrong side of the boundary line. He then had a survey done and, low and behold, the plaintiffs in that case were correct and the trees were cut on their side of the property line.

In the case at bar, a survey was made by Dan Redden, stakes were put in the ground with ribbons. Before Royal cut any trees near the boundary line, Ms. Bennett told Royal, without

contradiction, that he should not cut those trees on the north side of the staked boundary line. (RP Bennett, p. 73-74). What more could she do? Royal was not present at the conversation between Eric Wisti and Evelyn Bennett, so he could not be relying on her assertion or belief that her boundary was north of those trees. She, therefore, did not authorize or direct Royal himself to cut those trees or to trespass on to the Phillips' property. Plus, she and Eric Wisti concluded there needed to be a survey.

It is helpful to examine the cases cited by the *Kirkendoll* case. It primarily relies on *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App 669, 626 P.2d 30. This case involves timber cutting out in the Hinterlands. A boundary line was staked, but the fallers crossed the line. There was no evidence that a particular individual directed the trespass or participated in it. The person that had been the lead forester on the matter was dismissed from the case as he had marked the boundary, he knew where it was, and was not present nor did he participate in the

actual cutting of the timber. The Court of Appeals took that factual situation, used the principle of law about one who directs or authorize a trespass is jointly and severally liable and used that factual situation to exclude that person individually from any personal liability. The other case is *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (2002). In this case there was twenty acres sold by an estate which reserved the right to log the property. The deal made between the buyer and the seller was not to cut trees within 100-foot radius of the cabin on the property. At least twelve trees were cut within that radius. The personal representative of the estate was sued because there was indication that he told the loggers where to log.

In a deposition before his death, that personal representative denied any responsibility. That case held that merely denying responsibility is not enough to create an issue of fact. The inference is that the personal representative must have done something affirmatively to show that his

activity was not instrumental in cutting the trees within the radius.

Another case that merits review is *Fordney v. King County*, an older case found at 9 Wn.2d 546, 115 P.2d 667 (1941). The factual situation in this case is that the fire department told King County that there was an old house that needed to be destroyed. They gave the correct address but gave an erroneous legal description. The County actually owned the lot that was described, but it didn't have a house on it. An unnamed clerk sent the request to destroy to a company that did that for King County, who then hired an individual to deconstruct the house. The County claimed it had no responsibility. The Court held:

"It has often been held that one who authorizes and directs another to commit an act of trespass is responsible to the owner of the property damaged by the trespass [citations omitted] and that such persons are jointly liable with those who actually do the act. [citations omitted] Neither negligence nor intent are necessary elements of an action for trespass. [citations omitted] It is therefore immaterial that in authorizing the act, the corporation was acting as agent for another and even without benefit to itself." *Fordney v. King County, supra*, at page 558.

The court found that the County was negligent in that it could have determined that the property where the house was located was not owned by the County, but they failed to do that investigation.

Having done this analysis, let's turn to the primary defense of Bishop/Bennett. That is that a principal is not liable for the intentional tort of an agent. Trespass is an intentional tort. There is no argument of negligence by Royal or Wisti or Defendants Bennett/Bishop. See *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 64 P.3d 1244 (2003).

So what evidence is there that Bennett/Bishop Defendants authorized or directed a trespass by the faller? There is no evidence that the faller was present at the conversation between Defendant Bennett and Eric Wisti. So, the only way he could have found out about Bennett's then belief is from Wisti. If he was present, then he would have known that there needed to be a survey. In fact, the survey was conducted at the expense of the Bennett/Bishop Defendants and Ms. Bennett actually told him not to cut trees on the north side of the

staked boundary line. That testimony is not contradicted. He proceeded to fall those trees, which was a trespass and an intentional tort.

STANDARD OF REVIEW

The trial court misapplied the principle of law found in the *Kirkendoll* case and the other cases mentioned above. There is absolutely no evidence that Ms. Bennett or Mr. Bishop actually directed or authorized the faller to commit the trespass.

The case of *Buck Mountain Owners' Association v. Prestwich v. Starr*, 174 Wn. App. 702, 308 P.3d 644 (2013) lays out the rules of appellate procedure that apply to a bench trial. That case lays out several principals, including:

"When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings support the court's conclusions of law and judgment. *Sunnyside Valley Irrigation Dist. V. Dickie*, 111 Wash.App. 209, 43 P.3d 1277 (2002). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. [citation omitted]. This court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. [citation omitted]. In determining the

sufficiency of the evidence, this court need only consider evidence favorable to the prevailing party. [citation omitted]. There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. [citation omitted]." *Buck Mountain Owners' Association, supra*, pgs. 713 and 714.

The Findings of Fact, (CP 53 paragraph 7), indicate that Bennett claims she told Wisti's faller not to cut down the three Douglas Fir trees, and goes on to say that despite this alleged warning by Bennett, Wisti's crew cut down three mature Douglas Fir trees. Controverted Findings of Fact indicate that the Court found that the testimony is "cloudy." And while deference must be given to the Trial Court, there needs to be substantial evidence to sustain that Finding of Fact. As pointed out above, there is no contradictory testimony as to the conversation that Ms. Bennett had with the faller, Royal. There is nothing in her testimony and nothing in any other testimony that contravenes that.

There is also no evidence whatsoever that the faller, Royal, was present at any conversation that Bennett had with Eric Wisti that her belief

in November, 2016 was that she owned all the property south of the road known as 8th Street. Furthermore, the stakes planted by the surveyor, with flags, were there to be seen, whether or not Bennett had any conversation with Royal, which seems to be the "cloudy" part of the testimony.

So, a "fair-minded person" needs to connect the dots between the conversation that Bennett and Wisti had in November of 2016 with the actions of the faller, Royal, in February of 2017. As indicated repeatedly, there is no evidence that Royal participated in any conversation with Wisti and Bennett concerning the relief of Bennett as to her boundary line. Had he been in those conversations, he would have known that the boundary line was disputed and that a survey was necessary. He would have seen or should have seen the survey conducted and the stakes placed in the ground which, if nothing else, should have triggered his thoughts as an experienced faller of what these stakes meant.

There is no substantial evidence or persuasive evidence that the direction by Bennett

to the faller to not cut those trees did not occur. There is no evidence that is sufficient to demonstrate that the faller was aware of Bennett's subjective belief in November of 2016. Accordingly, this portion of the Court's Findings and Judgment should be reversed and Bennett and Bishop relieved of the Judgment entered by the Court.

Assignment of Error No. 3: The Trial Court Erred by Imposing Statutory 12% Judgment Interest, Exceeding the Rate Mandated by RCW 4.56.110 (3)(b).

The trial court set statutory judgment interest at 12% per annum. (CP 53) This exceeds Washington's statutory interest rate.

RCW 4.56.110. Interest on Judgments.

Interest on judgments shall accrue as follows:

(3)(b) Except as provided in (a) of this subsection, judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as

published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

CONCLUSION

The trial court erred by ruling the timber damages Mr. and Mrs. Phillips suffered would be determined by replacement value instead of stumpage value. To reach this result, the trial court applied the wrong legal standard. This was a clear abuse of the court's discretion. The Court of Appeals should reverse the trial court and remand the matter with directions to recalculate damages, awarded for wrongfully harvested timber, employing stumpage value not

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restoration cost; and award statutory interest in compliance with RCW 4.56.110(3)(b).

RESPECTFULLY SUBMITTED this 17th day of April, 2020.

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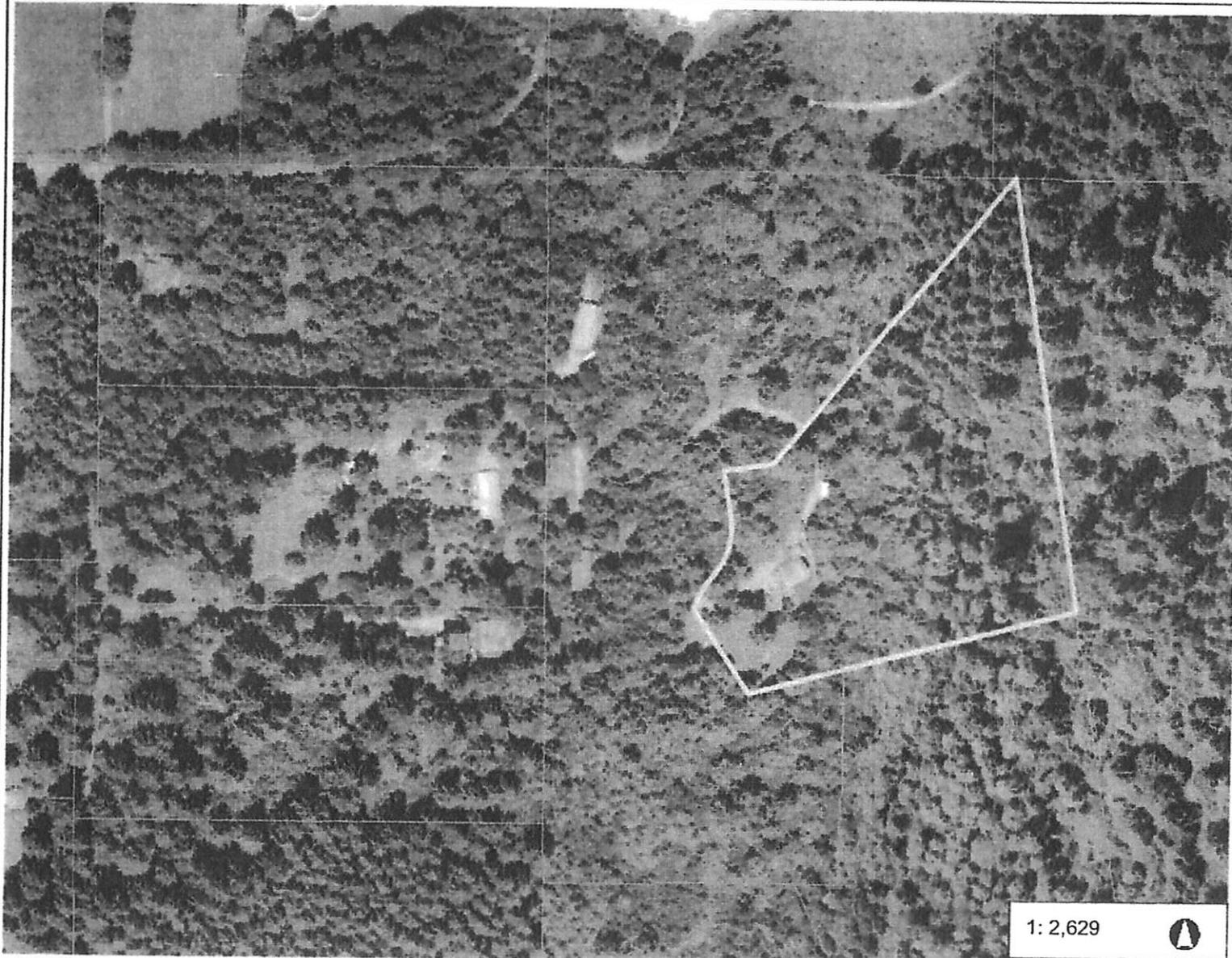
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APPENDIX

Survey Map Exhibit 20
Aerial Photo Exhibit 16
Survey Diagram of Stump Location Exhibit 19
Photo Looking West on 8th Street Exhibit 26



Phillips/Bennett Properties



Legend

- Building Footprints
- Taxlots
- Cities Boundaries
- Urban Growth Boundaries

1: 2,629



Notes:

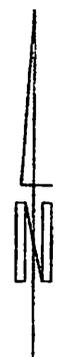
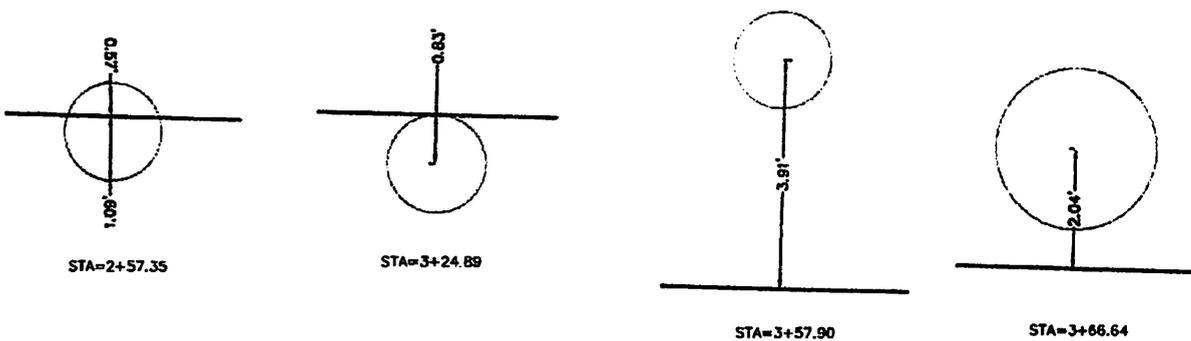
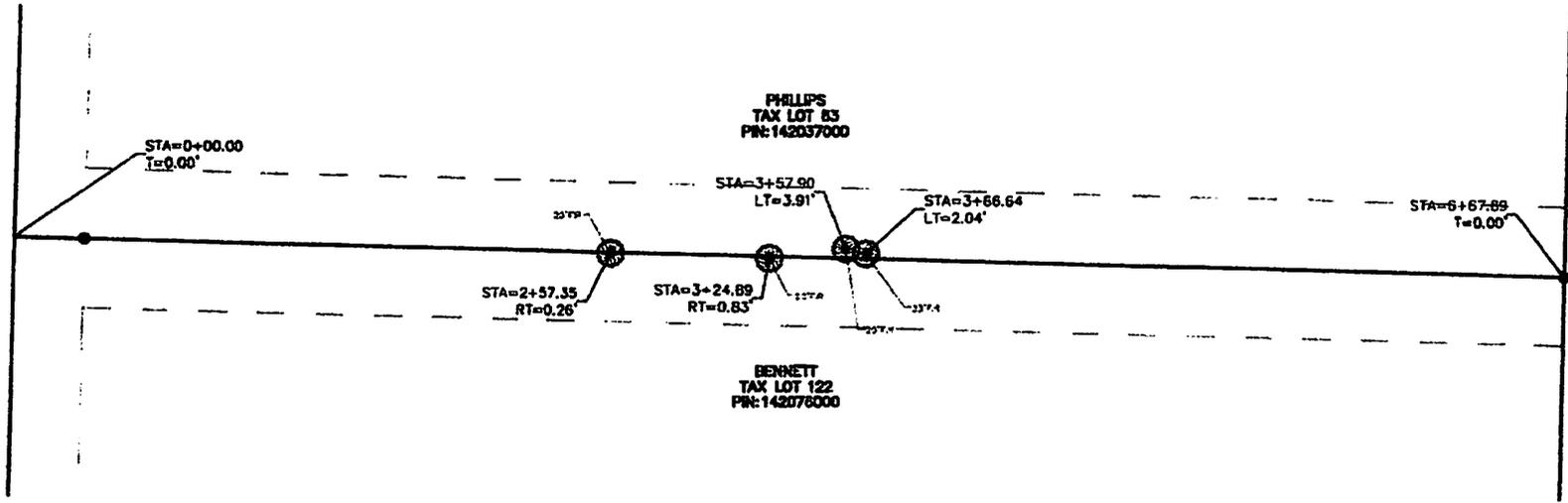
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WGS_1984_Web_Mercator_Auxiliary_Sphere
Clark County, WA, GIS - <http://gis.clark.wa.gov>

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LEGEND:

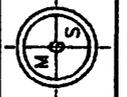
- RT INDICATES CENTER OF STUMP ON BENNETT PROPERTY
- LT INDICATES CENTER OF STUMP ON PHILLIPS PROPERTY
- STA INDICATES DISTANCE MEASURED WEST TO EAST



SCALE: 1"=80'
 JOB NO. 17-055
 DATE: 08-08-18
 DWG FILE: 1705585
 DRAWN BY: DAR

EXHIBIT
 SHOWING STUMPS
 ON THE COMMON PROPERTY LINE
 BETWEEN THE PHILLIPS AND BENNETT

PREPARED BY:
MINISTER-GAESER
 SURVEYING INC.
 2210 E. LEXINGTON BLVD.
 VANCOUVER, WA 98661
 (360) 884-3313





CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Appellants upon the following named person(s) on the date indicated below by:

mailing with postage prepaid;

hand delivery;

facsimile transmission;

overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last known address(es) indicated below:

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Dated: April 17, 2020.


JENNIFER L. BROWN

ROBERT E.L. BENNETT, ATTORNEY AT LAW

April 17, 2020 - 12:35 PM

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Superior Court Case Number: 17-2-01073-5

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