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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 91317-0

(Court of Appeals No. 45177- 8- II)

ROBERT GUNN, a single man,

Petitioner,

v.

TERRY L. RIELY and PETRA E. RIELY,
husband and wife,

Respondents

ANSWER TO PETITION FOR REVIEW

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I.

IDENTITY OF RESPONDENTS

Respondents are Terry Riely and Petra Riley, husband and wife.

II.

CITATION TO COURT OF APPEALS DECISION

Gunn v. Riely, No. 45177-8-II. Filed on January 21, 2015.

III.

**CONDITIONAL ISSUES RAISED IN SUPPORT OF
REVERSAL BUT NOT DECIDED BY COURT OF
APPEALS**

1. Whether the affirmative defense of implied easement was established by the Rileys such that the mitigation effect of RCW 64.12.040 would be appropriate as single damages rather than treble damages under RCW 64.12.030?
2. Reconsideration of that portion of the Appellate Court's opinion that the Rielys did not properly present their request for Attorney fees on Appeal under RAP 18.1(b). The issue of damages under RCW 64.12.030 has been remanded to the trial court and has not yet been determined as to whether defendant's prevail through the use of RCW 4.84.250 concerning an offer of settlement of timber trespass damages and the shifting of costs under CR 68 if Gunn recovers less than the offer of settlement.

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IV.

COUNTER-STATEMENT OF CASE

The Rielys hired a well driller to construct a well on their property. (CP-18). The well driller moved his equipment down an old logging road (referred to as “the grassy path”) across neighboring land owned by Gunn to access the intended well site on the Riely property. (RP p. 99, ln. 17-25; RP p.100, ln. 1-7; RP p. 118, ln. 12-17). The well site was just below the intersection of the terminus of the adjoining parcels of land by the grassy path. Trial testimony from Gunn established that the grassy path was gradually being obscured by the natural growth of the foliage (RP p. 84, ln. 1-13; CP-12). The well driller cut down 107 alder saplings growing in or along the grassy path that obstructed movement of his equipment. (RP p. 107, ln. 7-24;CP-Ex. 20). That action commenced the dispute between Gunn and the Rielys over the right to use the grassy path (an old logging road). (CP-146; CP-160). Gunn claimed treble damages to his land under either RCW 64.12.630 (timber trespass) or RCW 4.24.630 RCW 64.12.030 (damage to land). An expert witness determined the value of the loss of the trees to be \$153.00. (RP p. 107, ln. 7-24; CP-Ex. 20). At trial, Gunn was awarded treble damages, restoration costs, attorney fees and costs pursuant

to RCW 4.24.630 as a matter of law on trial judge's belief that the actions constituted an injury to land. (CP-15; CP-19). The trial court disregarded Riley's affirmative defense of implied easement and found that they "knowingly and willfully trespassed upon Gunn's land when the alder trees were cut. (CP-15; Finding of Fact 1.40; 1.41; 1.42 and 1.43).

IV.

ARGUMENT

1. No evidence of damage to the land thus the trial court erred in awarding damages under RCW 4.2.630.

In this case, there was no evidence presented to the trial court by Mr. Gunn of any damage to the land (waste) apart from the cutting of the alder saplings along the grassy path (CP-19: Findings of Fact 1.24; 1.29; Conclusion of Law 2.28; CP-93 Exhibit 20). In cross-examination at trial, Mr. Gunn testified thusly:

Q: (By Mr. Johnson) Right. And the trees that were cut that were the basis of Tom Swanson's damage estimate were located along the grassy path, were they not?

A: Correct.¹

Only alder saplings were cut. There was no other evidence of damage to the land that was established. On that basis, the Rielys asserted

¹ See RP p. 124, ln. 24-25; RP p. 125, ln. 1-2)

that RCW 64.12.030 controlled the issue of damages. In their answer to the complaint as an affirmative defense, the Rielys asserted an easement, albeit an “implied easement” as the underlying legal right to enter Gunn’s property and use the grassy path despite the omission of an express easement in their property deed. The Rielys did not bring a quiet title action as a counterclaim. If the affirmative defense of implied easement was established, then they argued that they had a common law right of maintenance to keep the way open from foliage over-growth. This would bring into consideration the companion statute of RCW 64.12.040 for the determination single damages if the Riely’s entry on the land was not “wrongful” but a matter of right.

Between the years of 2000-2009, the Rielys used the grassy path to access parts of their property. The Riely property was 10 acres with high bank and a ditch with no road access to the well site. The Rielys disputed Gunn’s argument that they had no right to use the grassy path on his land. While there was no express easement due to the Storm King Large Lot Subdivision developer’s error of omission in their deed to Gunn, the Rielys’ contended that they had an implied easement for their use. The Riely’s affirmative defense was based upon their belief that they held the easement from the parties common grantor, Joel Sisson, who with his partners established the Storm King Development. The trial court ruled that the

Rielys could prove the affirmative defense but could not bring a quiet title action. The appellate court mischaracterized the issue finding that the Riely's failed to plead a quiet title claim but did not rule on the presentation of the affirmative defense of easement. The trial court ruling that Riley were trespassers was error both factually and as a matter of law.

Division II of the Court of Appeals reversed the trial court's conclusion of law that RCW 4.24.630 controlled. The Court of Appeals held that RCW 64.12.030 (timber trespass) applied due to the exclusionary language of RCW 4.24.630(2) since at trial only evidence of tree cutting was introduced but there was no other evidence of damage to the land, for example, structures, fences, forest land, farmland or to the road.

2. Factors governing discretionary review are not established by the required standards of RAP 13.4.

This case does not fit any of the categories for discretionary review of a Court of Appeals decision defined by RAP 13.4(b)(1) and (b)(2). Contrary to Gunn's argument, the decision is not in conflict with the prior decisions of the Supreme Court or the Court of Appeals concerning timber trespass cases.

Gunn's attempt at a distinction between the two statutes, RCW 4.24.630 and RCW 64.12.030, are unwarranted since the words of the exception in RCW 4.24.630(2) are plain, simple and unambiguous and do

not require any form of statutory construction. See *State v. Sweet*, 138 Wn. 2d 466, 478, 980 P. 2d 1223(1999). Both statutes are penal in nature and are therefore subject to strict construction. *Jongeward v. BNSF Ry. Co.*, 174 Wn. 2d 586, 278 P. 3d 157 (2012). The legislative history surrounding the adoption of RCW 4.24.630 in 1994 does not indicate any intent in the modern statute that expresses any legislative intent to supersede or negate the application of the long-standing timber trespass statute contained in RCW 64.12.030. The companion provision of RCW 4.24.630(2) unambiguously refers to RCW 64.12.030 as coming within its ambit. Therefore the court must apply the statute as written. See also *HomeStreet v. Dept. of Revenue*, 166 Wn. 2d. 444, 451-52, 210 P. 3d 297 (2009) which held that if the plain language of a statute is subject to only one interpretation, the court's inquiry ends because the plain language of the statute does not require construction.

Gunn has argued that the two statutes were alternative forms of relief, with RCW 4.24.630 available if a claimant was able to meet a heightened burden of proof concerning damage to the land. (CP-48; CP-95; CP-112). However, unlike cases involving sewage overflows that damaged the property owners (see *Bird v. Best Plumbing Group, LLC.*, 175 Wn. 2d 756, 287 P. 3d 551 (2012) and *Clype v. Michels Pipeline Constr. Inc.*, 154

Wn. App. 573, 225 P. 3d 392 (2010), this action involved only the cutting of trees that did not cause further damages to the Gunn property.

Furthermore, interpreting the two statutes as “alternative” forms of relief renders the more restrictive and conservative statutory damages under RCW 64.12.030 completely meaningless, as no reasonable person would “choose” to utilize the statute that affords less relief for the same complaint.

The primary goal of statutory construction is to carry out legislative intent. *Cockle v. Dept. of Labor & Indust.*, 142 Wn. 2d 801, 807, 16 P. 3d. 583 (2001); *City of Walla Walla v. Topal*, 104 Wn. App. 816, 819, 17 P. 3d 1244 (2001). The actions of the Rileys involved the cutting of the alder saplings on the Gunn property. They are therefore encompassed by the timber trespass statute (RCW 64.12.030) and as such come within the exclusionary section of RCW 4.24.630(2). Therefore, applying RCW 4.24.630(1) as the trial court did, rendered the exception of RCW 4.24.630(2) meaningless. Courts will not interpret statutes in a manner that renders portions of them meaningless. *Whatcom County v. City of Bellingham*, 128 Wn. 2d 537, 546, 909 P. 2d 1303 (1996).

There are no reported cases where Washington courts have applied RCW 4.24.630 to timber trespasses where only damages to trees/shrubs was established by evidence. No other damage to land, such as any structures,

fences, crops or minerals was involved in the current action. The damage claim was based on the cutting of the alder saplings or other foliage in or along the grassy path. Therefore discretionary review by the Supreme Court should be denied.

There are no published cases that are in conflict with the Court of Appeals decision in this matter. Gunn alludes to several unpublished cases as being in conflict, however RCW 2.06.040 explicitly states that decisions not having precedential value shall not be published. GR 14.1 states that “A party may not cite as an authority an unpublished opinion of the Court of Appeals.” The policy surrounding this is that the appellate courts have held that “No matter how well reasoned, unpublished opinions of the Court of Appeals lack precedential value in part because they merely restate well-established principles”. *State v. Nysta*, 168 Wn. App. 30, 275 P. 3d 1162 (2012); *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 108 P. 3d 1273 (2005).

In the published cases over the last fifteen years in which RCW 4.24.630(1) has been applied to award damages, the cutting of timber or trees has been absent as a factor for application of that statute.

Bird v. Best Plumbing Group, LLC, 175 Wn. 2d. 756, 287 P. 3d 551 (2012) involved an action where Best Plumbing employee without

Plaintiff's consent, went onto Bird's property and cut Bird's pressurized sewage line in three places. Over the next few months sewage continued to escape the line and according to the Plaintiff this sewage flow caused hillside instability and extensive damage to his residence. Best Plumbing admitted that its employee went onto Bird's property without permission. At a reasonableness hearing involving the defendant's insurer, the trial court found that Bird's damage claim was 100% and that Best Plumbing was liable.

In *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 23 P. 3d 520 (2001), the plaintiff, an association of property owners in a real property development, had placed a number of gates on an easement passing through its property to deter trespass and vandalism. The defendant holder of the easement repeatedly entered onto the Standing Rock land and destroyed the gates. The court held that the gates were reasonable burdens on the easement and that the defendant holder of the easement was liable for all damages under RCW 4.24.630(1) caused by his actions.

In *Clipse v. Michels Pipeline Constr., Inc.*, 154 Wn. App. 573, 225 P. 3d 492 (2010), a subcontractor committed a statutory trespass under RCW 4.24.630 by entering property without permission to perform sewer work on a county building project. A back up of sewage or wastewater caused damage to the plaintiff's real property. On appeal, the case was

remanded back to the trial court following the holding that RCW 4.24.630(1) requires a showing that the defendant acted intentionally and unreasonably committed one or more acts and knew or had reason to know that he or she lacked authorization.

In *Colwell v. Etzell*, 119 Wn. App. 432, 81 P. 3d 895 (2003), a landowner took steps to remedy the increasing damage to his land caused by a runoff of water from an uphill adjacent parcel by installing culverts and ditches. A neighbor, who possessed an easement for passage over the land, sued for damages under the theory that the owner had damaged the neighbor's interest in the easement. The appellate court reversed the award of damages, finding that there had been no trespass.

To adopt Gunn's argument would require the Supreme Court to overturn the myriad cases decided in the past 142 years construing RCW 64.12.030 governing a direct trespass against the plaintiff's timber, trees or shrubs. See for instance *Birchler v. Costello* 133 Wn.2d 106, 942 P. 2d 968 (1997); *Guay v. Wash. Nat. Gas*, 62 Wn. 2d 473, 383 P. 2d 296 (1963); *Mullally v. Parks*, 29 Wn. 2d 899, 190 P. 2d 107 (1948); *Gardner v. Lovegren*, 27 Wash. 356, 67 P. 615 (1902).

- 3. The affirmative defense of implied easement affects the application of RCW 64.12.030 and/or RCW 64.12.040 such that maintenance of the easement should not have been considered wrongful or trespassing.**

The appellate court decision remanded to the trial court for the determination of damages under RCW 64.12.030. However, the appellate court did not consider the application of the companion statute of RCW 64.12.040 if the burden of proof on the affirmative defense of implied easement was met by the Rielys. The Rielys argued that issue both at trial and on appeal. An easement is a non-possessory interest in the land of another---either express or implied. See *Butler v. Craft Eng. Contr. Co.*, 67 Wn. App. 684, 697, 843 P.2d 1071 (1992); *Richardson v. Cox*, 108 Wn. App. 881, 26 P.3d 970 (2001). By its very nature an easement is a burden on the land of another and gives the dominant tenement the right to use the land of another (usually for ingress and egress along a designate route). The trial court allowed the Rielys to present evidence supporting their implied easement defense but then made a determination that they were trespassers. The evidence showed the grassy path had been used historically to access the property before the land was subdivided into neighboring 10 acre parcels. However, the trial court failed to recognize that evidence and testimony from the witnesses was legally sufficient to establish the affirmative defense of implied easement. On that basis it was Riely's contention that their use and actions on the grassy path were not wrongful. If that is true, the treble damages that are authorized under RCW 64.12.030

may not be warranted and the companion statute of RCW 64.12.040 may control the determination of single value of damages to the trees cut.

Division II of the Court of Appeals has mischaracterized and misinterpreted this argument. The issue is not hypothetical---if the Rielys proved their affirmative defense of implied easement, there could be no trespass for cutting in the easement based on an underlying common law right of use and maintenance of easements. *Dreger v. Sullivan*, 46 Wn. 2d 36, 278 P. 2d 647 (1955); *Hughes v. Boyer*, 5 Wn. 2d 81, 90, 104 P.2d 760 (1940)

4. Attorney Fees and Cost Shifting at Trial and on Appeal should abide the application of RCW 4.84.250 and CR 68.

Prior to the trial of this action, the Rielys has submitted an offer of settlement (CR-13) pursuant to RCW 4.84.250 and an Offer of Judgment (CP-11) to resolve the damage claims of Mr. Gunn. The request for an award of attorney fees in this case was set forth and briefed at the appellate court level. The award to attorney fees in cases under \$10,000 are dependent upon compliance with RCW 4.84.250. This in turn is dependent on the trial court's determination of damages following remand and a determination of damages under either RCW 64.12.030 or RCW 64.12.040. The latter statute provides for single damages if the actor proves probable cause to believe land was his or her own. The damages that may be found

by the trial court on remand may cause a shifting under RCW 4.84.250. The Rielys followed the required procedure under RCW 4.84.250 and CR 68. Whether either RCW 4.84.270 or CR 68 has any application to this case involves factors that the trial court has not yet determined. Attorney fees were raised as an issue and briefed in the appeal to Division II of the Court of Appeals submitted by the Rielys. Any award of attorney fees should abide by the result at trial on the remand of the damage determination to determine the prevailing party. *Eagle Point Condo v. Coy*, 102 Wn. App. 697 (2000) held that where a statute authorizes attorney fees to the prevailing party at trial, they are also available on appeal.

V.

CONCLUSION

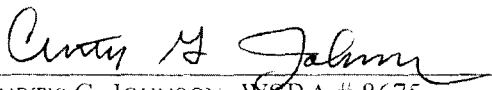
RCW 4.24.630(2) specifically precludes the application of section (1) in any case where RCW 64.12.030 provides for damages. The trial court should not have applied RCW 4.24.630 because the statute does not allow for certain damages when RCW 64.12.030 applies. The actions and conduct of the Rileys are encompassed by RCW 64.12.030. The loss that Gunn suffered was as a result of the cutting down of trees, and it is for the value of those trees that damages would be awarded and trebled under RCW 64.12.030 (timber trespass). However, single damages would be potentially available if the companion statute of RCW 64.12.040 applied if the Rielys'

prevailed on their affirmative defense of implied easement since the trees removed were natural growth in or along the grassy path.

If, on remand, the trial court awards damages equal to or less than that offered by the Rielys in their offer of settlement based on RCW 4.84.250, then the Rileys should be deemed the prevailing party and entitled to an award of reasonable attorney fees at trial and on appeal plus the shifting of costs under CR 68 as an offer of judgment was also submitted. The Supreme Court should direct the trial court following remand to include in its amended judgment an amount awarded for recoverable fees on appeal if the damages are less than that offered by the Rielys for settlement and judgment.

Respectfully submitted this 18th day of March, 2015.

Law Office of Curtis G. Johnson, P.S.


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1. Answer to Petition for Review
2. Transmittal Letter to Supreme Court Deputy Clerk
3. Declaration of Electronic File and Proof of Service

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