71726-0 71726-0

No. 92324-8

No. 71726-0

COURT OF APPEAL OF THE STATE OF WASHINGTON
DIVISION I

LESLIE PENDERGRAST, an individual,

Appellant/Cross-Respondent,

v.

ROBERT MATICHUK and JANE DOE MATICHUK, as individuals and in their marital capacity; BLAINE PROPERTIES, L.L.C., a Washington State limited liability company,

Respondents/Cross-Appellants.

APPELLANT/CROSS-RESPONDENT'S REPLY-RESPONSE BRIEF

MARK J. LEE, WSBA #19339
Brownlie Evans Wolf & Lee, LLP
230 E. Champion Street
Bellingham, WA 98225
Ph. (360) 676-0306
E-mail: mark@brownlieevans.com

Attorneys for Appellant/Cross-Respondent Leslie Pendergrast

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 OCT 27 AM 9:33

ORIGINAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .....iii-v

I. INTRODUCTION 1

II. RESPONSE TO RESPONDENTS' CROSS APPEAL 3

A. Counter Statement of Facts 3

1. Counter Statement of Facts Relating to Summary Judgment on the Common Grantor Doctrine 3

a. Undisputed Facts 3

b. Procedural History 8

2. Counter Statement of Facts Relating to Motion for New Trial or Reduction of Non-Economic Damages 10

B. The Trial Court Properly Granted Summary Judgment and Quieted Title to Pendergrast. 19

1. Respondents Waived Any Argument That the Burden of Proof for the Common Grantor Doctrine Is Clear and Convincing, Nor Is This the Proper Burden of Proof. 20

2. Summary Judgment Was Appropriate, Regardless of the Burden of Proof Applied. 22

3. The Only Relief That Could Be Granted by This Court Is Remand for Trial on the Common Grantor Doctrine. 32

TABLE OF CONTENTS

Page

C. There Is Nothing to Establish That the Trial Court Abused Its Discretion in Denying the Motion for New Trial or to Reduce the Award of Non-Economic Damages. 33

1. The Proper Standard of Review Requires Proof That the Trial Court Abused Its Discretion When It Applied the Very Narrow Standards for Intervening in a Jury Verdict. 33

2. Respondents Do Not Cite Any Cause of Prejudice or That Such Existed. 38

3. Respondents Fail to Establish That the Trial Court Abused Its Discretion in Concluding That There Was Evidence to Support the Jury's Verdict. 41

III. REPLY TO RESPONDENTS' RESPONSE TO PENDERGRAST'S APPEAL 48

IV. CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Behnke v. Ahrens, 172 Wn.App. 281, 294 P.3d 729 (2012) 41

Bingaman v. Grays Harbor Community Hosp., 103 Wn.2d 831, 699 P.2d 1230 (1985) 37-38, 41, 45

Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 942 P.2d 968 (1997) 2, 48-49

Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 116 P.3d 381 (2005) ..... passim

Delahunty v. Cahoon, 66 Wn.App. 829, 832 P.2d 1378 (1992) 38

Fernandes v. Mockridge, 75 Wn.App. 207, 877 P.2d 719 (1994), rev. denied, 126 Wn.2d 1005 (1995) 47

Gestson v. Scott, 116 Wn.App. 616, 67 P.3d 496 (2003) 36

Green v. McAllister, 103 Wn.App. 452, 14 P.3d 795 (2000) 42

Haueter v. Cowles Pub. Co., 61 Wn.App. 572, 811 P.2d 231 (1991) 20

Heriot v. Smith, 35 Wn.App. 496, 668 P.2d 589 (1983) 21

Hill v. Cox, 110 Wn.App. 394, 41 P.3d 495 (2002) 36, 41

Hill v. GTE Directories Sales Corp., 71 Wn.App. 132, 856 P.2d 746 (1993) 46

In re Welfare of Sego, 82 Wn.2d 736, 513 P.2d 831 (1973) 22

TABLE OF AUTHORITIES

Lybbert v. Grant County, State of Washington, 141 Wn.2d 29, 1 P.3d 1124 (2000) 19

Martin v. Hobbs, 44 Wn.2d 787, 270 P.2d 1067 (1954) 22

Nickell v. Southview Homeowners Ass'n, 167 Wn.App. 42, 271 P.3d 973 (2012) 21

Pardee v. Jolly, 163 Wn.2d 558, 182 P.3d 967 (2008) 21

State v. Enloe, 47 Wn.App. 165, 734 P.2d 520 (1987) 50

Strom v. Arcorace, 27 Wn.2d 478, 178 P.2d 959 (1947) 31

Thompson v. Bain, 28 Wn.2d 590, 183 P.2d 785 (1947) 25, 28

Thompson v. Berta Enterprises, Inc., 72 Wn.App. 531, 864 P.2d 983 (1994) 41, 47

Washington Federal Sav. v. Klein, 177 Wn.App. 22, 311 P.3d 53 (2013) 20

Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993) 34

Winans v. Ross, 35 Wn.App. 238, 666 P.2d 908 (1983) ..... passim

Worthington v. Caldwell, 65 Wn.2d 269, 396 P.2d 797 (1964) 36

TABLE OF AUTHORITIES

Statutes

RCW 4.28.328(3) 32-33

RCW 64.12.030 ..... 1-2, 49-50

Rules

CR 59(a)(5) and (9) 34

RAP 2.5(a) 20, 28

Treatises

18 WA PRAC. § 14.12 (2014) 26

I. INTRODUCTION

This appeal arises out of the trespass and timber trespass committed by Respondents Blaine Properties L.L.C. ("Blaine Properties") and Robert Matichuk ("Matichuk") (collectively referred to as "Respondents"). The Trial Court quieted title in the property upon which the trespass and timber trespass occurred to Appellant Leslie Pendergrast ("Pendergrast") by way of summary judgment under the common grantor doctrine. Pendergrast's trespass and timber trespass claims were tried to a six-person jury, which found that: (1) Respondents committed a trespass, and awarded $5,200 in economic damages and $75,000 in non-economic damages; and (2) Matichuk committed a timber trespass under RCW 64.12.030, and awarded $3,310 in economic damages and $40,000 in non-economic damages. The Trial Court awarded a host of equitable relief.

On cross appeal, Respondents challenge the Trial Court's granting of summary judgment quieting title to the at-issue property to Pendergrast. They incorrectly argue for the first time that the common grantor doctrine requires proof by "clear and convincing evidence," and renew a host of arguments specifically rejected in Winans v. Ross, 35 Wn.App. 238, 240, 666 P.2d 908 (1983). As to the facts, Respondents cannot avoid the

undisputed evidence which establishes the elements of the common grantor doctrine as a matter of law.

Respondents alternatively argue that the Trial Court erred in refusing to reduce the awarded non-economic damages pursuant to their Motion for New Trial or Reduction of Non-Economic Damages, CP 370-74. Respondents fail to establish that the Trial Court abused its discretion in denying remittitur based upon the considerations of substantial evidence, shocking of the conscience, and passion and prejudice. Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 176, 116 P.3d 381 (2005).

Finally, Matichuk ignores the extensive and thorough legal analysis provided by Pendergrast in appealing the Trial Court's legal conclusion that the jury's non-economic damages award under the timber trespass claim should not be trebled under RCW 64.12.030. Instead, Matichuk argues, without analysis that the Court should refrain from trebling non-economic damages because this would require an expansive, instead of narrow, interpretation of the statute. On the contrary, such an interpretation comports with the clear language of the statute, its intent, and the Supreme Court's analysis in Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 111, 942 P.2d 968 (1997).

II. RESPONSE TO RESPONDENTS' CROSS APPEAL

A. Counter Statement of Facts

Respondents' Statement of Facts fails to identify pertinent and relevant evidence, thus Pendergrast provides an alternative statement.

1. Counter Statement of Facts Relating to Summary Judgment on the Common Grantor Doctrine

a. Undisputed Facts

Respondents do not dispute the following facts:

- The parties each own separate parcels that are contiguous and share a common boundary line.

- Both parties' parcels were commonly owned prior to conveyance to them by Tali Conine and Cyrus Conine (collectively "Conine").

- Conine first conveyed what is a vacant parcel to Matichuk on April 25, 2006. CP 45-46.[1]

- Conine subsequently conveyed the other contiguous parcel to Pendergrast on September 18, 2006. CP 47-49. The parcel sold to Pendergrast had a long-standing house on it.

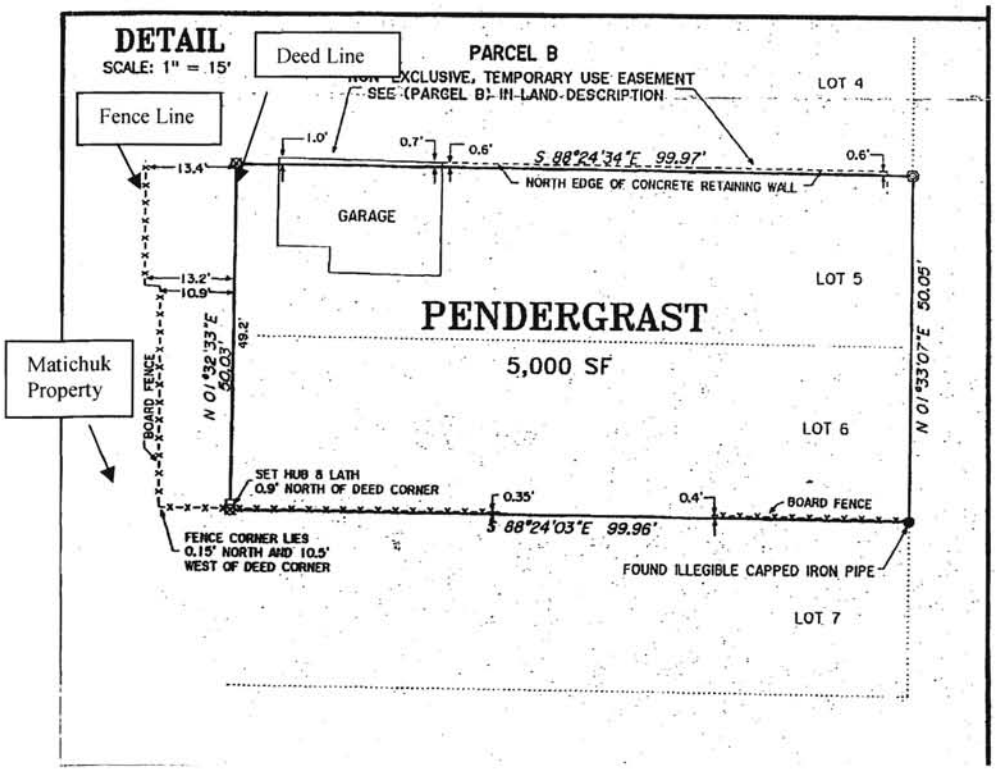
- At the time of both conveyances, there was a six-foot solid wood fence that ran directly between the Pendergrast property and, inter alia, the

[1] At the time of this acquisition, Matichuk also purchased a second parcel from Conine that is also contiguous to Pendergrast's property, which had a small house. This property is not relevant to the issues presented in the case.

vacant parcel sold to Matichuk. This fence line extended the entire length of the common boundary between Matichuk's vacant lot and Pendergrast property. The fence line, as shown from the interior of the Pendergrast property, and as extending from the south corner of the common boundary line to the north corner of the common boundary line, looked as follows at the time Conine sold each lot, and for over three years thereafter:

CP 28, 30.

The precise location of the fence line at the time of both conveyances is shown on a survey obtained by Pendergrast, with the Matichuk vacant lot on the right (west) side of the fence marked in "x:"



CP 31.

- Matichuk planned to construct condominiums on the vacant parcel. CP 51. At the time he acquired the vacant lot, Matichuk walked off what he understood to be its legal description and noted the existence of the fence line between the vacant lot and the Pendergrast property:

> I came to the conclusion – I came to the conclusion the fence was not on the property line. Actually, let me

> rephrase that, I came to the conclusion I didn't know where the fence was in relation to the property line.

CP 52. The fence appeared to him to be connected with the Pendergrast property. CP 53. He did no further investigation at that time to come to a different conclusion. Id. at 52.

- When she purchased, Pendergrast was provided with a listing statement that referenced her property as "Fenced-Partially." CP 32. She also received a Seller's Disclosure Statement which represented that there were no encroachments or boundary disputes. CP 33.

- Pendergrast at all times thought, and both parties treated, the fence line as the common boundary line between the Matichuk and Pendergrast properties. Pendergrast performed all yard work in the area within the six-foot high fence line. There was also a large tree and tree fort on her side of the fence, which was used exclusively by her family members. Pendergrast often saw Matichuk walking around his property when he did maintenance and remodeling work. He never came onto her side of the fence, or said anything about the fence line encroaching onto his vacant property. CP 26. Matichuk concedes that he never used any of the property on Pendergrast's side of the fence after he purchased on April 25, 2006, until he moved the fence line in 2009. CP 54.

- After he purchased the Conine vacant lot, Matichuk began to process an application to construct the condominiums. Sometime in June 2008, Matichuk surveyed the vacant lot, and discovered that the fence line was over the deed line in his legal description. CP 53.

- Matichuk did nothing about this issue, until he sent a letter to Pendergrast six months later, on January 29, 2009, advising that the fence was "6-8 feet" over his boundary line and that he was going to move the fence to the deed line. CP 38. Pendergrast had her own survey performed, which confirmed this contention.

- Pendergrast retained attorney Philip Sharpe, who sent a letter to Matichuk on April 21, 2009, claiming Pendergrast's ownership up to the fence line based upon the common ownership by the previous owner and location of the fence as the agreed boundary. Matichuk was advised that he should not move the fence as threatened. CP 39. Matichuk nonetheless moved the fence line to the deed line and then cut down the large tree that housed the tree house. CP 27. He came back later and reversed the panels on the fence, so that the cross beams were showing on Pendergrast's side. Id. Matichuk concedes that he knew that Pendergrast claimed ownership up to the fence line when he took these actions. CP 55-56.

b. Procedural History

In their Opening Brief, Respondents fail to disclose two important procedural points. First, Matichuk initiated the summary judgment procedures on the common grantor doctrine by filing a Motion for Summary Judgment on October 31, 2012, seeking to dismiss Pendergrast's quiet title claim under the common grantor doctrine, based upon the lack of any disputed facts.[2] CP 306-315. On November 21, 2012, Pendergrast filed a Response and Cross-Motion for Summary Judgment agreeing that there were no disputed issues of fact, but that she was the party entitled to summary judgment to quiet title under the common grantor doctrine. CP 58-70.

On January 4, 2013, Judge Steven Mura entered an Order Granting in Part and Denying in Part Defendants Matichuks' Motion for Summary Judgment, in which the Trial Court denied Matichuk's Motion for Summary Judgment to dismiss Pendergrast's quiet title claim under the common grantor doctrine. CP 82. By a completely separate Order Granting Plaintiff's Cross-Motion for Summary Judgment, the Trial Court granted Pendergrast's Cross-Motion for Summary Judgment and quieted

[2] At the time of the critical summary judgment motions, Matichuk was the only defendant relating to title issues. Blaine Properties was later added as a defendant in recognition that it had been conveyed the property during pendency of the action.

title to the area on her side of the fence under the common grantor doctrine. CP 85.[3] In their Notice of Cross-Appeal, Respondents did not appeal the separate Order Denying in Part Defendants Matichuks' Motion for Summary Judgment, but instead only appealed the Order Granting Plaintiff's Cross-Motion for Summary Judgment. CP 376.

Second, on January 14, 2013, Matichuk filed a Motion for Reconsideration of the Trial Court's Order Granting Plaintiff's Cross-Motion for Summary Judgment. CP 353-59. Matichuk restated his rejected arguments and argued that there was an issue of fact that should have prevented the granting of summary judgment to Pendergrast under the common grantor doctrine. This motion was heard by Judge Deborra Garrett. The Trial Court denied the Motion for Reconsideration. CP 101-02. Thus, two separate Trial Court judges have confirmed the appropriateness of granting of summary judgment to Pendergrast on her quiet title claim under the common grantor doctrine.

[3] The Trial Court also granted Respondents' Motion for Summary Judgment and denied Pendergrast's Cross-Motion for Summary Judgment on her separate claim to quiet title under the doctrine of boundary by agreement. CP 82, 85. This ruling has not been appealed.

2. Counter Statement of Facts Relating to Motion for New Trial or Reduction of Non-Economic Damages

Pendergrast's trespass and timber trespass claims were tried to a six-person jury. During trial, Pendergrast, who at the time of trial was going to be a 62-year old mother of two, and grandmother to four step-grandchildren and two natural grandchildren, RP at pp. 5-6, lines 6-5; p. 74, lines 10-11, provided extensive testimony relating to the effects of Respondents' trespass and Matichuk's timber trespass:

- Between 2001-2006, Pendergrast had successfully purchased, fixed up, and sold three properties. RP at pp. 7-8, lines 21-9.

- Pendergrast has two grown daughters who are disabled, and whom she financially supports, which put a crunch on her income. RP at p. 8, lines 17-23. To take the strain off this financial stress, Pendergrast purchased the property from Conine to make it a unique bed and breakfast. RP at pp. 8-9, lines 24-7.

- Pendergrast explained that the backyard area, where the trespass and timber trespass occurred, was the critical part of the bed and breakfast. There, she was going to build a swimming pool and put in a deck in an old cherry tree in the shape of a boat prow from which people could see Drayton Harbor and White Rock, Canada. RP at p. 13, lines 9-21. She

also planned to take a freestanding garage in the area and make a honeymoon cottage. Id. at p. 14, lines 10-15. She testified that these features were "the whole thing" in terms of the bed and breakfast because they would make it different. RP at p. 15, lines 7-10.

- Pendergrast worked from March 2007 to June 2008 remodeling the house interior, with plans to follow with the outside work during the summer of 2008. RP at p. 19, lines 8-22. Unfortunately in June 2008, a pipe burst in the house, flooding everything and requiring her to put the interior back together, RP at pp. 19-20, lines 23-13, which she did over the next six-months. Id. at pp. 31-33, lines 21-1.

- By June 2009, Pendergrast testified that she had completed the interior work, and was about to start on the backyard work. RP at p. 36, lines 14-19. By that point, Pendergrast had invested approximately $130,000 into the remodel and development of the proposed bed and breakfast. RP at p. 31, lines 13-20.

- On January 29, 2009, Matichuk sent Pendergrast a letter stating:

> Please allow me to introduce myself as your neighbor to the South of your property at 951 Third Street.
>
> As you may or may not be aware, I had Compass Point Surveys locate the property corners at my property's on 951 and 955 Third Street. As the fence is approximately 6-8 feet West of the East property line, I will be

> relocating (in the near future) the fence East to the common property line.
>
> Please contact myself if you have any questions or concerns.

Ex 10.

- Pendergrast had at least two prior conversations with Matichuk. She called him at the time of purchasing her property in September 2006, advised him that she was buying the house and asked about purchasing the vacant lot. He did not advise that the fence was in the wrong place, or that there were any boundary line issues. RP at pp. 38-40, lines 18-5. He also did not mention any boundary line issues during passing conversations while she worked in her backyard. Id. at pp. 40-41, lines 6-3.

- Between the time she purchased her property in September 2006 and receipt of the January 29, 2009, letter, Pendergrast maintained the area within the fence line as her own, doing all yard work, mowing, hiring a gardener to maintain, sitting in the backyard, letting her grandchildren use, and storing supplies for her interior remodel. She never saw Matichuk or any other third party in or use the area. RP at pp. 41-42, lines 8-18.

- Pendergrast described her initial reaction to the January 29, 2009, letter as follows:

> Q. So Ms. Pendergrast, what was your initial reaction to the letter of January 2009, from Mr. Matichuk he was going to move the fence?
> A. My initial reaction when I opened the letter I felt like somebody had slugged me in the stomach.
> Q. And why was that?
> A. It was so out of left field, I had no idea where this was coming from.
> Q. How did it relate to your plan to build a bed and breakfast, this proposal to move the fence?
> A. I was in tears, I was, everything that I had planned on doing and the few weeks,...

RP at p. 46, lines 11-22.

- Attorney Philip Serka sent a letter to Matichuk which explained that she owned the property up to the fence line. Ex 9. She thought this letter would persuade Matichuk that he did not own the property, and that he would halt his plans to move the fence. RP at pp. 49-50, lines 25-19.

- Instead, Pendergrast found out that Matichuk was going to move the fence anyway, so she called him to beg him to reconsider:

> A. What happened next was when, I don't know how, I can not remember how I knew he was still, after this letter was still going to go forward with his plans, but I did. And so with that knowledge I called him at his home in Birch Bay and I literally was sobbing on the phone asking him "please, do not move my fence. Do not go forward with your plans. Please let" and...I used some words that would represent authority or legal to decide whose property it really was and I had all the confidence in the world that whoever decided that was going to know that and decide it was my property, which that has happened twice.

> So but I had no idea, so I was begging him to please do not do anything until we can legally get this figured out and I just thought it was going to be between attorneys or my attorney with Mr. Matichuk. And the phone conversation ended that he was going forward. He had the big digger and the guy that ran it scheduled for the next day and everything and so, or the guys to move the fence, that was going to happen, no matter what it was going on.

RP at pp. 50-51, lines 21-22.

- Pendergrast testified to the jury how this news and Matichuk's moving of the fence made her feel:

> Oh, I felt, I felt violated, trespassed upon. What do I do next because I had one of the best real estate attorneys in the area that had done some vital work for me before and so I knew he was competent and I was devastated. I didn't know what to do.
> Q. At that point when you had that conversations with Mr. Matichuk what had been happening with your plans to do the bed and breakfast?
> A. Oh, it was at a standstill and I was, I'll tell you something, I was petrified because I had, I've been single most of my adult life and I have always been capable of earning an income and after my auto accident, which thank God I'm even alive, I have had to be very creative on how to earn an income because I'm not, basically not employable.
> So when I'd already been a season behind because I was supposed to be opening up in 2008 now we're coming into 2009, I'm now a year behind in that and now with these things when I should start out there, be out there digging the swimming pool hole I'm at a dead stop. I'm at a dead stop because replacement, putting that fence into this new location stopped everything because now I

> didn't have the proper setback that I needed to continue with the uniqueness of the bed and breakfast.

RP at pp. 51-52, lines 24-23.

She further testified as to her situation and emotional reactions:

> I didn't have that kind of money to play with. I was supporting two disabled daughters and it was very, very expensive and I was not in my element of feeling confident that now that I'm held up in having to deal with my own issues and keeping diabetes under control, keeping my central nervous system under control to where I wasn't falling flat on my face, it became so much that I almost feel catatonic.

RP at p. 53, lines 13-20.

- When Matichuk moved the fence, he gained control over the large cherry tree in which Pendergrast was going to put her signature deck. He unceremoniously cut the tree down, as explained by Pendergrast:

> Q. At some point in time did Mr. Matichuk cut, did you discovered [sic] that he cut down the cherry tree?
> A. Yes.
> Q. Did Mr. Matichuk call you or provide any indication to you that he was going to do that?
> A. No.
> Q. So what was your response when you saw that he had done that?
> A. There was an overwhelming feeling of a point of no return.

RP at p. 54, lines 14-23.

- Pendergrast explained how the loss of the property and tree caused her financial stress:

> Q. So you say you had at that point your expenses you were having troubles were or some troubles financially. What was the reason for those financial struggles?
> A. I, with both my daughters being ill and having to move them up from Seattle I had helped purchase a home for each daughter and I was carrying their mortgages, both of their mortgages plus other living expenses for them and their children and it was getting really tight because, again, I was planning on opening up the bed and breakfast and having them work it and start earning money in 2008. So, you know, when you're carrying $3,500 in mortgages when you're a year behind, that's a lot of money.

RP at pp. 58-59, lines 14-2.

- Pendergrast explained that she had been diagnosed with vestibule concussion and that the "grim reality is when things get stressful it effects [sic] me whether I want it to or not, no matter how much I give myself a pep talk it hits me." RP at pp. 59-60, lines 24-1. She testified that she was not able to open the bed and breakfast after movement of the fence and cutting of the tree because she was beyond any ability to be creative, and there was no need for just another bed and breakfast in the area. She further explained that because of the stress of the situation:

> I would get stuck at the top of the stairs in the morning and not really be able to get down the stairs, so to have people coming and going and me not feeling well and

> them seeing me in that kind of a state, it wasn't going to happen.

Id. at p. 59, lines 14-18.

- As to the vestibule concussion, Pendergrast was asked particularly if the stress of the boundary line dispute and Respondents' actions caused additional problems, to which she said yes and explained to the jury:

> I didn't know what I was going to do at that particular point because once I had hired the real estate attorney to take care of this issue and I knew it wasn't going to go away, and there had been quite a few thousands of dollars out of my pocket at that point that I had not expected, I started to panic because not only did I have to support myself, I had to support my other family members, and I was always the one that everybody came to. And now with this, with this, with this halt on this project that I just knew was going to succeed, I'd owned businesses before so I was competent in bringing in some finances, with that option being put on hold and not knowing when it was going to be released I was sick, I was sick over it. And I still am because it's five years down the road.

RP at pp. 60-61, lines 23-13.

- As to the overall impact, Pendergrast further testified as follows:

> Q. So how's this whole experience, this whole conflict, how has it affected your health?
> A. Very negatively.
> Q. Explain that to the jurors?
> A. I'm a very optimistic person. Every spring is my birthday. I always look, not New Years, every spring I look forward to new things happening, creativeness, and

> all that kind of thing, it's been very, very hard to keep that optimism going because it's been so long. And I've always been a people person, I'm a caregiver so to not be able to have any closure to this has just been incredibly hard.
>
> And I thank God every day that I am awake when I get up because the positive things that happened in my life like the grandchildren and everything, I'm grateful for that. And this has been an incredible experience. I have even offered this property because I started having chest pains back in 2012 and Mr. Matichuk wanted to take me to court for attorneys [sic] fees and I was so ill I just, I told Mark I –
>
> * * *
>
> A. I fight every day to keep everything under control to keep the seizures from not happening. It's upsetting. It's upsetting, he's my neighbor, he built beautiful condominiums.

RP at pp. 70-71, lines 3-7.

- Pendergrast also explained:

> Q. How's the conflict with Mr. Matichuk impacted you financially in terms of the bed and breakfast?
> A. It doesn't exist.
> Q. How about your kids, were you able to sustain paying their mortgage?
> A. My oldest daughter she is doing okay, she is on disability and she is basically providing for herself. My youngest daughter I will always be providing for her. It's hard, it's hard for them to see me having, sacrificing so much for my livelihood. My five year old granddaughter at her birthday asked me what court was.

RP at pp. 71-72, lines 19-5.

B. The Trial Court Properly Granted Summary Judgment.

Respondents contend that the Trial Court erred in granting summary judgment quieting title to the land up to and including the old fence line to Pendergrast under the common grantor doctrine. This Court reviews the appeal of summary judgment de novo, meaning the review is the same as the Trial Court. Lybbert v. Grant County, State of Washington, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the non-moving party. Id. If there is no genuine issue of material fact, summary judgment be granted. Id. Respondents have only appealed the granting of Pendergrast's Cross-Motion for Summary Judgment on this issue. Thus, even if Respondents prevail, which they should not, their only relief would be a remand for trial on the issue.

A common grantor who owns land on both sides of a line "he has established as the common boundary is bound by that line." Winans v. Ross, supra, 35 Wn.App. at 240. Subsequent grantees will be bound to this new line "if the land was sold and purchased with reference to the line, and there was a meeting of the minds as to the identical tract of land to be transferred by the sale." Id. The common grantor doctrine is premised on two questions:

> (1) was there an agreed boundary established between the common grantor and the original grantee, and (2) if so, would a visual examination of the property indicate to subsequent purchasers that the deed line was no longer functioning as the true boundary?

Id. at 241.

1. Respondents Waived Any Argument That the Burden of Proof for the Common Grantor Doctrine Is Clear and Convincing, Nor Is This the Proper Burden of Proof.

Respondents maintain that Pendergrast must prove application of the common grantor doctrine based upon clear and convincing evidence. Respondents/Cross-Appellants' Opening Brief ("Respondents' Brief"), p. 10. However, Respondents did not raise this argument below, and therefore waived their right to raise this argument on appeal. RAP 2.5(a); Washington Federal Sav. v. Klein, 177 Wn.App. 22, 29, 311 P.3d 53 (2013) ("As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal."); Haueter v. Cowles Pub. Co., 61 Wn.App. 572, 590, 811 P.2d 231 (1991) ("An issue not raised in a summary judgment proceeding should not be considered on review.") Since the burden of proof does not implicate Respondents' constitutional rights, the allegedly incorrect burden of proof cannot be reviewed. Haueter v. Cowles Pub. Co., supra, 61 Wn.App. at 578, n. 4.

Even if considered, the claim is subject to a preponderance of the evidence burden of proof. Respondents do not cite a single case that supports their claim for a higher burden of proof. Instead, they rely upon the imposition of a clear and convincing burden of proof on other real property doctrines, such as equitable estoppel. However, a clear, cogent, and convincing burden of proof is utilized in such case because courts disfavor equitable estoppel. Nickell v. Southview Homeowners Ass'n, 167 Wn.App. 42, 54, 271 P.3d 973 (2012). Courts have never expressed disfavor for the common grantor doctrine. They also cite boundary by acquiescence cases as support. Heriot v. Smith, 35 Wn.App. 496, 504, 668 P.2d 589 (1983). However, in such case proof of recognition of the boundary line must be shown to have occurred for a ten-year period, which justifies a higher burden of proof.

Respondents also point to the court's reference to a "substantial evidence" standard in Winans. However, Winans involved review of the findings and conclusions of a bench trial, and therefore the question was whether there was substantial evidence to support the trial court's findings of fact. Pardee v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).

The only relevant authority is Martin v. Hobbs, 44 Wn.2d 787, 790-91, 270 P.2d 1067 (1954), where the court stated in reviewing a trial court's refusal to apply the common grantor doctrine:

> the fair preponderance of the evidence makes it more reasonable to conclude that Philp purchased the north one hundred five feet of Tract 11, with reference to, and reliance upon, the paper title or the true legal boundary line as described in the deed.

Id. (emphasis added). In affirming the conclusion, the Supreme Court specifically stated that "[w]e agree with the trial court that the appellants failed to meet the burden of proof necessary to establish the laurel hedge, fence, and return wall from the bulkhead as the actual boundary…." Id. at 791. Thus the proper burden of proof is preponderance of the evidence.

2. Summary Judgment Was Appropriate, Regardless of the Burden of Proof Applied.

Ultimately, the burden of proof is irrelevant because Pendergrast was entitled to summary judgment under a clear, cogent, and convincing burden of proof. Clear, cogent, and convincing evidence means "the ultimate fact in issue must be shown by evidence to be 'highly probable.'" In re Welfare of Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

Again, the critical inquiry on the common grantor doctrine's first element is whether Conine and Matichuk agreed that the fence line was

the common boundary when Conine conveyed the vacant property to Matichuk. In this, "[a] formal, or specific, or separate contract as to the boundary line between the parties is not necessary." Winans v. Ross, supra, 35 Wn.App. at 241. Instead, the relevant facts to establish such an agreement are the "parties' manifestations of ownership after the sale." Id. The facts here are undisputed and only establish Matichuk's and Conine's recognition of the fence as the common boundary.

It is undisputed that Matichuk never once used or even went onto Pendergrast's side of the fence for over three years after he purchased. Meanwhile, Conine and Pendergrast exclusively used and controlled the area up to the fence as their own. The exclusivity of such use, and Matichuk's recognition of the fence as the property line, is established by Pendergrast's uncontroverted testimony:

> After I purchased the property, I consistently and routinely used the area on the east side of the fence. This included mowing the lawn, tending to the vegetation in the area, and allowing my ten-year old grandson to use the tree house that he very much enjoyed. I often saw Mr. Matichuk walking around his rented house to the south and the vacant property to the west side of the fence line. He never once came on to my side of the fence line or ever said anything about the fence being in the wrong location. ... I always treated the property on my side of the fence as belonging to me because I understood the fence to be the property line between my property and Defendants' properties. This use and understanding

> continued from the day I purchased on September 18, 2006, until I received a letter from Mr. Matichuk around January 29, 2009.

CP 26-27. Additional evidence supporting the fence line as the agreed boundary was Conine's listing of the remaining Pendergrast property. As Pendergrast testified, again without any dispute:

> At the time that I was looking to purchase the property, I was provided with a copy of the listing information. Attached to my declaration and incorporated by reference as Exhibit E is a true and correct copy of this listing information, which includes a representation that the property is "Fenced-Partially." I understood that this identification referred to the entire fenced area as shown in the photographs.

CP 26 and 32.

Respondents' arguments against application of the doctrine are contrary to existing authority. They first argue that an agreement is lacking because "neither Matichuk nor Pendergrast had ever met the Conines before the purchases of their respective parcels." Respondents' Brief at pp. 10-11. This contention was explicitly rejected in Winans:

> The Rosses contend there was no proof the Corletts and Youngs agreed the fence would be the boundary, because the record shows they did not talk about the boundaries at the time of sale. We disagree. A formal, or specific, or separate contract as to the boundary line between the parties is not necessary....An agreement or meeting of the minds between the common grantor and original grantee may be shown by the parties' manifestations of ownership

> after the sale....There is substantial evidence in the record that the Corletts and Youngs agreed the fence was the boundary between the two lots.

Winans v. Ross, supra, 35 Wn.App. at 241.

Respondents next argue that there "is absolutely no reference to the fence line in the deed conveying Pendergrast's parcel to her...and there is absolutely no reference to the fence line in the deed conveying the Matichuks' property to them...." Respondents' Brief, p. 10. Accordingly, Matichuk complains that he did not know of a new boundary. These propositions ignore Winans' ruling that "[a] formal, or specific, or separate contract as to the boundary line between the parties is not necessary...." Winans v. Ross, supra, 35 Wn.App. at 241; see also Thompson v. Bain, 28 Wn.2d 590, 592, 183 P.2d 785 (1947). It also ignores Winans' explicit rejection of this argument:

> The Rosses contend the trial court erred in finding the east and west lots were purchased with reference to the fence as the boundary. They claim the record shows both lots were purchased by legal description only; therefore, neither the Rosses nor the Winans agreed the fence was the boundary. We disagree.
>
> It is not necessary that every grantee, from the time the boundary is determined, should himself agree that that was the boundary line....Once an agreed boundary is established between the common grantor and the original grantee, it is binding on subsequent purchasers if a visual

> examination of the property indicates the deed line is no longer functioning as the true boundary.

Winans v. Ross, supra, 35 Wn.App. at 241-42. By its very nature, the doctrine applies in contradiction to the legal description in conveying documents. As explained by William B. Stoebuck and John W. Weaver at 18 WA PRAC. § 14.12 (2014):

> There are several ways in which interests in land may come into existence without having to be recorded. In other words, there are several kinds of 'transactions' (for lack of a better word) that are not subject to the recording act. Therefore interests created through those 'transactions' are protected against persons who subsequently acquire interests in the land, though there is nothing of record to memorialize the 'transaction.'
>
> * * *
>
> As to title to strips of land that are acquired through one of the boundary adjustment doctrines, common grantor …, it seems that recording is not required or possible. As with adverse possession, title to the strip is not documentary title. …. Essentially what the boundary adjustment doctrines do is excuse the operation of the statute of frauds, so that oral and implied transfers are enforceable. However, since by definition this is a non-documentary transfer, there is no instrument to record, nothing upon which we can expect the recording act to operate.

As to knowledge, the only thing that Matichuk needed to know was the presence of the fence line which he concedes he was aware of.

Respondents then maintain that Matichuk's January 29, 2009, letter (which followed over three years of recognition of the fence line as the common boundary) and a demand letter from Philip Serka on Pendergrast's behalf to Conine asking for damages associated with Matichuk's position dispute an agreement that the fence line is the common boundary. Respondents' Brief, p. 11. The two letters are irrelevant under Winans because "[o]nce an agreed boundary is established between the common grantor and the original grantee, it is binding on subsequent purchasers if a visual examination of the property indicates the deed line is no longer functioning as the true boundary." Winans v. Ross, supra, 35 Wn.App. at 241. The two letters are equally irrelevant from an evidentiary perspective. Every case involving the common grantor doctrine necessarily evolves from a claim of ownership contrary to the agreed-upon boundary, and so Matichuk's demand, sent three years after his purchase, is no more relevant than the fact that the plaintiff in Winans commenced a lawsuit to dispute application of the agreed-upon boundary line. The letter from Mr. Serka is irrelevant to the question of agreement between Matichuk and Conine, and specifically claims Pendergrast's ownership of the property. CP 39. The two letters came three years after undisputed use of the two properties in reference to

the fence line and seven months after discovering the discrepancy, and provide no proof to dispute an agreement. CP 53.

Matichuk then suggests that the time period for reviewing the parties' "manifestations of ownership after the sale" is limited to the time that Conine owned the Pendergrast property, which is only five months. Respondents' Brief, p. 12. First, "no lapse of time is necessary" to apply the common grantor doctrine. Thompson v. Bain, supra, 28 Wn.2d at 592. In any case, during the five-month period, Matichuk and Conine used the fence as the common boundary line. Use after Conine sold to Pendergrast is relevant because it represents Matichuk's manifestations.

Respondents then contend, without explanation or legal authority, that "*at best* Matichuks' failure to immediately remove the fence at purchase, with nothing more, creates only an *inference* of an agreement between Matichuk and Conine, and is not actual proof of one." Respondents' Brief, p. 12 (emphasis in original). They go on to state that the Trial Court erred in granting a summary judgment merely on an inference, and that it could only raise an issue of fact. Id. Respondents never made this argument below, and so it has been waived. RAP 2.5(a). Moreover, the evidence to prove an agreement or meeting of the minds is "the parties' manifestations of ownership after the sale." Winans v. Ross,

supra, 35 Wn.App. at 241. Respondents' recognition of the fence line as the common boundary is a fact, not an inference, indeed, the precise fact used to establish the doctrine's application.

Respondents next argue that Matichuk took the property based upon the deed line, and even "paced off those dimensions before purchase." Id. at pp. 12-13. The subjective intent for a party to purchase based upon the record deed line is irrelevant. Winans v. Ross, supra, 35 Wn.App. at 242 ("They claim the record shows both lots were purchased by legal description only; therefore, neither the Rosses nor the Winans agreed the fence was the boundary. We disagree."). Moreover, Matichuk's pacing off of the boundary line is actually an additional manifestation of an agreement between him and Conine. Matichuk paced the property prior to purchase and concluded:

> I came to the conclusion-I came to the conclusion the fence was not on the property line. Actually, let me rephrase that, I came to the conclusion I didn't know where the fence was in relation to the property line.

CP 52. Moreover, he conceded that at the time of this inspection, the fence appeared connected to the Pendergrast property. CP 53. Matichuk did not do any further investigation of the location of the property line, CP 52, and then used his property to the fence line for over three years.

Finally, Respondents maintain that application of the doctrine requires more than just the undisputed existence of the fence line followed by a consistent occupation of the properties subject to the fence line for over three years. Respondents' Brief, p. 13. They do not explain what this "something more" is. It is undisputed that the parties recognized, occupied, referenced, and respected the fence line as the property line for over three years. This is the only evidence necessary to establish an agreement under the common grantor doctrine.

Winans exemplifies the appropriateness of the level of proof in this case. There, the court identified the parties' subsequent use of a fence line as sufficient to prove an agreement:

> In 1956, Ira Chapman surveyed the west lot and built the fence on what the survey revealed to be the east boundary line. The Corletts rebuilt the fence and did not change its location because they believed the fence marked the boundary. Both parties treated the fence as the boundary after the Youngs bought the lot. The Corletts continued to use the driveway and pond on the east side of the fence as their own property. The driveway and part of the pond are within the disputed strip. A tenant of the Youngs obtained the Corletts permission to use the pond to irrigate the west lot. When the Youngs sold the lot to the Rosses, the driveway and pond were not mentioned as part of the property on the listing agreement. The realtor who handled the sale testified that the driveway and pond would normally be mentioned in the listing agreement if they were part of the property being sold.

Winans v. Ross, supra, 35 Wn.App. at 241 (emphasis added). Equally compelling is Strom v. Arcorace, 27 Wn.2d 478, 481-82, 178 P.2d 959 (1947), where the doctrine was applied based upon the following:

> In the case at bar, a common grantor established a line fence between two lots. He built an entrance way to the basement and porch up to within a few inches of this fence. In the event the line as fixed by the plat were to be held the correct line, then the line would cut off a part of the entrance way and porch, making it impossible to use the entrance way as a means of entrance to and exit from the basement. Both lots were enclosed by a fence. Appellants purchased their property seeing and knowing the conditions as they existed, and although they raised a question with their grantor as to the location of the dividing line, they were assured by their grantor that the fence was the correct line. They did nothing to protest in fact, they rebuilt a part of the fence in the same location as the former fence. They stood idly by while respondent purchased the adjoining lot. They are bound by the established boundary fence.

Respondents do not dispute that the second element is met, which requires a demarcation sufficient to provide indication upon visual examination that the deed line is no longer serving as the boundary line. The fence line stretched across the entire common boundary line between the properties and was described by Pendergrast as follows:

> The fence was approximately six feet high, was fully filled in, and had the panels facing towards my house, and the cross beams facing towards the vacant lot to the west, which is owned by Robert Matichuk. All of the

> fence lines matched in terms of material, age, weathering, and size.

CP 25. Matichuk agreed that the fence appeared to be connected to the Pendergrast property. Thus, the fence sufficiently established the location of the agreed-upon boundary line.

3. The Only Relief That Could Be Granted by This Court Is Remand for Trial on the Common Grantor Doctrine.

Respondents request that the Trial Court's order granting summary judgment be reversed, and that this Court instead determine that they are entitled to judgment as a matter of law. In addition, they contend that upon such relief, they should be awarded attorneys' fees under RCW 4.28.328(3) because there was not a substantial justification for Pendergrast to file a lis pendens. Respondents' Brief, p. 14. The Trial Court's granting of summary judgment was appropriate, since there is not a single fact to dispute application of the common grantor doctrine. Even if summary judgment was not appropriate, Respondents did not appeal the denial of Matichuk's Motion for Summary Judgment on the issue, and so there is no basis for this Court to substantively rule as requested. At best, Respondents would be entitled to a remand for trial on the issue.[4]

[4] Although Pendergrast maintains that there is no evidence to support such relief, if granted, this Court should retain the substance of the jury verdict on Pendergrast's

Finally, even under this most unlikely result, Respondents' suggestion that there is not substantial support for Pendergrast's filing a lis pendens disregards the facts. RCW 4.28.328(3) grants discretion to the court to award attorneys' fees where a lis pendens is filed "[u]nless the claimant establishes a substantial justification for filing the lis pendens…." Two Trial Court judges have already quieted the property in Pendergrast. The facts establish Pendergrast's entitlement to the property, and certainly provides a substantial basis to support a lis pendens.

C. There Is Nothing to Establish That the Trial Court Abused Its Discretion in Denying the Motion for New Trial or to Reduce the Award of Non-Economic Damages.

1. The Proper Standard of Review Requires Proof That the Trial Court Abused Its Discretion When It Applied the Very Narrow Standards for Intervening in a Jury Verdict.

In seeking to reverse the Trial Court's denial of their motion for new trial or to reduce the jury verdict for non-economic damages, Respondents fail to acknowledge the scope of the standard of review applied by this Court.[5] Denial of a motion to reduce a jury award is reviewed "for abuse of discretion using the substantial evidence, shocks

---

various claims, and it should be reinstated if she prevails at trial on the common grantor issue.

[5] It should be noted that Respondents do not challenge any of the jury's conclusions or findings on any elements of the trespass and timber trespass claims.

the conscience, and passion and prejudice standard articulated in precedent." Bunch v. King County Dept. of Youth Services, supra, 155 Wn.2d at 176. Such deference is based upon the fact that the judge saw the witnesses and heard the evidence first hand. Thus, the Trial Court's denial of the motion actually strengthens the jury verdict:

> The appellate court does not engage in exactly the same review as the trial court because deference and weight are also given to the trial court's discretion in denying a new trial on a claim of excessive damages. The verdict is strengthened by denial of a new trial by the trial court. While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages, 'appellate review is most narrow and restrained' and the appellate court 'rarely exercises this power.'

Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 330, 858 P.2d 1054 (1993).

CR 59(a)(5) and (9) allow a court to vacate a judgment where one of the following materially affected the substantial rights of a moving party: (1) the damages are "so excessive…as unmistakably to indicate that the verdict must have been the result of passion or prejudice"; or (2) "substantial justice has not been done." RCW 4.76.030 provides authority to require a new trial or reduce a jury award only when the court finds "the damages awarded by a jury to be so excessive or inadequate as

unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict,...."

Respondents acknowledge that they must prove abuse of discretion, but contend that this simply means that they must prove that "the verdict evoked a feeling of prejudice by the jury such that the Matichuks were deprived of a fair trial." Respondents' Brief, p. 15. On the contrary, "abuse of discretion" occurs when a trial court "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). A decision is based "on untenable grounds" or made "for untenable reasons" if it "rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rundquist, 79 Wash.App. 786, 793, 905 P.2d 922 (1995).

Respondents also understate the Trial Court's standard. A "jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact." Bunch v. King County Dept. of Youth Services, supra, 155 Wn.2d at 179. Thus, in evaluating Respondents' request, this Court must determine whether the Trial Court abused its

discretion and in this, recognize that the Trial Court was to "presume the jury's verdict is correct," id., and presume all of the evidence in the light most favorable to Pendergrast. Gestson v. Scott, 116 Wn.App. 616, 622, 67 P.3d 496 (2003). It also means that the Trial Court could not substitute its conclusion over that of the jury, and needed to proceed hesitantly to interfere with the jury's verdict. Hill v. Cox, 110 Wn.App. 394, 411, 41 P.3d 495 (2002).

Here, the reviewed verdict relates to non-economic damages, which Respondents suggest provided more latitude to the Trial Court to intervene. Respondents' Brief, p. 16 ("However, courts should 'scrupulously analyze' an award of compensatory damages for emotional distress predicated exclusively on the plaintiff's own testimony."). This is incorrect. Instead, "[t]he jury's role in determining noneconomic damages is perhaps even more essential." Bunch v. King County Dept. of Youth Services, supra, 155 Wn.2d at 179-80; see also Worthington v. Caldwell, 65 Wn.2d 269, 273, 396 P.2d 797 (1964). A jury's damages determination is warranted to the greatest deference:

> The determination of the amount of damages, particularly in actions of this nature, is primarily and peculiarly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made.

Bingaman v. Grays Harbor Community Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985); see also Johnson v. Marshall Field & Co., supra, 78 Wn.2d at 617.

Respondents also incorrectly maintain that there is authority for this Court to "scrupulously analyze" an award for emotional distress where based only upon a plaintiff's testimony and also incorrectly suggest that Pendergrast's failure to seek medical care undermines the non-economic award. Both arguments conflict with Bunch:

> The county argues that Bunch never consulted a healthcare professional, and no one close to him testified about his anxiety. That is true, but such evidence is not strictly required; our cases require evidence of anguish and distress, and this can be provided by the plaintiff's own testimony....Corroborative evidence is certainly helpful, but it is for the jury to weigh the credibility of the witness and determine if he in fact suffered mental anguish. Bunch presented sufficient evidence to convince an 'unprejudiced, thinking mind' of his anguish, and that is enough to support an award for emotional distress.

Bunch v. King County Dept. of Youth Services, supra, 155 Wn.2d at 181.

The proper rule is that a court should only intrude into the jury's constitutional right to determine damages under a limited situation:

> The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly

> show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.

Id. at 179. This narrow exception is further limited in that passion and prejudice can only be relied upon where its existence is "of such manifest clarity as to make it unmistakable." Delahunty v. Cahoon, 66 Wn.App. 829, 842, 832 P.2d 1378 (1992).

2. Respondents Do Not Cite Any Cause of Prejudice or That Such Existed.

Respondents have never referenced any action, testimony, or event during trial that might have triggered prejudice or passion towards them. Bingaman v. Grays Harbor Community Hosp., supra, 103 Wn.2d at 836 ("nothing so untoward occurred at the trial to arouse the passion and prejudice of the jury.") Thus, they have not identified a cause of any passion or prejudice, an essential element to justify a new trial, or reduction in a jury award. They instead reference otherwise benign indications that such existed. Johnson v. Marshall Field & Co., supra, 78 Wn.2d at 612 (trial court erred in granting new trial where nothing disclosed "anything that occurred during the course of the trial that might reasonably be said to have unfairly resulted in passion or prejudice

detrimental to the defendant's cause, nor has counsel for defendants directed our attention to any such prejudicial matter."). Thus, they have failed immediately to meet the heavy burden.[6]

Respondents point to the following as proving passion and prejudice: (1) the jury only awarded damages against them, and not the other Defendants, even though these individuals occupied a similar position to Blaine Properties; (2) the jury asked if they were supposed to award attorneys' fees; (3) the jury awarded more than asked by Pendergrast; and (4) the size of the awards. Respondents' Brief, p. 19. Each actually prove a lack of any passion or prejudice.

On the first issue, the jury could not have awarded damages against any other Defendant on the timber trespass claim, as they were specifically instructed that this claim was limited to Matichuk. CP 204. The jury thus followed the instructions, indicating a lack of prejudice or passion. As to the trespass claim, there was a host of evidence distinguishing Blaine Properties from the other condominium owners in relationship to this claim. Blaine Properties is solely owned by Matichuk who caused the

[6] In fact, Pendergrast filed an opposition to Respondents' Statement of Arrangements (see Designation of Additional Parts of Verbatim Report of Proceedings filed July 14, 2014) because the lack of presentation of the testimony of Matichuk made it impossible to prove any prejudice against him. Respondents failed to have his testimony transcribed, therefore assuring they could not establish prejudice.

trespassing actions through his entity. Blaine Properties became the owner of the property on December 1, 2010, Ex 12, and thereafter built the condominiums which perpetuated the trespass onto Pendergrast's property. Ex 15 and Ex 31. It was the party that sold the condominiums to the individual Defendants, and recipient of the sale proceeds. Ex 13 and Ex 14. The jury's decision not to find the other Defendants liable shows that they recognized the relevant distinctions and acted logically.

The jury's request for clarification on attorneys' fees does not prove prejudice, but instead proves they were dutiful in complying with the jury instructions, and acted not out of passion or prejudice, but instead in recognition of their obligations to follow the instructions.

As to Pendergrast's proposed awards, Respondents are only half correct. The jury awarded $40,000 in non-economic damages against Matichuk on the timber trespass claim, when Pendergrast asked for $50,000. This award shows that the jury acted out of thoughtfulness and logic, not passion or prejudice. The fact that the jury awarded more than requested on one claim is no more evidence of prejudice than it would be for Pendergrast to argue that the jury acted out of passion or prejudice by awarding less than she requested on the timber trespass claim.

As to the size of the award, this cannot be the basis for a finding of prejudice or passion, or support reduction of an award or a new trial. Thompson v. Berta Enterprises, Inc., 72 Wn.App. 531, 543, 864 P.2d 983 (1994) ("A jury verdict cannot be overturned merely because of its size."); Behnke v. Ahrens, 172 Wn.App. 281, 299, 294 P.3d 729 (2012) ("Where an award is not contrary to the evidence, this court will not find it to be the result of passion or prejudice based solely on the award amount."); Bingaman v. Grays Harbor Community Hosp., supra, 103 Wn.2d at 838.

3. Respondents Fail to Establish That the Trial Court Abused Its Discretion in Concluding That There Was Evidence to Support the Jury's Verdict.

Since there is no evidence of prejudice or passion, the issue is whether the size of the award "shocks the conscience of the court" or stated another way "were the damages flagrantly outrageous and extravagant?" Bingaman v. Grays Harbor Community Hospital, supra, 103 Wn.2d at 836-37. Non-economic damages are not susceptible to mathematical certainty, and therefore the jury's determination is given even greater latitude. Hill v. Cox, supra, 110 Wn.App. at 410; Johnson v. Marshall Field & Co., supra, 78 Wn.2d at 617 ("Certainly the subject matter of the damages, i.e., plaintiff's fear of death because of the defendant's failure to provide her with necessary care and attention, is an

element uncertain in character and not susceptible of being fixed with mathematical certainty.") Given the constitutional implications, the Trial Court could "not substitute its judgment for that of the jury on the amount of damages, unless no substantial evidence supports it." Green v. McAllister, 103 Wn.App. 452, 462, 14 P.3d 795 (2000).

The Trial Court's role was therefore limited to determining whether the awarded damages were within the "range" of the evidence provided. James v. Robeck, supra, 79 Wn.2d at 870-71. This evaluation begins with recognition of the uncontested controlling jury instruction:

> If you find that one or more of the Defendants committed trespass or timber trespass, you should also consider the following non-economic damages:
>
> - Mental anguish, emotional distress, and inconvenience experienced by the Plaintiff as a result of the trespass or timber trespass.
>
> The burden of proving damages rests with the party claiming them. It is for you to determine, based on the evidence, whether any particular element has been proven by a preponderance of the evidence.
>
> Your award must be based upon evidence and not upon speculation, guess, or conjecture.
>
> The law has not furnished us with any fixed standards by which to measure non-economic damages. Your decisions on these issues must be governed by your own judgment, by the evidence in the case, and by these instructions.

CP 199-200. Respondents argue that there were contravening facts that the jury could have relied upon to award less in non-economic damages. For instance, Pendergrast was "undergoing stress from other [sic] a variety of other sources." Respondents' Brief, p. 17 (emphasis added). They also contend that there "many other factors which frustrated that dream [of opening a bed and breakfast]" other than the trespass committed by Respondents and the timber trespass committed by Matichuk. Id. (emphasis added). They also maintain that it was "unlikely that Pendergrast could ever have operated such a business" because she had a concussion disorder. Id. at 18 (emphasis added).

On their face, these points recognize that there was contrary evidence, which could support the jury's award of non-economic damages and the Trial Court's denial of the motion. Respondents argued each of these facts to the jury in closing, and it had the right and authority to reject or accept these contrary arguments and facts to define the scope of non-economic damages. Indeed, it is conceivable that the jury took all or some of these considerations into account to determine the amount awarded.

Respondents simply ignore the abundance of evidence which fully supported the awards, and the Trial Court's decision to refrain from taking

the extraordinary course of intervening in the jury's role. The full scope of this evidence is set out here, infra pp. 10 to 18, which is incorporated by reference. In summary, Pendergrast testified that that she planned to build a unique bed and breakfast to earn money to support her disabled adult children. Pendergrast completed the interior work, and was about to turn to the exterior work, when Respondents moved the fence line, physically prohibiting the exterior work and cut down the unique tree.

This brought her project to a standstill, and made her feel "like somebody had slugged me in the stomach" and brought her to tears. She further explained how she begged Matichuk to refrain from moving the fence, but he moved it anyway. This in turn made her feel "violated, trespassed upon," "devastated," and "petrified." As she testified, without any controversion: "I'm at a dead stop because replacement, putting that fence into this new location stopped everything because now I didn't have the proper setback that I needed to continue with the uniqueness of the bed and breakfast." Physically, she described that the stress from Respondents' actions made her "catatonic."

As to the tree cutting, this caused her to feel that she had reached a point of no return. The events led to her inability to financially care for her disabled children. As to her preexisting condition, the stress of the

conflict triggered the condition, which on some occasions, manifested itself by her getting "stuck at the top of the stairs in the morning and not really be able to get down the stairs, so to have people coming and going and me not feeling well and them seeing me in that kind of a state, it wasn't going to happen." RP 59. She also started having chest pains.

The jury and Trial Court had the opportunity to personally see the emotional impact of Respondents' actions, when Pendergrast broke down and openly cried on the stand. Pendergrast's testimony and emotions were powerful and credible evidence showing the enormous and overwhelming anxiety, stress, and emotional impact on her even after almost five years since the initial trespass occurred. Bingaman v. Grays Harbor Community Hospital, supra, 103 Wn.2d at 835 (trial court should rely upon its first hand ability to evaluate a plaintiff's "candor, sincerity, demeanor, intelligence and any surrounding incidents" when reviewing request for new trial or reduction in an award).

Finally, Pendergrast testified that she spent at least $130,000 to remodel the house for the proposed bed and breakfast. Respondents did not object to this testimony, nor did they dispute that this monetary figure was and is relevant, and could have been relied upon by the jury to calculate non-economic damages.

Respondents cite Hill v. GTE Directories Sales Corp., 71 Wn.App. 132, 856 P.2d 746 (1993) as being "similar" because the reduced non-economic damages there were more than ten times the awarded special damages. Respondents contend the reduction in Hill to $125,000 occurred "because there was insufficient credible evidence" to support the severe award of $410,000.00. Respondents' Brief, pp. 18-19. Hill actually supports the jury's award in this case.

First, Respondents fail to disclose that the court was reviewing a trial court's reduction of a jury verdict, thereby implicating a completely different standard of review. They also fail to recognize that the court's affirmation of the trial court's reduction was not limited to the size of the award, but also to the jury's failure to properly determine the economic damages: "In light of the meager evidence and the jury's award of excessive economic damages (as discussed earlier), we agree the $410,000 award clearly indicates passion or prejudice, or an attempt to award punitive damages." Id. at 140 (emphasis added). This factor was noted by the Washington Supreme Court in Bunch v. King County Dept. of Youth Services, supra, 155 Wn.2d at 181 as a specific distinction. The awarded economic damages to Pendergrast were precisely the same as the uncontested values provided by experts, which have not been challenged.

Moreover, nothing in Hill suggests that the proper or necessary evaluation of non-economic damages includes a mathematical comparison with the amount awarded for economic damages. Respondents' comparison between the damages is irrelevant and would violate the rule that a "jury verdict cannot be overturned merely because of its size." Thompson v. Berta Enterprises, Inc., supra, 72 Wn.App. at 543. Indeed, comparing the two categories of damages runs contrary to the fact that emotional distress damages may be recovered in the absence of any special damages. Fernandes v. Mockridge, 75 Wn.App. 207, 213, 877 P.2d 719 (1994), rev. denied, 126 Wn.2d 1005 (1995). For instance, the court in Thompson v. Berta Enterprises, Inc., supra, 72 Wn.App. at 541-42 reversed a trial court's reduction of a jury award of $278,000 in emotional distress damages recovered under RCW 49.60.030(2). This award was 278,000 times the non-economic damages awarded. Similarly, the court in Johnson v. Marshall Field & Co., supra, 78 Wn.2d at 617-18 reversed a reduction of a $20,000 general damages award where the jury found $0 in special damages. The focus is upon the amount of the award in comparison with the evidence, not some arbitrary comparison of the proportionality between economic and non-economic damages.

III. REPLY TO RESPONDENTS' RESPONSE TO PENDERGRAST'S APPEAL

Pendergrast's limited issue on appeal challenges the legal determination by the Trial Court to refuse to treble the $40,000 non-economic damages awarded by the jury against Matichuk for timber trespass under RCW 64.12.030, which requires that "any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed." In response, Matichuk first misstates that the Trial Court refused to treble because it correctly found that the "non-economic injuries did not reasonably relate to the economic harm suffered." Respondents' Brief, p. 19. The Trial Court did not state such a qualitative reasoning for its decision, but instead concluded that the "Court declines to triple the non-economic damages because such a trebling is not specifically provided in RCW 64.12.030, which, as a penal or punitive statute, should be interpreted and applied literally and narrowly." CP 237.

In the face of the unequivocal language in the statute to treble the "damages claimed or assessed," the overwhelming support of standard rules of statutory interpretation, and the clear reasoning in Birchler v. Castello Land Co., Inc., supra, 133 Wn.2d at 111, 942 P.2d 968 (1997), the totality of Matichuk's opposition is two arguments. First, he contends

that the Birchler decision suggests that non-economic damages should not be trebled because it noted that historical cases only allowed trebling of "injury to the vegetation." Respondents' Brief, p. 20.

The Supreme Court did note that earlier cases limited the award of damages under the statute to "injury to the vegetation," but then specifically overruled these decisions, and found that damages under RCW 64.12.030 "are not confined exclusively to injury to or destruction of vegetation,..." Birchler v. Castello Land Co., Inc., supra, 133 Wn.2d at 115 (emphasis added). It then concluded that recoverable "damages" under the statute included non-economic damages for emotional distress: "We believe the correct rule is that emotional distress damages are recoverable under RCW 64.12.030 for an intentional interference with property interests such as trees and vegetation." Id. at 116. The Birchler ruling absolutely compels application of the trebling component to non-economic damages. See Pendergrast's Opening Brief, pp. 13-17.

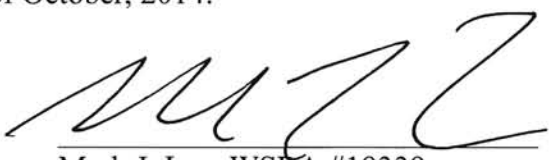
Finally, Matichuk argues that trebling non-economic damages "would interpret the statute expansively rather than narrowly, and extend damages in timber cases beyond what has been awarded for over a hundred years." Respondents' Brief, p. 20. As pointed out in her opening brief, but ignored by Matichuk, even if the statute deserves to be

interpreted as "penal," such statutes are construed "according to the plain meaning of their words to assure that citizens have adequate notice of the terms of law…." State v. Enloe, 47 Wn.App. 165, 171, 734 P.2d 520 (1987) (emphasis in original). In this, "we do not read into a statute matters which are not there, nor do we modify a statute by construction or read into the statute things which we may conceive that the Legislature unintentionally left out." State v. Hursh, 77 Wn.App. 242, 246, 890 P.2d 1066 (1995) (citations omitted). Thus, the Trial Court erred in adding the qualifier "economic" to damages, even under such a characterization.

IV. CONCLUSION

Based upon the above, Pendergrast requests that the judgment be affirmed in all respects, except that the non-economic damages of $40,000 against Matichuk for timber trespass be trebled under RCW 64.12.030.

DATED this 1st day of October, 2014.



Mark J. Lee, WSBA #19339
of Brownlie Evans Wolf & Lee, LLP
Attorneys for Appellant/Cross-Respondent
230 E. Champion Street
Bellingham, WA 98225
Ph. (360) 676-0306
E-mail: mark@brownlieevans.com