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Division II
State of Washington
No. 54217-0-11
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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, WILLIAM J. BISHOP,
an individual, and ERIC WISTI, an individual doing business as ERIC
WISTI LOGGING, a Washington Sole Proprietorship**

Appellants.

BRIEF OF RESPONDENTS

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I. Introduction

Evelyn Bennett and William Bishop decided to have most of the trees on their property logged by professional logger, Eric Wisti. Kirt and Lynn Phillips own the property to the north. Before having the property line marked, Bennett told Wisti to cut down all the trees south of the roadway, except for certain trees that she decided to keep for their aesthetic value. The problem was that several of the trees lying south of the roadway were located on the Phillips property. Wisti cut down the trees, as directed by Bennett, and the Phillips sued for timber trespass.

After a bench trial, the court found that Bennett and Wisti were jointly and severally liable for treble damages. Moreover, because the court found that the trees were ornamental in nature, it used the restoration or replacement cost as the method of valuing the trees.

Bennett and Wisti have appealed, and their appeal raises three issues.¹

1. Inadequate Record for Review? Under RAP 9.2(b), “[i]f the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding.” Appellants argue there is insufficient evidence to support the trial court’s factual findings, but they have only included in the record the portions of testimony they consider favorable to them. Without the benefit of the contrary testimony, can this Court determine whether any substantial evidence supports the findings?

2. Measure of Damages. When trees are not being kept for fruit production or timber or some other commercial purpose—but instead to adorn, embellish, or decorate property—they are “ornamental,” and the damages for their

¹ Appellants challenge the trial court’s award of post-judgment interest at the rate of twelve percent. Respondents agree that the lower interest rate provided for in RCW 4.56.220(3)(b) should have been applied.

improper removal are based on their restoration value.² Based on the evidence presented at trial, the court found that the Phillips had no intention of selling the trees as timber; instead, the trees “were ‘ornamental’ in that they added to the aesthetic quality of the Phillips property.”³ Did the trial court properly apply restoration value to calculate damages?

3. Bennett Jointly Liable? As our Supreme Court recently affirmed: “A person who directs or advises another to commit a timber trespass is liable for his or her own ‘culpable misfeasance.’”⁴ Bennett initially told Wisti to cut down all the trees south of the roadway, except those she marked to keep for their aesthetic value. Wisti’s logging crew did just that, even though Bennett claims she later told the logger not to cut down the Phillips’ trees that lied south of the roadway. Could the trial court make its own credibility determination and hold Bennett liable, despite her self-serving and uncorroborated testimony?

² *Sherrell v. Selfors*, 73 Wn. App. 596, 871 P.2d 168, review denied, 125 Wn.2d 1002, 886 P.2d 1134 (1994)

³ CP 55

⁴ *Porter v. Kirkendoll*, 194 Wn.2d 194, 202, 449 P.3d 627 (2019)

II. Statement of the Case

Unchallenged findings of fact are treated as verities on appeal.⁵ With one exception, noted below, appellants do not challenge any of the trial court’s findings of fact. Thus, the following facts—which come straight from the trial court’s findings⁶—should be treated as verities for purposes of this appeal.

1. Plaintiffs Kirt and Lynn Phillips (hereinafter referred to collectively as “Phillips”) and Defendants Evelyn Bennett and William Bishop (hereinafter referred to collectively as “Bennett”) are neighbors who own adjoining residential properties in Clark County.

2. Bennett owns a rectangular 5-acre lot, and Phillips owns four lots that border on the northern and eastern edge of Bennett’s property. Phillips lives on one of the lots to the east of the Bennett property. A private road, known as NE 8th Street, runs in the vicinity of the boundary line separating the

⁵ *Sherrell, supra*, 73 Wn. App. at 599

⁶ The Findings of Fact and Conclusions of Law are at CP 53-58.

Bennett property from the Phillips lot to the north. Most of the roadway is located on the Phillips property to the north.

3. In November of 2016, Bennett entered into a contract with Eric Wisti (“Wisti”) to cut, yard, process, load, market, and deliver logs from the Bennett property. At that time, there was a question about the location of the boundary between the Bennett property and the Phillips property to the north. This put Wisti on notice of a potential boundary line/timber trespass issue.

4. At the start of the logging project, Bennett told Wisti to cut all the marketable trees located south of NE 8th Street, except for certain trees that Bennett marked with ribbons, which she had decided to keep because of their aesthetic value. Wisti’s crew started the job, but they focused on other parts of the Bennett property, away from the northern boundary.

5. To clear up the confusion regarding the location of her property, Bennett hired surveyor Daniel Renton, of Minister

& Glaeser Surveying, to mark the corners and boundary lines of her property.

6. The surveyors marked the boundaries of the Bennett property. There was no credible evidence that these survey markers were meant to mark anything but the boundaries of the Bennett property. Once the survey markers were in place, the boundaries of the Bennett property were obvious.

7. After the survey markers had been put in place, Bennett testified she told Wisti's feller not to cut down the three Douglas Fir trees that are at issue in this lawsuit, which were located in a narrow strip of property that is north of the Bennett property but south of NE 8th Street. The trial court found Ms. Bennett's uncorroborated testimony regarding this alleged conversation to be "cloudy, at best."

8. Despite this alleged warning by Bennett, Wisti's crew cut down three mature Douglas Fir trees that lay either wholly or partially on the Phillips property.

9. Two of the trees were located several feet north of the Bennett property, and roughly one-third of one tree was located on the Phillips property.

10. The Phillips were not in the timber business, and they 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.⁷

11. The trial court agreed with the valuations of the three trees set forth by the expert arborist retained by Phillips, who opined that the replacement or restoration cost of the three trees was \$10,700. The defendants did not present any controverting evidence regarding the replacement or restoration cost of these trees.

⁷ While Appellants do not expressly assign error to this Finding of Fact, they challenge the trial court’s finding that the trees in question were ornamental.

Based on these factual findings, the trial court concluded that Bennett and Wisti were jointly liable for treble damages, and it awarded the Phillips \$32,100 for the timber trespass.

III. Argument

A. The Appellants Have Failed to Provide an Adequate Record to Support Their Appeal

Rather than arranging for the court reporter to transcribe the entire trial, Appellants have cherry-picked the portions of the testimony they believe is most favorable to their appeal. This approach is misguided, however, especially when the basis of the appeal is a lack of substantial evidence to support the trial court's findings and conclusions.

RAP 9.2 sets forth the obligations of an appellant with regard to the verbatim report of proceedings. Subsection (b) is entitled "Content" and provides, in pertinent part:

A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review...If the party seeking review intends to

urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record *all evidence relevant to the disputed verdict or finding*. (Emphasis added.)

Appellants have not met the requirements of RAP 9.2(b).

Appellants are urging that the trial court's findings of fact are not supported by the evidence, but they did not include in the record all evidence relevant to the contested findings.

Appellants have two chief complaints: (1) that there was no substantial evidence to support the finding that the trees in question were ornamental and not mere timber; and (2) that there was no substantial evidence to support the finding that Bennett failed to prevent Wisti's crew from cutting down the trees.

With respect to the former, however, Appellants have failed to include the direct testimony of Kirt Phillips. This omission severely hampers this Court's ability to determine whether there is substantial evidence to support the trial court's findings of fact regarding the Phillips' intentions and use of the

subject trees, as well as the aesthetic benefit of the trees to their property.

As for the latter contention, Appellants have failed to include any testimony from Wisti, which could shed light on what Bennett did, and failed to do, to prevent these trees from being cut down by Wisti.

In *Bulzomi v. Dep't of Labor & Indus.*, the Court of Appeals rejected the appeal because the appellant had failed to provide the court with an adequate record on review. “The party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence. An insufficient record on appeal precludes review of the alleged errors.”⁸

Similarly, as the Supreme Court stated in *State v Wade*:
“A trial court’s judgment is presumed to be correct and should

⁸ *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (citations omitted)

be sustained absent an affirmative showing of error.”⁹ In *Wade*, the Supreme Court confirmed that the burden of providing an adequate record for review falls squarely on the appellant, and that “[a]n appellate court may decline to address a claimed error when faced with a material omission in the record.”¹⁰

Here, in their effort to avert this Court’s eyes from the evidence that is contrary to their appeal, the Appellants have clearly failed to provide this Court with all evidence relevant to the issues raised in their appeal. Because they have failed to satisfy their burden of providing an adequate record for review, this Court should reject their appeal for this reason alone.

B. Substantial Evidence Supports the Trial Court’s Finding that the Trees were Ornamental and Not Mere Timber

As noted above, the trial court found that the subject trees were ornamental in nature and were not mere timber.

⁹ *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999) (citation omitted)

¹⁰ *Ibid.*

The Phillips were not in the timber business, and they 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.¹¹

Appellants indirectly challenge this finding, although they attempt to characterize their attack as legal in nature in an effort to avoid the “substantial evidence” standard of review. As shown below, however, the trial court did not apply the “wrong legal standard” in making this finding; instead, the trial court based its finding on the evidence regarding the nature and use by the property owners of the trees in question.

The standard of review from a trial court’s judgment are well established.

We review *de novo* questions of law and a trial court's conclusions of law. And we review findings of fact under a substantial evidence standard. Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted.¹²

¹¹ CP 55

¹² *Mitchell v. Washington State Institute*, 153 Wn. App. 803, 225 P.3d 280, 284 (2009) (citations omitted)

Moreover, when applying the substantial evidence standard, the appellate courts view the evidence, and all inferences from the evidence, in the light most favorable to the prevailing party. “We defer to the fact finder and consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.”¹³

Even in the limited record presented by the appellants, there is substantial evidence to support the trial court’s finding that the trees were ornamental in nature, and not mere timber.

First, and contrary to Appellants’ characterization of the evidence, there is evidence that the trees in question could be viewed from the residential unit that sat on the same property.¹⁴ Moreover, Phillips testified that the trees “would provide some sound barrier” for his own house.¹⁵ Phillip’s expert arborist also testified that the trees provided “privacy for the

¹³ *Id.* at 285

¹⁴ RT 5:3-5

¹⁵ RT 6:12-16

residence.”¹⁶ In addition, the arborist testified that Phillips would see the trees on the side of the road every time he came and went from his property, but now he just looks at their stumps.

Q. Do you know whether that road is how Mr. Phillips gets to and from his house every day?

A. Through that road.

Q. Yes.

A. That –

Q. Yes. And would he see the trees every time he drives by?

A. Yes.

Q. And now he's looking at stumps instead?

A. Yes.¹⁷

Additional evidence of the aesthetic value of these majestic Douglas Fir trees comes straight from Bennett’s own words and actions. Her testimony makes clear that she decided to keep several of the same trees on her property—rather than sell them for timber—because of their location near the road

¹⁶ RT 38:6-7

¹⁷ RT 58:20-59:4

and their inherent aesthetic value. She marked with ribbons or flags the trees on her own property that she wanted to save, but she did not mark the three trees on Phillip's property.

THE COURT: So I'm looking at Exhibit No. 26. That's the black-and-whites offered by the defense. And there -- talk to me about the flags on tree stumps.

THE WITNESS: Uh-huh.

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.

THE COURT: For aesthetics.

THE WITNESS: Yes.¹⁸

The Court reconfirmed this point later in its questioning of Bennett.

¹⁸ RT 80:1-16

THE COURT: So all in all, let me close out my questioning with is that you selectively ribboned or saved some trees, one, because they weren't necessarily marketable as they stood?

THE WITNESS: Uh-huh.

THE COURT: And also that you wanted the aesthetics of them to remain on your property?

THE WITNESS: Yes.¹⁹

These admissions by Bennett factored heavily in the trial court's finding that the Phillips trees also served an aesthetic purpose. The court observed that "the use of these three Doug Firs was for aesthetics, for adorning and embellishing and decorating the Phillips property and it was for the quality and nature of this particular rural property..."²⁰

Similarly, the trial court further observed:

There's no evidence in the record that there are any other like Doug Firs on the Phillips property, so as far as the record shows, there was some that were recently planted, but as far as the record shows, these were the three most mature and tallest Doug Firs on the property. Everybody can recognize, and we all know how when the wind blows and the Fir trees sway back and forth

¹⁹ RT 86:13-20

²⁰ CP 43.

and it can have that sense of adorning and embellishing the aesthetics of the property.²¹

The trial court then turned its attention to Ms. Bennett's admission that similar trees on her property were kept for their aesthetic value, rather than being sold for timber.

Ms. Bennett purposefully understood the aesthetic value of Doug Fir trees, tall blowing in the wind, to the degree that she, to avoid getting market value or stumpage value from the mill, she marked trees throughout her property to maintain that aesthetic value. For her then to come in and argue that the Phillips aren't entitled to the same aesthetic benefits that she herself wants to enjoy is really kind of unfair. It's an unfair argument. She got to save the trees she wanted and she took the Phillips' trees. That, that can't stand with the Court.²²

Finally, the trial court revisited the import of

Ms. Bennett's testimony in this regard:

What we're talking about is two rural home owners that want particular trees saved. 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 Phillipses [sic] trees.²³

²¹ CP 44

²² CP 45

²³ CP 48

These excerpts from the trial provide more than ample evidence to support the trial court's finding of fact that the subject trees were ornamental in nature and not mere timber. That is why the trial court based its award on their restoration value of \$10,700, rather than their "stumpage" value, which defendants argued was \$462.²⁴ In other words, instead of receiving a treble damage award of \$32,100 for these majestic trees, Appellants ask this court to reduce the award to \$1,386.

Appellants' attack on the trial court's finding is based on the argument that the trial court used the "wrong legal standard," but the record clearly refutes this argument. The court correctly cited to the leading case of *Sherrell v. Selfors*²⁵ in choosing the appropriate measure of damages for these trees.

I think it was Sherrell case that talks about the things that you guys spent a little bit of time talking about, whether or not an ornamental doesn't seem to be a very fair word to use for it either. The Court found that the replacement cost of trees was the proper measure of damages given that trees

²⁴ The stumpage value comes from the "Timber Appraisal" admitted as Exhibit 23.

²⁵ 73 Wn. App. 596, 871 P.2d 168 (1994)

were ornamental in that they adorned the property even though they were indigenous to the land.²⁶

The court followed the same line of reasoning in its written Findings of Fact and Conclusions of Law.

As to the proper measure of damages, it depends on the nature of the plaintiffs 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 cost, also known as restoration cost, would be appropriate measure of damages. Here, the court concludes that the proper measure of damages is their restoration cost of \$10,700.²⁷

The *Sherrell* case stands for the proposition that when the property owner is not using the tree for timber or fruit production or some other commercial purpose, but rather for adornment and embellishment of a residential or recreational property, the proper measure of damages is their replacement or "restoration" value.

²⁶ CP 47

²⁷ CP 57

When trees are cut from recreational and residential property, damages based on stumpage value, production value, lost profits, and the before-and-after property value may be inappropriate. This was recognized in *Tatum*. *Tatum*...held RCW 64.12.030 was applicable to "ornamental" trees and shrubs as well as timber and trees grown for production. The trial court's award of damages based on restoration costs was upheld as within the province of the trier of fact.²⁸

In other words, whether the tree is ornamental or not is a factual finding based on the nature of the use of the tree by the property owner. The *Sherrell* court rejected the defendant's argument that the trees could not be ornamental because they were indigenous to the property. It does not matter whether the tree may be indigenous to the property.

Although *Tatum* did not define an ornamental tree, the term serves to distinguish trees grown for production or timber from trees whose primary function and value is essentially noncommercial in nature. In general, something "ornamental" serves to "adorn", "embellish", or "decorate."²⁹

²⁸ *Sherrell, supra*, 73 Wn. App. at 603

²⁹ *Ibid.*

While it is true that the trees in *Sherrell* also functioned as a buffer from noise and dust and provided a visual screen for the residence, these functions are not the *sine qua non* of a tree being ornamental. A delicate Dogwood or a slender Aspen might not provide much protection from noise or dust, but they can adorn and embellish any residential property. A towering Oak may be located far from the house, and provide no privacy, but just knowing it is there, and being able to visit it, can add aesthetic value to the property.

In sum, the courts have never imposed a strict requirement that all trees that adorn or embellish a property must also serve some utilitarian function in order for them to be classified as “ornamental.” In fact, the very use of the word “ornamental” highlights the fact that the tree is not being used for some utilitarian purpose. As state in *Sherrell*: “An award is appropriate if it is in accord with the principle that damages should be compensatory.”³⁰ The paltry sum of \$1,386 is simply

³⁰ *Ibid.*

not enough to compensate the Phillips for the reduction of three majestic Douglas Fir trees to three ugly stumps. The Phillips' arborist already discounted his opinion of value by seventy-seven percent because the trees were not located close to the residence.³¹ This Court should not reduce their value by yet another ninety-five percent, from \$10,700 to \$462, just because the trees did not also serve a utilitarian purpose on the property.

C. Substantial Evidence Supports the Trial Court's Conclusion that Bennett is Jointly Liable

Based on the evidence, the trial court made the factual finding that Bennett had, at one time, instructed Wisti to cut down the Phillips trees.

At the start of the logging project, Bennett told Wisti to cut *all the marketable trees located south of NE 8th Street*, except for certain trees that Bennett marked with ribbons, which she had decided to keep because of their aesthetic value. The Phillips trees were located south of NE 8th Street, and so they were cut by Wisti's crew.³²

³¹ RT 24:7-10

³² CP 54

The trial court also noted that Bennett knew the trees were on the Phillips property before they were cut down. “Further Bennett at the time the trees were cut down, knew the trees were on Phillips property.”³³

Based on these findings, the trial court rejected Bennett’s argument that she could not be directly liable to Phillips and that all liability rested with Wisti. The trial court concluded that “Bennett had a duty to make sure Wisti did not cut down any trees that were either wholly or partially located on the Phillips property.”³⁴

Because Bennett failed to meet this standard, the trial court concluded that Bennett was jointly liable with Wisti:

As to the question of joint and several liability, “[o]ne who authorizes or directs a trespass is jointly and severally liable with the actual trespassers.” Here, Bennett authorized and /or directed Wisti to cut down the trees in question . As a result, the court concludes that Bennett and Wisti are jointly and severally liable to Phillips.³⁵

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ CP 57

The trial court cited to the Court of Appeals decision in *Porter v. Kirkendoll* for the imposition of joint and several liability.³⁶ In the time since the trial court issued its decision, the Supreme Court has affirmed in part and reversed in part the *Porter* decision. In doing so, however, the Supreme Court reaffirmed the proposition cited by the trial court below:

A person who directs or advises another to commit a timber trespass is liable for his or her own “culpable misfeasance.” *Ventoza v. Anderson*, 14 Wash. App. 882, 896, 545 P.2d 1219 (1976); *see also Hill v. Cox*, 110 Wash. App. 394, 404, 41 P.3d 495 (2002) (upholding liability of the individual who directed loggers to cut the trees but did not cut the trees himself).³⁷

Bennett’s sole argument on appeal is that she should not be liable because she claims she told Wisti’s crewmember not to cut down the trees in question. But the trial court was free to make its own credibility determination and to disbelieve Bennett’s self-serving and uncorroborated testimony in this

³⁶ *Ibid.*

³⁷ *Porter, supra*, 194 Wn.2d at 202

regard.³⁸ The trial court was also free to rely on the circumstantial evidence: right after Bennett supposedly told the crewmember not to cut the trees down, the crewmember promptly went ahead and cut the trees down.

The trial court is not required to believe everything a witness says simply because no specific testimony was introduced to contradict the witness. And the appellate court should refrain from substituting its own credibility determinations for those of the trial court judge.

We do not reweigh or rebalance competing testimony and inferences even if we may have resolved the factual dispute differently. This is especially true when the trial court finds the evidence unpersuasive.³⁹

And as Division III has explained:

The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual

³⁸ Bennett did not call the crewmember as a witness at trial to corroborate Bennett's alleged statement to him.

³⁹ *Bale v. Allison*, 173 Wn. App. 435, 458, 294 P.3d 789 (2013) (citations omitted)

findings made by the trier-of-fact. Judgment as to the credibility of witnesses and the weight of the evidence is the exclusive function of the jury.

It is one thing for an appellate court to review whether sufficient evidence supports a trial court's factual determination. That is, in essence, a legal determination based upon factual findings made by the trial court. In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive.⁴⁰

Here, the trial court obviously found Bennett's testimony unpersuasive. The trial court referred to this testimony as "cloudy at best," and as "this *alleged* warning by Bennett..."⁴¹ Finally, even if Bennett had given such a warning, it was obviously insufficient to overcome her initial instructions to cut down all the trees south of the roadway. As the trial court noted in its comments from the bench:

⁴⁰ *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009)

⁴¹ CP 55

Bennett had a duty to ensure that her agent, the contractor, had the information available to properly log this property. Both of them failed in their duties to the Phillips to ensure that they did not suffer the loss of their timber, their trees.⁴²

As a result, the trial court did not err in holding Bennett jointly and severally liable, along with Wisti, for the harm caused to the Phillips property.

IV. Conclusion

For the foregoing reasons, Respondents Kirt and Lynn Phillips respectfully request that the Court reject this appeal and allow the trial court's judgment to stand.

Respectfully submitted June 2, 2020

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⁴² CP 39

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