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No. 92324-8

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 71726-0-I

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LESLIE PENDERGRAST, an individual,  
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, Petitioners.

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LESLIE PENDERGRAST'S SUPPLEMENTAL BRIEF

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A. IDENTITY OF RESPONDENT

Leslie Pendergrast (“Pendergrast”) responds to Robert Matichuk and Jane Doe Matichuk’s, and Blaine Properties, LLC’s (collectively “Matichuk”) Petition for Review (“Petition”).

B. COURT OF APPEALS’ DECISION

The Petition seeks review of the August 31, 2015, Published Opinion of the Court of Appeals, Division I, attached as Appendix A to the Petition (“Opinion”).

C. ISSUES PRESENTED FOR REVIEW

Pendergrast does not raise a cross-petition for review.

D. STATEMENT OF THE CASE

Pendergrast relies upon her Statement of the Case as set out in her original filings in the Court of Appeals, and the Response of Leslie Pendergrast to Matichuk, et al.’s Petition for Review (“Response”).

E. ARGUMENT

Although review has been accepted, it remains unclear what basis Matichuk seek reversal of the Court of Appeals’ decision under RAP 13.4(b), since none of these standards have ever been referenced by Matichuk. Nor have Matichuk established any basis for reversal of the Court of Appeals’ decision.

1. The Court of Appeals' Affirmation of the Trial Court's Granting Pendergrast Title of the Disputed Property by Way of Summary Judgment Under the Common Grantor Doctrine Does Not Conflict With Existing Law.

In addition to the arguments in her original filings with the Court of Appeals and Response, Pendergrast makes the following points:

- Matichuk's contention that the Court of Appeals failed to use the proper standard by referencing that the common grantor doctrine focuses upon whether there "(1) was there an agreed boundary established between the common grantor and original grantee,..." is facially wrong, given this Court's ruling in Thompson v. Bain, 28 Wn.2d 590, 592, 183 P.2d 785 (1947):

The respondents contend that there is no proof that any agreement was entered into between the common grantor and the appellants establishing the fence as the line of lot 6, and that the fact that the appellants occupied up to the fence does not prove, nor is there any other proof of, an agreement between the common grantor and the appellants so establishing the boundary line.

The rule as heretofore set out contemplates that the boundary line should be established by the grantor and that the grantee takes the land in reliance thereon. A formal, or specific or separate contract as to the boundary line between the parties is not necessary.

- Matichuk's contention that post-acquisition facts are irrelevant or simply created an inference is contrary to this Court's ruling in Strom v. Arcorace, 27 Wn.2d 478, 481-82, 178 P.2d 959 (1947):

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.

(Emphasis added); see also Windsor v. Bourcier, 21 Wn.2d 313, 316, 150 P.2d 717 (1944):

The testimony touching the location of appellants' improvements which were consistent with their acquiescence to the line, though negative in character, likewise has sufficient probative value to make it admissible. While its weight may have been very slight, in any event, its admission was not reversible error.

2. Trebling of Non-Economic Damages Under RCW 64.12.030 Is Consistent With Birchler v. Costello Land Co., Inc. and Is the Proper Interpretation of the Statute.

In addition to the arguments in her original filings with the Court of Appeals and Response, Pendergrast reminds the Court of its longstanding recognition of the intent and purpose of RCW 64.12.030: "Ultimately, the legislature enacted the timber trespass statute to deter

specific conduct and punish a voluntary offender.” Jongeward v. BNSF R. Co., 174 Wn.2d 586, 606, 278 P.3d 157 (2012); Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 111, 942 P.2d 968 (1997) (The overall purpose of allowing enhanced damages under the statute is “to punish trespassers, to prevent careless or intentional removal of trees and vegetation from property, and to roughly compensate landowners for their losses.”). Such is accomplished by interpreting the term “damages” to include all categories of damages caused by a timber trespass, including non-economic damages.

Finally, it is worth noting that Matichuk have never cited a single supportive rule of construction or policy to warrant the adding of language differentiating “economic” versus “non-economic” damages for purposes of trebling. On the other hand, Pendergrast, in her materials to the Court of Appeals and Response thoroughly evaluated the statute using long-recognized rules of statutory construction, and this Court’s ruling in Birchler v. Castello Land Co., Inc., *supra*, to reach the only logical and proper conclusion, which is that non-economic emotional distress damages are trebled under the statute.

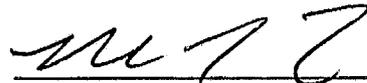
3. The Court of Appeals Followed Proper Standards to Refuse to Reverse the Trial Court's Denial of Matichuk's Motion for a New Trial or to Reduce Damages Under CR 59.

Pendergrast relies upon the argument in her original filings with the Court of Appeals and Response.

F. CONCLUSION

Matichuk do not present any basis to trigger Supreme Court reversal.

DATED this 5<sup>th</sup> day of April, 2016.



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**SUPREME COURT OF THE STATE OF WASHINGTON**

LESLIE PENDERGRAST, an individual,

Respondent,

v.

ROBERT MATICHUK, ET AL.,

Petitioners.

Supreme Court No.  
92324-8

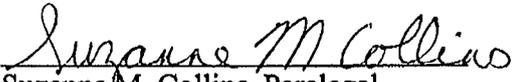
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71726-0-I

**PROOF OF SERVICE**

I, Suzanne M. Collins, certify under penalty of perjury under the laws of the state of Washington that I am over the age of 18, and on April 5, 2016, I hand delivered to the attorney named below a true and correct copy of Leslie Pendergrast's Supplemental Brief at the following address:

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DATED this 5<sup>th</sup> day of April, 2016, at Bellingham,  
Washington.

  
Suzanne M. Collins, Paralegal  
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Good afternoon. Please find attached for filing in the matter referenced below Respondent Leslie Pendergrast's Supplemental Brief and Proof of Service.

Leslie Pendergrast, Respondent v. Robert Matichuk, et al., Petitioners  
Case No. 92324-8  
Filed by: Mark J. Lee, WSBA #19339, Attorney for Respondent Leslie Pendergrast  
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Please advise immediately if there are problems with this transmission. Thank you.

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