NO. 45177-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT GUNN, a single man,

Respondent,

v.

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

Appellants

BRIEF OF APPELLANT
TERRY & PETRA RIELY

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INTRODUCTION

The Rielys hired a well driller to construct a well on their property. The well driller moved his equipment down an old logging road (referred to as "the grassy path") across neighboring land owed by Gunn to access the intended well site on the Riely property. The well site was just below the intersection of the terminus three adjoining parcels of land by the grassy path. The well driller cut down several alder trees along the grassy path that obstructed movement of his equipment. That action commenced a dispute between Gunn and Riely over the right of use the old logging road. Gunn claimed damage to his land on the basis of RCW 4.24.630 rather than a timber trespass under RCW 64.12.030. An expert witness determined the value of the loss of the trees to be $153.00. At trial, Gunn was awarded treble damages, restoration costs, attorney fees and costs pursuant to RCW 4.24.630.

As their affirmative defenses, the Rielys asserted that they had an underlying legal right to enter Gunn's property and use the grassy path stemming from use by their common grantor despite any omission of an easement in their property deed.

The Rielys further claim that the trial court abused its discretion in granting a motion in limine to exclude consideration of the acts of the well driller as the responsible party for any damages suffered by Gunn.

I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it applied RCW 4.24.630 rather RCW 64.12.030 to this timber trespass case, thus awarding the Plaintiff damages specifically disallowed under Washington law, including both actual damage, restoration/mitigation costs, investigation/surveying costs, attorney's fees and other litigation costs. (Conclusions of Law 2.19; 2.20; 2.21; 2.23, 2.25; 2.26; CP-19).

Assignment of Error No. 2: The trial court erred when it concluded the grassy path was not suitable for vehicle transportation beyond the size of a quad. (Findings of Fact 1.11; CP-19)

Assignment of Error No. 3: The trial court erred when it concluded that the Rielys had no right of use of the grassy path if an easement by grant or reservation did not appear on the face of their deed such that they did not take reasonable steps to confirm their right of use and there was not an easement for anybody's use. (Findings of Fact 1.23; 1.30; 1.31;1.33 and 1.39; and CP-19).

Assignment of Error No. 4: The trial court erred when it concluded there was a clear trespass and that the Rielys are responsible and legally liable for said damages. (Findings of Fact 1.42; CP-19).

Assignment of Error No. 5: The trial court erred when it concluded that even if Rielys had an easement, they would not have a right of maintenance on the easement (cutting obstructing foliage) without the owner's permission. (Findings of Fact 1.43; CP-19).

Assignment of Error No. 6: The trial court erred when it concluded that the Rielys trespassed and trashed the Gunn property through their use of the grassy path. (Findings of Fact 1.23; 1.24; 1.43; and Conclusion of Law 2.36; CP-19).

Assignment of Error No. 7: The trial court erred when it denied the right of the defendant the use the affirmative defense of non-party fault under CR 12(i) i.e., that the responsibility for the cutting of the trees was by the actions of an independent contractor (Oasis Well Drilling) and therefore such denial was an abuse of discretion. (RP p. 19, ln. 4-25; p. 20, ln. 1-9 and Findings of Fact 1.41)

Assignment of Error No. 8: The trial court erred in its conclusion of law that the Riely's wrongfully caused "waste" or "injury to land" (Conclusion of Law 2.1, CP-19).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it applied the general property damages statute of RCW 4.24.630, rather than the specific timber trespass statute RCW 64.12.030, where RCW 4.24.630(2) specifically precludes application in any case where RCW 64.12.030 provides liability. **(Assignment of Errors No.1; No. 11 and No. 12)**

2. Whether the Plaintiff's evidence established any damage to the land apart from the *cutting* of the alders such that RCW 64.12.030 should control. **(Assignment of Error No. 1)**

3. Whether the trial court erred when it granted Plaintiff a motion in limine to exclude testimony about actions of an independent contractor in causing the harm where the failure to identify the non-party contractor did not cause unfair surprise or mislead Plaintiff. **(Assignment of Error No. 7).**

4. Whether the trial court erred when it refused to consider whether the Rielys had an implied easement from the common grantor? If so, could there be a trespass if they had an underlying common law right of use and maintenance of the implied easement? **(Assignment of Errors No. 2; No. 3, No. 4; No. 5: No. 6; No. 7; and No. 8).**

5. Whether the trial court erred in awarding costs and attorneys' fees to the Plaintiff on the basis of RCW 4.24.630? (**Assignment of Error No. 1**)

6. If the Defendants had a quasi-easement (as obtained from a common grantor) and RCW 64.12.030 applies, would the facts also justify a finding that RCW 64.12.040 applies such that single damages for tree loss would be appropriate? (**Assignment of Error No. 5**)

7. If RCW 64.12.030 controls this action, whether the damages awarded the Plaintiff are less than the amount offered by the Defendant pursuant to both RCW 4.84.250 and CR 68, such that the Defendant would be considered the prevailing party and entitled to an award of reasonable attorneys fees and an adjustment of costs?

III. STATEMENT OF THE CASE

A. Substantive Factual History.

Terry and Petra Riely (collectively "the Rielys") appeal from the trial court's ruling awarding damages against them for a timber trespass which occurred on Robert Gunn's property .(CP-09; CP-15) In July, 2009, the Riely's contacted Keith Winter of Oasis Well Drilling to construct a well to provide additional water on their property being used as

a berry and tree farm. (CP-18) Keith Winters and his employee cut the scrub alders along access road (the "grassy path") in order to move their well drilling equipment onto the Riely property. (RP p. 99, ln. 17-25; RP p.100, ln. 1-7; RP p. 118, ln. 12-17). That action formed the basis of Mr. Gunn's timber trespass claim against the Rielys. (CP146; CP-160)

Gunn was the owner of Parcel 1 and the Rileys were owned adjoining Parcel 2. Each parcel was about 10 acres. (CP Ex. 6; CP-Ex. 11). The Treerise's own Parcel 3 and are not parties to this litigation. (RP p. 79, ln. 6-17; CP- Ex.10). The Treerise's had a written easement for use of the grassy path, but later released their easement to Gunn by a quit-claim of their interest. (RP p. 73, ll. 6-16; CP-8). Parcels 1, 2, and 3 adjoin each other and have one common corner, was near the center where the activity that leads to this lawsuit occurred. (RP Vol. 2, p. 33, ll. 1-25). Running down from Sponberg Lane through the Gunn land was an old logging road that the witnesses at trial referred to as the "grassy path". (RP p. 30, ll. 1-19; CP-Ex.12; CP-19). The properties involved in this conflict were part of the Storm King Large Lot Subdivision developed by Joel Sisson and Donald Goralski (CP-Ex. 5; CP-Ex. 10 & 11). The Riely's used their land for a berry farm, orchard and tree farm but did not reside on their property. (RP p. 81, ll. 25; RP p. 82, ll. 1-2; RP p. 133, ll. 21-23).

After the cutting of the alders occurred, Robert Gunn hired a full boundary survey from James Wengler, a licensed surveyor. (RP p. 27, ll. 9-18; CP-Ex. 2). As part of his duties, Wengler also mapped the grassy path that went from north to south on the Gunn property and the extent of some recent tree clearing along the grassy path. (RP p.28, ln. 7-11; p. 29, ln 5-9). Wengler testified that the cutting of the trees took place near the approximate boundary between Parcel 2 and Parcel 3. Wengler testified that to his observation the grassy path had been a road at one time. (RP p. 31, ln. 6-16). At the time of the survey, Wengler noted that the width of the grassy path from the northwestern side to the southwestern side had varied as it had been narrower at the north end and at the south end was approximately 8 feet wide. (RP p. 53, ll. 3-6; CP-Ex. 2). The length of the tree cutting observed by the surveying crew along the grassy path was estimated to be 75 feet. (RP p. 55, ll. 20-24).

Wengler charged Gunn $6,070.50 for the survey and estimated that about $2,604 was for services directly related to the timber trespass or about 43% of the total. (RP p. 32, ll. 19-25).

In the spring of 2007, Gunn first met Mr. Riely after he had noticed Riely's blue Volvo pickup truck parked on the grassy path. (RP p. 63, ln. 8-20); RP p. 68, ln. 8-16). Gunn testified that he informed Riely that he did not want him to drive on the grassy path any more. (RP p. 71,

ln. 1-13). Gunn then testified as to their conversation regarding the right to use the grassy path:

> A:....At that point I looked at him and again I said, you don't have a right to this easement or roadway and he(Riely) said 'well, Joel Sisson says we do' and I went on to tell him Joel Sisson is wrong.

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). Gunn testified that trees were overgrowing the grassy path. (RP 84; ln. 6-12).

Gunn hired Tom Swanson of Green Crow to set the value of the trees that were cut. (RP p. 82, ln. 16-21). Swanson estimated the value the approximately 107 alder trees to be $153.00. (RP p. 107, ln. 7-24;CP-Ex. 20). After the cutting occurred, Gunn testified that he put up a "No Trespassing" sign on the grassy path. (RP p. 95, ll. 1-3; RP p. 114, ll. 20-25; RP p. 115, ll. 1-5; CP-Ex.14; CP-Ex.15). Gunn testified that the cut alder trees had been placed into brush piles along the grassy path, noting that the largest pile was approximately 12 by 12 feet in size. (RP 97, ln. 5-17; RP p. 74, ln. 14-21; CP-Ex.15). On June 20, 2009, the Riely's had hired Oasis Well Drilling to drill the new well. (CP-Ex. 18). On the bid, Gunn testified that there was a $20.00 charge for tree removal. The approximate drilling start date was to be July 10, 2009. (RP p. 100, ln. 1-8; CP-Ex. 18). On questioning at trial, Gunn admitted that the Riely's in

their answers to interrogatories stated that the tree removal charge related brush and a fir tree that had been removed on the Riely's own land as to where the new well was to be located. (RP p. 101, 14-22); RP 102, ln. 3-10). Gunn admitted that he was informed that Oasis Well Drilling cut the trees along the grassy path from the answers to interrogatories provided by the Rielys. (RP p. 118, ln. 8-17; RP p. 120, ln. 9-23). Gunn never performed any annual maintenance on the grassy path or took any action to make it easier to use. (RP p. 125, ln. 10-12; RP p. 125, ln. 21-23).

B. Procedural History.

On March 2, 2010, Gunn filed his Complaint for Timber Trespass and injunctive relief to have the Rielys' new well incapacitated. (CP-160; CP-146). Defendant filed their Answer and Affirmative Defenses to the Complaint on March 16, 2010. (CP-157). On April 26, 2013, Plaintiff subsequently filed an Amended Complaint governing the pleadings at trial. (CP-146). Defendants Riely filed their Amended Answer and Affirmative Defenses to the Amended Complaint on April 29, 2013. In their amended answer, Defendant alleged the Plaintiff's damages (if any) were done by an independent contractor but failed to identify the contractor (Oasis Well Drilling) by name despite being disclosed in the interrogatory responses on June 20, 2010 submitted two years earlier to

the Plaintiff. (CP-1; CP-21, RP pages 5 thru 18; See also Appendix-1 attached hereto). In his complaint, Plaintiff alleged that the Defendants Riely entered onto Plaintiff's property and "unlawfully cut" a number of trees. Plaintiff claimed damages in the sum of $153.00 for 107 alder trees (CP-20) under RCW 4.24.630 or alternatively RCW 64.12.030. (CP-146; CP-160). Less than two weeks before trial, the parties entered an order dismissing Gunn's claim for injunctive relief against the well. (CP-139).

The matter went to trial before the Honorable S. Brooke Taylor of the Clallam County Superior Court on May 6-7, 2012. The trial court issued is oral opinion on May 7, 2012 (RP Vol. 2, pages 32-53). In that opinion, the court determined the following:

(1) That the Defendants "knowingly and willfully" trespassed upon Plaintiff's property in late July, 2010, when the alder trees along the grassy path were cut by employees of Oasis Well Drilling. (Finding of Fact 1.40; 1.41; 1.42 and 1.43)

(2) That the Defendants should have known that the grassy path was not an easement for their use and that they had no right to cut alders along the grassy path to clear the way for vehicle travel.

(3) RCW 4.24.630 applied as a matter of law as the Defendants actions constituted an injury to the land.

The court also found the following damages:

(1) For the injury to the land; $153 as actual damages, trebled under RCW 4.24.630 (for a total of $459); and costs of restoration of $300 to "restore" the loss, trebled to $900.00. The trial court also awarded surveying costs of $2,604.00; plus $690 expert witness fees; and court reporter transcription fees of $138.60. (CP-15). The court also reserved the issue of attorney's fees to the Plaintiff.

(2) The trial court subsequently awarded the Plaintiff $17,500 in attorney fees. The total damages awarded for Plaintiff thus totaled $22,571.60 finding that the award was based on RCW 4.24.630 (CP-15; CP-19).

Defendant filed a motion for reconsideration asserting that the trial court erred in awarding damages under RCW 4.24.630 when the timber trespass statute, RCW 64.12.030 controlled the action. (CP-57; CP-76 and CP-80). The trial court issued a Memorandum Decision denying the motion for reconsideration on June 19, 2013. (CP-44). With respect to the remaining issues, the trial court signed the Findings of Fact and Conclusions of Law provided by Plaintiff's counsel with minor interlineations. (CP-19). In the judgment, the trial court also cleared the Gunn property of any claim of easement by the Rielys although there is no finding of fact or conclusion of law in reference to such decision. (CP-15).

The Plaintiff's award was based on the trial court's adoption of RCW 4.24.630 as the controlling law of this action. (CP-15; CP-19). In his oral opinion, the trial judge stated that RCW 64.12.030 did not apply to the facts of this case. (RP Vol. 2. p. 49, ln. 2-23).

IV. ARGUMENT

A. Summary of Argument.

The trial court erred in awarding damages under the broader scope of RCW 4.24.630, where damages were available and appropriate under RCW 64.12.030. By the specific terms of RCW 4.24.630(2) an award was not available under that statute where RCW 64.12.030 provided liability. Thus, the trial court's award of both actual damages, restoration costs; surveying fees and costs; and the award of attorneys fees and litigation costs were in error.

B. Standard of Review.

The appropriate review of a trial court's decision following a bench trial is a determination as to whether substantial evidence supports the findings, and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 644, 668-69, 754 P. 2d 1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Wenatchee Sportsmen*

Ass'n. v. Chelan County, 141 Wn. 2d 169, 176, 4 P.3d 123 (2000). The appellate court will defer to the trier of fact in resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn. 2d 78, 87, 51 P. 3d 793 (2002).

Questions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. V. Dickie*, 149 Wn. 2d 873, 879-880, 73 P. 3d 369 (2003). This appeal centers primarily upon the correct application of two statutes relating to timber trespass claims. The meaning of a statute is a question of law that the Appellate Court reviews de novo. *King County v. Seawest Inv. Associates, LLC*, 141 Wn. 2d 304, 170 P. 3d 53 (2007). The applicability of RCW 64.12.030 versus RCW 4.12.630, including the appropriate scope of damages under these statutes as applied to this case were issues squarely before the trial court. (CP-117) (Defendant's Motion for Reconsideration and Legal Memorandum in Support) (CP-57; CP-76; CP-80); (Plaintiff's Response) (CP-48; CP-95 and CP-112); (Memorandum Opinion Denying Motion) (CP-44).

With respect to a trial court's decision regarding attorneys fees, the standard of review is abuse of discretion. *Estate of Johan Kvande v. Olsen*, 74 Wn. App. 64, 71, 871 P. 2d 669 (1994). An abuse of discretion occurs when the trial court's decision rests on untentable grounds or

untentable reasons. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 427, 54 P. 3d 687 (2002). Here, however, the issue of attorneys fees is one of law to be reviewed de novo. The trial court's error was in awarding attorneys fees and litigation costs as such fees and costs are not recoverable if RCW 64.12.030 is the applicable statute.

C. The trial court erred when it applied RCW 4.24.630 rather than RCW 64.12.030 thus awarding the Plaintiff damages specifically disallowed under Washington law.

In his complaint, Gunn plead two alternative forms of relief: damages under the timber trespass statute, RCW 64.12.030, as well as the statute governing waste or damage to land and property, RCW 4.24.630 (CP-146; CP-160). The findings, conclusions and orders signed by the trial court, as presented by Plaintiff, identify RCW 4.24.630 as the statute under which damages were awarded. (CP-19). The trial court adopted Plaintiff's arguments on the issue of applying RCW 4.24.630 and disregarding subsection (2) and despite the fact that RCW 64.12.030 controlled if a timber trespass against the Rileys was found by the court. (CP-117; CP-80; CP-55, CP-76).

Defendants submit that both the Plaintiff and the trial court confused the relevant statutes, and erred in analyzing the applicable case law. RCW 64.12.030 provided liability for the timber trespass claim at

issue since the only evidence of damage presented was the cutting of alders along the old logging road. Recovery under RCW 4.24.630 was thus not available as a matter of law. The specific language of RCW 4.24.630(2) *precluded* application in this case.

1. *The relevant statues.*

Washington's original timber trespass statute, first passed in 1869 and currently codified under RCW 64.12.030 reads as follows:

64.12.030 Injury to or removing trees, etc.--- Damages

Whenever any person shall *cut down*, girdle or otherwise *injure*, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefore, as the case may be.

The companion statute, RCW 64.12.040, provides an exception to the strict treble damage provisions of this penal statute:

64.12.040 Mitigating circumstances ---Damages

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from unenclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.

In 1994, the Legislature passed RCW 4.24.630, providing liability for general damage to land and property where RCW 64.12.030 did not apply:

4.24.630 Liability for damage to land and property--- Damages ---Costs --- Attorney's fee---Exceptions

(1) Every person who goes on to the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For the purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs or restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorney's fee and other litigation-related costs.

(2) ***This section does not apply in any case where liability for damages is provided under RCW 64.12.030.*** 79.01.456, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035. (Emphasis added).

Thus, where liability is *not* provided under the more specific timber trespass statute of RCW 64.12.030, then RCW 4.24.630 fills the gap and provides for general damages to the land. However, the specific language of the more contemporary statute, RCW 4.24.630 does *not* apply where RCW 64.12.030 provides for liability. See RCW 4.24.630(2). Nor is there anything 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.

2. *Damages are limited to those available under RCW 64.12.030, and thus the trial erred in awarding damages under the broader scope of RCW 4.24.630.*

This distinction between the two statutes and their applicability is crucial because RCW 4.24.630 provides a broader scope of damages than RCW 64.12.030 allows. Several elements of the trial court's damage award are precluded under RCW 64.12.030. In the Judgment rendered in this action to the Plaintiff, damages were $153, trebled to a total award of $459 for the "injury to the land" (i.e., cutting of the alder trees); costs of restoration of the land $300; trebled to $900; surveying costs of $2,604, expert witness fees of $690; court reporter transcription fees of $138.60 and $17,500 in attorney's fees and litigation costs, for a total of $22,571.60. The actual applicable statute of RCW 64.12.030 and attending case law would preclude most of those damages.

Plaintiff 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 *Clipse 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.

The Plaintiff's statutory interpretation and the trial court's analysis of "restorative" concerns, however, completely negate not just a single word, but an entire *section* of RCW 4.24.630, namely subsection (2) which *specifically* precludes application of this statute where there is liability under RCW 64.12.030. (RP Vol. 2 p. 48- ln. 9-25; p. 49, ln. 1-25; p. 50, ln. 1-9)

Furthermore, interpreting the two statutes as "alternative" forms of relief render 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 long line of Washington cases applying RCW 64.12.030 (and RCW 64.12.040) since its passage in 1869 unambiguously limits the available damages for actions under this factual pattern in the Gunn litigation. For the cutting down or injury to the trees, timber or shrubs on the land of another, available damages are the stumpage value of the severed trees, together with other damages that are a normal consequence

of the logging operation. *Birchler v. Castello Land Co., Inc.,* 133 Wn.2d 106, 111, 942 P.2d 968 (1997).

In this case, the alders were natural growth along the old logging road. (See sequence of aerial photographs CP- Exhibit 12). Therefore, the only loss that could be used is their loss of value of $153.00. (CP-Ex. 20). The damage restrictions constitute an important part of the case law history defining and applying statutory liability for timber trespass cases. Washington courts have, as appropriate to a penal statute, narrowly interpreted the punitive damages provision. *Birchler*, 133 Wn.2d at 110-11; *Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879, 886, 289 P.2d 975 (1955); *Bailey v. Hayden*, 65 Wash. 57, 61, 117 P. 720 (1911).

The appellate court must presume that the Legislature knew the existing state of the case law when it passed further legislation in this arena. *Woodson v. State*, 94 Wn.2d 257, 262, 623 P.2d 683 (1980). When a statute is unambiguous, the courts assume the legislature means what it says and will not engage in statutory construction past the plain meaning of the words. *Davis v. Dept. of Licensing*, 137 Wn. 2d 957, 963-64, 977 P. 2d 554 (1999). It is not reasonable to suggest that the Legislature intended to so casually negate nearly a century and half of law and significantly

broaden liability for timber trespass without some indication that such was the legislature's intent.

3. *Resolving ambiguity: the clear terms of the statute preclude application of RCW4.24.630 in <u>any</u> case where RCW 64.12.030 provides liability. Case law supports this.*

RCW 4.24.630(2) clearly states that "[t]his section ***does not apply*** in ***any*** case where liability for damages is provided under RCW 64.12.030." Thus, where RCW 64.12.030 provides liability for a timber trespass claim, the claimant is entitled to damages under that statute *but not* RCW 4.24.630. The more general statue governing waste and damage to land, RCW 4.24.630, applies if *and only if* there is no liability for damages available under RCW 64.12.030. Therefore, the trial court erred in both its analysis, and in awarding damages under RCW 4.24.630(1).

While the language of these two statutes appear confusingly similar, and thus at first blush appear to provide alternative avenues of relief, a closer examination tells a different story. The key question seems to be what was meant by the following words: "[t]his section does not apply where liability for damages *is provided under* RCW 64.12.030." More specifically, perhaps, is the question of what the Legislature meant by the verb "is"? Did the Legislature mean that damages under RCW 4.24.630 were unavailable if liability *could* be found under RCW 64.12.030 for that particular claim? Or did the Legislature mean that

damages for RCW 4.24.630 were unavailable only where a court *chose* to use RCW 64.12.030 instead? While no Washington case has yet squarely presented this issue, the clear assumption in those cases decided after the passage of RCW 4.24.630 is that this statute will not, does not, and cannot apply where liability is available under RCW 64.12.030. See for instance *Clipse v. Michels Pipeline Constr., Inc.*, 154 Wn. App. 573, 225 P. 3d 492 (2010); *Colwell v. Etzell*, 119 Wn. App. 432, 81 P. 3d 895 (2003); *Bird v. Best Plumbing Group, LLC*, 175 Wn. 2d. 756, 287 P. 3d 551 (2012). In the group of cases just cited, RCW 4.24.630 was applied where the cutting of trees or timber was an absent factor.

a. Division I affirmed that RCW 4.24.630 would not apply where damages are available under RCW 64.12.030 in JDFJ Corp v. Intl. Raceway, Inc. (1999)

Most cases to date that deal with the general property damage statute, RCW 4.24.630, involved waste to the land from causes other than damages from the cutting of trees, such as flooding, sewage overflow or destruction of a hillside. There is, however, guidance directly on point from the 1999 Division I case, *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999). In that case, the tenant (International Raceway) filed suit against the landlord to enforce a contractual lease extension. In response, the landlord (JDFJ Corporation) asserted counterclaims alleging that the tenant had harvested trees from

the leased land without first obtaining JDFJ's permission, as required by the lease. The landlord prevailed on its claim for timber trespass under RCW 64.12.030, but the court declined to find the "willful conduct" necessary to award triple damages. The landlord then urged the court to utilize RCW 4.24.630 instead and award triple damages, arguing that RCW 64.12.030 should not apply, anyway, because the liable party was a tenant, and thus not a "trespasser" in the sense required for a common law trespass claim. The court rejected this argument, finding that the timber trespass statute encompassed a more general sense of "trespass," and did not require that the act meet the specific elements required for a common law trespass.

Critical to the present case, Division I in *JDFJ* also determined that since RCW 64.12.030 afforded liability for the acts in question, that RCW 64.12.030 further governed the awardable damages, thus *precluding* any application of the broader remedies afforded under RCW 4.24.630:

> ...JDFJ asserted that International Raceway, Inc. should be held liable for treble damages under RCW 4.24.630 (removal of timber without authority), rather than timber trespass damages under RCW 64.12.030, because International Inc, was a lessee and therefore could not commit a trespass. **The timber trespass statute, however**, is not limited simply to situations equivalent to a common law trespass. It **includes within its scope** unauthorized logging by a lessee **and RCW 4.24.630 is thus *by its terms* inapplicable.** 97 Wn. App. at 3 (emphasis added);

The statute proffered by JDFJ, **RCW 4.24.630, states that it is inapplicable where damages are provided for under RCW 64.12.030. RCW 64.12.030 provides treble damages when a party cuts down timber of another without lawful authority....** 97 Wn.App. at 6 (emphasis added);

RCW 64.12.030 encompasses the conduct of IRI in this case **and provides the appropriate measure of damages for the acts that occurred.** 97. Wn. App. at 7 (emphasis added).

The entire record in this case tells a classic tale of actions clearly encompassed under RCW 64.12.030. (CP-117; CP-80; CP-57). Therefore, as RCW 64.12.030 provides liability for the actions of Oasis Well Drilling and/or the Rielys' acts, as alleged in this lawsuit, RCW 4.24.630 "is thus *by its terms* inapplicable." *JDFJ Corp.*, 7 Wn. App. At 3.

b. Where RCW 64.12.30 provides liability, claimant cannot seek damages otherwise not encompassed by that statute.

In *Birchler v. Castello Land Co.* 133 Wn. 2d 106, 942 P. 2d 968 (1997) the Supreme Court simply held that RCW 64.12.030 was not an exclusive remedy, and thus did not bar recovery of damages *not* already encompassed by the statutory liability: in that case, emotional distress damages. 133 Wn.2d at 115. However, it should be observed that the *Birchler* decision *also* made clear that the statute *did* operate to preclude any duplicative recovery for damages already encompassed under the rubric of RCW 64.12.030:

Numerous cases indicate that a party can recover treble damages under RCW 64.12.030, as well as other, provable, ***nonduplicative*** damages. For example, in *Henriksen v. Lyons,* 33 Wn. App. 123, 652 P.2d 18 (1982), *review denied,* 99 Wn. 2d 1001 (1983), upon which [the defendants] rely, ... [t]he Court of Appeals affirmed the award of damages for timber trespass, but reversed the $3,000 judgment for diminution in the value of Henriksen's land, stating:

In this state, the landowner suffering a timber trespass may ***elect*** to pursue ***either*** common law remedies **or statutory** remedies. ... The statutory remedy trebles the "stumpage value" of the severed trees. **It is designed to compensate the landowner for all damages that are a normal consequence of the logging operation including inter alia, "the loss of trees of less than merchantable size, the carving out of unwanted logging roads, or possible soil erosion and stream pollution".** (citations omitted).

* * *

The court held Henricksen was entitled to recover for diminution in the value of her land under the timber trespass statute, ***but only*** to the extent she could show the diminution was not a "usual or normal consequence of logging operation, the Court of Appeals vacated the award of damages for loss of property value. [citations omitted]. ***

Henricksen does not hold an action under RCW 64.12.030 precludes the assertion of a claim for emotional distress, as the [the defendants] contend. *Henricksen* stands only for the **straight-forward proposition that the timber trespass statute subsumes under its rubric all damage claims that are a usual or normal consequence of timber trespass.**

133 Wn.2d at 113-114.

Here, Gunn requested–and the trial court awarded – damages for damage to trees *as well as* restoration/mitigation costs and surveying fees. However, those are precisely the types of duplicative damages precluded under RCW 64.12.030. Other errors in the trial court's decision flow from

here, as the trial court awarded substantial damages under RCW 4.24.630 that are outside the scope of allowable damages under RCW 64.12.030. Those issues will be discussed in turn below.

3. *Interpretation of legislative intent further affirms that the specific language of RCW 4.24.630 means what it says: that the statute shall* not *apply in any case where RCW 64.12.030 applies.*

Washington's case law concerning rules for legislative interpretation support the application of the plain language of RCW 4.24.630(2), precluding recovery under RCW 4.24.630 where RCW 64.12.030 otherwise applies. The meaning of RCW 4.24.630(2) would be a question of law since all statutory interpretation is a question of law. *Western Telepage, Inc. v. City of Tacoma,* 140 Wn.2d 599, 607, 998 P.2d 884 (2000). The fundamental objective in reading a statute is to ascertain and carry out the Legislature's intent. *King County v. Seawest Inv. Associates, LLC, 141* Wn.2d 304, 309, 170 P.3d 53 (2007); *Cockle v. Dep't. of Labor & Indus.,* 142 Wn.2d 801, 807, 16 P.3d 583 (2001). If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007).

Where a statute is clear on its face, it is not subject to judicial interpretation. *Keithy v. Sanders,* 170 Wn. App. 683, 687, 285 P. 3d 225 (2012). When the intent of the legislature is clear from a reading of a statute, there is no room for construction and its meaning is to be derived from the language of the statute alone. *Raum v. City of Bellevue*, 171 Wn. App. 124, 286 P. 3d 695 (2012); *State v. Moeurn*, 170 Wn. 2d 169, 174, 240 P. 3d 1158 (2010). If the statutory language is susceptible to more that one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. *Christensen,* 162 Wn. 2d at 373. A statute is ambiguous only if it can be *reasonably* interpreted in more than one way. Statutes are not ambiguous, however, merely because one could conceive of a different interpretation, or other possible interpretations exist. *Indoor Billboard/Washington, Inc.v. Integra Telecom of Washington, Inc.,* 162 Wn. 2d 59, 170 P3d 10 (2007). A court should avoid strained meanings and absurd results, and should not adopt an interpretation that renders any portion meaningless. *King County v. Seawest Inv. Associates,* 141 Wn. 2d at 309; *Cherry v. Municipality of Metropolitan Seattle,* 116 Wn.2d 794, 802, 808 P.2d 746 (1991).

A specific statute, such as the RCW 64.12.030 timber trespass statute, will supersede a more general statute, such as the more general

waste and damage to property statute RCW 4.24.630, when both might otherwise apply. *Waste Mgmt. of Seattle, Inc.v. Utilities and Transp. Comm'n,* 123 Wn. 2d 621, 630, 869 P.2d 1034 (1994). Statutes relating to the same subject "are to read together as constituting a unified whole, to the end that harmonious total statutory scheme evolves which maintains the integrity of the respective statutes." *State. v. Wright,* 84 Wn.2d 645, 650, 529 P.2d 453 (1974); *see also Waste Mgmt. of Seattle,* 104 Wn.2d at 630: *State v. Fairbanks,* 25 Wn.2d 686, 690, 171 P.2d 845 (1946) ("It is a cardinal rule that two statutes dealing with same subject matter will, if possible, be so construed as to preserve the integrity of both."). Statutory provisions and rules should be harmonized whenever possible. *Christensen,* 173 P.3d at 232. "Courts should assume the Legislature means exactly what it says" in a statute and apply it as written. *Indoor Billboard,* 170 P.3d at 16.

At trial, Plaintiff argued that the court should choose RCW 4.24.630 over RCW 64.12.030. However, this is not what RCW 4.24.630(2) says. In plain language, that statute provides that it *shall not* apply to *any* case where there is liability available under RCW 64.12.030. Any other interpretation would negate any reason for the timber trespass statute, RCW 64.12.030, to exist at all. Why would any claimant select remedies under a statute limiting recovery. Such a result is absurd, and

thus cannot be reasonably read as the Legislature's intent. The reasonable reading is that RCW 4.24.630 is meant as *fall back* statute if, and only if, the timber trespass statute somehow did not apply to a case involving the cutting down of trees, timber or shrubs. Furthermore, contrary to the trial court's opinion, the value of the trees cut are not a determinative factor of what statute should be applied when a trespass has occurred. (RP Vol. 2, p. 49, ln. 7-23). However, apart from the trees, there was no evidence presented by Gunn at trial as to any other damage to his land and none is documented in the court's Findings of Fact and Conclusions of Law. (CP-19). So there is a complete lack of any substantial evidence in that regard. *Dorsy v. King County*, supra, at pp. 668-69.

Allowing a claimant (or the court) to utilize the more general land damages statute of RCW 4.24.630 where RCW 64.12.030 otherwise applies also impermissibly presents an opportunity for the claimant to skirt the limitations developed over the course of a century of Washington law governing timber trespass claims. Case law attending RCW 64.12.030 and RCW 64.12.040 provide important checks and balances, limiting treble damages, limiting recovery for attorneys fee and costs, and limiting duplicative damages, and disallowing all other claims for any damages that are part of the "usual result" of logging or timber cutting/removal operations. There is no reasonable basis for suggesting that the

Legislature intended such a fundamental shift in nearly a century of law with some ambiguous language, without more clearly defining such intent. In this context, the statutes can be reasonable read only one way: for a *timber trespass* case such as this one, damages are awardable under and governed by RCW 64.12.030, and are thus specifically *barred* from falling under the more general land damages statute RCW 4.24.630 by way of subsection (2) of that statute.

In its determination that RCW 4.24.630(1) controlled the outcome of this action, the Gunn trial court disregarded the application of the exemption provision expressed in RCW 4.24.630(2) on the basis of statutory construction and perceived interpretation of the interplay of the two statutes at issue in this case, such as the artificial bright-line as to whether the trees cut were valuable or of negligible value.

The Rileys respectfully suggest that no interplay exists between RCW 4.24.630 and RCW 64.12.030 under the facts of this case because the act that caused the loss to the plaintiff was the cutting of trees on his land. Here, the only evidence presented in the case was the damage to Mr. Gunn's trees along the grassy path. There was no other evidence of damage to his property; no damage to fences, structures or other improvements on the land. The trial court's application of RCW 4.24.630 should be reversed.

D. Whether the Defendants had an implied easement from a common grantor across the land of the Plaintiff such that maintenance of the easement would have been permissible under RCW 64.12.040?

The Rileys' set forth two affirmative defenses in their answer to the Plaintiff's complaints that they had an underlying legal right to enter onto private property as thus:

"In the event that the Plaintiff establishes trespass on the part of the Defendants, such trespass was casual or involuntary and not willful or reckless, and/or was done with probable cause to believe that defendant's had an interest in the area of the disputed property as envisioned pursuant to RCW 64.12.040 based upon covenants and easements affecting the burdened property...(CP-157; CP-141)

"Defendants have certain easement rights for ingress and egress and obligations for maintenance and of a dirt road and a well in proximity of where Plaintiff claims a trespass occurred. Said trespass, if it occurred, was inadvertent and de minimus" ...(CP-157; CP-141)

Unfortunately, trial court had granted Gunn's motion in limine to exclude evidence of such an easement for use of the grassy path. (RP p. 11, ln. 7-17) The trial court assumed that the Rielys were trespassers without any right to use of the grassy path. (CP-19). When evidentiary decisions are made pursuant to motions in limine, the losing party is deemed to have a standing objection where the trial court has made a final

ruling on the motion. *State v. Powell*, 126 Wn. 2d 244, 256, 893 P. 2d 615 (1995).

In their affirmative defenses and as set forth in their trial memorandum, the Rileys claimed that the evidence would establish that they possessed an implied easement for the use of the grassy path. (CP-117). Prior to the purchase of Parcel No. 2, Sisson (common grantor) walked the property with Riley and showed him the lines and corners. (RP p. 149, 6-17). Furthermore, Sisson told him about being able to use that road to eventually construct their home up on the top of the hill of Parcel No. 2. Thus the Rileys would have both a mountain and water view. (RP p. 166, ll. 14-25; RP p. 167 ll., 1-4). Terry Riely used to hunt the property with Andy Sponberg over 40 years earlier and knew the logging road had been in existence for quite a long period of time. (RP p. 167, ln. 15-25; RP p. 168, ln. 1-25).

Terry Riely testified that he use the grassy path several times per year. The use was heavier in the summer months following the planting of trees on their property. The trees were required to be watered three times a week before the irrigation system was constructed to provide water to the trees on the upper slopes. (RP p. 173, ln. 19-25; RP p. 174, ln. 1-6).

In cross-examination testimony, Gunn admitted that Mr. Riely was consistent in his assertion that they always had a right of use of the grassy path. (RP p. 185, ll. 24-25; RP p. 186, ll. 1-2).

The old road (the "grassy path") was in existence prior to Sisson and Goralski purchasing the property. (RP p. 151, ll. 11-21). Sisson testified that the format of the Storm King subdivision was to give each property owner a good view. (RP p. 152, ln. 17-19). The grassy path led to the area upon which to access the best view for the Riely property to build a house. (RP p. 152, ll. 3-22; RP p. 153, ll. 21-25; RP p. 154, ll. 1-7).

Sisson further stated that it was always the developers intention of the Storm King Subdivision that the purchasers of Parcels 2 and 3 would have access to their property from the grassy path. (RP p. 153, ln. 21-25; RP p. 154, ln. 1-7). He testified that use of the grassy path was supposed to be written up that the parcel owners shared that road. (RP p. 154, ln. 13-20) He further testified he later discovered that his attorney who had drafted the easements and maintenance agreements had written the use up for Parcel No. 3 (purchased by the Treerises) but had omitted it for Parcel No. 2 (purchased by the Rielys). Sisson characterized the omission stating that "someone had dropped the ball" implying that his attorney apparently forgot to put the easement language in Gunn's deed. Sisson never caught the omission prior to the sale. (RP p. 154, ln. 6-21; RP p. 157, ln. 16-21;

RP p. 158, ln. 3-8). Sisson was not aware of the omission until approximately four years earlier (from the trial date) when Gunn and Riely were having confrontations over the use of the grassy path. (RP p. 154, ll. 21-25). However, in discussing the issue, Sisson testified that he believed he communicated with Gunn about the right of the Rielys to use the grassy path. (RP p. 156, ll. 3-16).

Under an implied easement, authorization is provided under the common law to maintain the easement. For instance, see "Maintenance and Repairs" (25 Am. Jur. 2d Easements and Licenses p. 580-581. Sec. 82 Generally:

"It is not only the right, but the duty, of the owner of an easement to keep it in repair. The owner of the servient tenement ordinarily is under no duty to maintain or repair it, in the absence of an agreement imposing such a duty....The easement owner is not bound to repair and maintain the easement for the benefit of the servient owner, and he or she make the easement as usable as possible for the purpose of the right owned, so long as the owner of the easement does not increase the burden on the servient estate or unreasonably interfere with the rights of the owner thereof."

Sec. 83 Right of Access to make repairs or improvements; Secondary Easements pp. 581-582

"In order that the owner of an easement may perform the duty of keeping it in repair, he or she has the right to enter the servient estate at all reasonable times to effect the necessary repairs and maintenance. In addition, the owner of an easement may have the right to construct improvements necessary for enjoyment of the easement.

Such a right is an incident of the easement, and is sometimes called a "secondary easement." Secondary easements can be exercised only when necessary, and in such a reasonable manner as to not increase

needlessly the burden on, or go beyond the boundaries of, the servient estate. Moreover, the easement owner may not inflict any unnecessary injury to the servient estate and is under a continuing obligation to avoid inflicting such injury."

The Rileys would assert they had an implied the right to cut overgrowth on the grassy path to preserve it as a way of ingress and egress to Parcel No. 2. For instance, *Hughes v. Boyer*, 5 Wn. 2d 81, 90, 104 P.2d 760 (1940) held that the owners of the dominant tenement had the right to regrade an easement across the land of the owners of a servient tenement without any express grant from the owners of the servient tenement. In *Dreger v. Sullivan*, 46 Wn. 2d 36, 278 P. 2d 647 (1955), the court held that the owner of an easement by implied grant has the burden of making any necessary improvements to the way. In that action the court also stated:

> "An implied easement (either by grant or reservation) may arise (1) where there has been unity of title and subsequent separation; (2) when there has been apparent and continuous quasi easement existing for the benefit of one part of the estate to the determent of the other during the unity of title; and (3) when there is a certain degree of necessity that the quasi easement exist after severance." Id. 46 Wn. 2d at 38.

The case of *Longmire v. Yelm Irr. Dist.*, 114 Wash. 619, 195 P. 1014 (1921) held that ditch owners are bound to exercise only ordinary care in the maintenance of their ditches. The ditch owners had a right and duty to enter lands to conduct maintenance and effect repairs.

Therefore, even in the absence of a specific grant of easement, the Rileys' had a common law right to use the entire "grassy path" through Gunn

property to reach their land as obtained from the right of use by their common-grantor (the Sisson/Goralski group). (RP 123, ln. 20-25; RP p. 124, ln. 1-13; CP-5; CP-6; CP-10, CP-11).

An easement by implication may be deemed to arise from a former use only where the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, the use has been so long continued and so obvious as to show that it was meant to be permanent, and the easement is necessary for the proper and reasonable enjoyment of the dominant tract. 25 Am. Jur. 2d "Easements and Licenses" page 521.

It was held in Evich v. Kovacevich, 33 Wn. 2d 151, 156-158, 204 P. 2d 839 (1949):

> "Easements by implication arise where property has been held in a unified title, and during the such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, has been in use and is reasonable necessary for the fair enjoyment of the portion benefited by such use. The rule, then, is, that upon such severance, there arises, by implication of law, a grant of the right to continue such use....
>
> The essentials to the creation of an easement by implication are, as variously stated by this court, the following: (1) a former unity of title, during which time the right of permanent user was, by obvious and manifest use, impressed upon one part of the estate in favor of another part; (2) a separation by a grant of the dominant tenement; and (3) a reasonable necessity for the easement in order to secure and maintain the quiet enjoyment of the dominant estate.

> ...the prevailing rule is that the creation of such easement does not require an absolute necessity, but only a reasonable necessity....This court has heretofore declared such to be the majority rule and has aligned itself with it.....the majority rule is that the necessity need not be a strict necessity but need only be a reasonable necessity, and that degree of necessity is sufficient which merely renders the easement essential to the convenient or comfortable enjoyment of the property as it existed when the severance took place.....It is sufficient if full enjoyment of the property cannot be had without the easement, or if it materially adds to the value of the land.

Prior to buying Parcel 1, Gunn admitted that he had walked or drove through the property with Joel Sisson. They came to the grassy path but did not drive down it. (RP p. 121, ll. 8-18). At trial, Gunn admitted that he observed the grassy path and saw that it lead down from Parcel 1 to Parcels 2 and 3. He stated that he did not ask Joel Sisson how long the grassy path had been in existence before his purchase of property. Gunn further testified that he was not interested in what the grassy path was used for. (RP p. 122, ll. 1-22, RP p. 123, ll. 3-4). Gunn knew of the existence of the grassy path and made no objection to its use by the Rileys until 2007. (CP-19; CP-Exhibit 12).

The elements of unity and title and subsequent separation are evident from the photographic exhibits and testimony in the case at hand. The degree of reasonable necessity, however, is much less strict than implied easement by necessity cases. See *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948). In *Bushy*, the court found that use of an

existing driveway only had to be, "necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made.

"It is sufficient if full enjoyment of the property cannot be had without the easement, or if it materially adds to the value of the land. It has been contended that the use of the word "necessary" in these cases is misleading; that the so-called "necessity" upon which the judges rely is in fact no necessity at all, but a mere beneficial and valuable convenience. Certainly such use of the word must be distinguished from the cases in which it is implied in designing ways of necessity. Some courts have adopted as the test, whether the easement is one for which a substitute can be furnished by reasonable labor and expense, while others adopt the rule that the presence of no degree of necessity is requisite in order that the easement shall pass, that if an apparent and continuous quasi-easement forms a part of the tenement conveyed, and add to the value of the use, it becomes an easement and passes with the conveyance." *Bushy, supra*, p. 270.

The court in that case found an implied easement from prior use even though the party opposing the use of this property indicated that a new driveway could be built at a reasonable cost by the claimant. The fact that the claimant would have to destroy some of her landscaping, would damage the appearance of her home and would be an undue financial burden on a person of modest income, all contributed to the financial determination.

Having to construct a new road parallel to the existing road would be a significant expense to the Rielys, be wasteful and create additional water drainage onto Defendant's remaining property. Joel Sisson testified

that when he built another road to Parcel No. 8 of the Storm King Large Lot Subdivision, the cost exceeded $9,400. (RP p. 163, ln. 4-19).

This court should conclude that the trial court order granting the Plaintiff's motion in limine was erroneous. The testimony in the trial has shown each of the elements necessary to establish an easement by implication. The trial court should have found that the Gunn's property was burdened with an easement by implication as established by a common grantor.

Furthermore, had a finding of fact been made in that regard, then the Riley's may have prevailed on their affirmative defenses that their easement gave them certain rights over the property of Mr. Gunn. If so, on the basis of the implied easement and under RCW 64.12.040, it could be reasonably argued that they had probable cause to believe that they had the right to the use and maintenance of the grassy path and such right of use could be delegated to Oasis Well Drilling. Therefore, if Oasis Well Drilling cut down trees to provide for clearer access on the grassy path, then judgment could have been single damages of the value of the trees at $153, rather than trebled. RCW 64.12.040.

E. The trial court erred in ruling that the defendant had waived the affirmative defense of non-party fault under CR 12(1). One who contracts with an independent contractor for the

performance of work generally is not liable for the trespass caused by the independent contractor.

At trial, Gunn's attorney raised a motion in limine/motion to strike the affirmative defense of non-party fault of a person who may have been liable for plaintiff's damages.(RP p. 5 ln. 23-25; RP p. 6 ln. 1-25; RP p. 7, ln. 1-22) The motion was based on CR 12(i), which states:

> When ever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a non-party is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

In this case, the Keith Winters of Oasis Well Digging and an unknown employee cut down alder trees along the grassy way while they were moving their equipment to the well-head on the Riley property. The name, address and contact information had been previously provided to the Gunn's attorney in the Defendant's Answers Plaintiff's First Set and Second Set of Interrogatories and Requests for Production. (RP p. 8 ln. 2-25; RP p. 9, 1-25; CP-Ex.1).

Interrogatory No. 6 propounded by the Plaintiff asked:

> "Have you taken any action to install a well or well head on your real property referred to in interrogatory number 3 above, that is within 50 feet of plaintiff's property? ____Yes _____No. If you answer to this interrogatory is yes, please state the following:

a. The actions you took to install each well or well head:

b. The dates upon which you took such actions.

Answer: I have not measured the distance to the Plaintiff's boundary line following installation of our well.

a. The well was installed by Oasis Well Drilling, 231 Craig Rd., Sequim, WA 98382, 360-683-4773. This well provides water service to our residence and tree farm; however, we also have a joint well agreement on a well that is located on Robert Gunn's property.

   Keith Winter
   Lic. #1979
   State Contractor # OASISWD980DN

b. June 20, 2009.....

Interrogatory No. 15 propounded by the Plaintiff asked:

"Have you or anybody you are aware of other than the Plaintiff, gone on to the land of the Plaintiff and removed timber, crops, minerals or other similar valuable property from the land, or caused waste or injury to the land, or injured personal property or improvements to the real property of the land?"

Answer: Without waiving said objections, the brush and one 3" diameter fir tree were removed however– property was on our land. At the time of the construction of the well, brush was removed to level the area. Keith Winters and an unknown assistant are believed to have removed the brush. This was prior to a subsequent survey conducted by Mr. Gunn for which he bases his current complaints.

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Plaintiff's Second Set of Interrogatories And Requests for Production For Terry Riley:

Interrogatory 14: Have you requested or obtained the assistance of anyone in entering upon or conducting any activity in or on the plaintiff's property?

The following answer was provided on December 22, 2010:

Answer: Yes, we had contacted Keith Winter of Oasis Well Drilling to move the well drilling equipment on the access road to the well-head area on our property. The access road is believed traverse through Gunn property and terminate on our property.

a. Keith Winter
Oasis Well Drilling (360) 683-4773
231 Craig Road
Sequim, WA. 98382

Clallam County Sheriff's Office---I believe my wife requested stand-by assistance to bring well drilling equipment to our property. I do not know about any follow-up.

Joel Sisson---spoke to him about the right to use the access road.

b. Around June through July of 2009
c. To move the well drilling equipment from the access road to the well-head area on our property.
d. Oasis Well Drilling moved their equipment on the access road to our property.
e. The road and well-head may be illustrated in the Gunn Survey completed by Jim Wengler.

In *Ventoza v. Anderson*, 14 Wn. App. 882, 895-896, 545 P. 2d 1219 (1976), a classic timber trespass case, the court held that one who engages an independent contractor to perform logging operations is not liable to the adjacent landowners for the trespasses of the independent contractor or those employed by the independent contractor, whether as agents or independent contractors themselves, unless the trespass is the result of the advice or direction of the principal, or unless the principal has notice of the trespass and fails to intervene. CR 8(c) is satisfied when the

affirmative defense is raised for the first time in response to the amended complaint. Following the amended complaint, the timeliness of the response is governed by CR 14(a), not CR 12. *Cellular Engineering, Ltd. v. O'Neill*, 118 Wn. 2d 16, 820 P. 2d 941 (1991).

Although the grant or denial of leave to amend a complaint to add a claim or a party is within the trial court's discretion, outright refusal to leave without any justifying reason is not an exercise of discretion, it is an abuse of that discretion. *Watson v. Emard*, 165 Wn. App. 691, 267 P. 3d 1048 (2011). Therefore, the same should apply to an affirmative defense where the information was disclosed in answers to interrogatories several years prior to trial. The appellate court should find that granting the motion in limine to strike the affirmative defense of non-party fault was an abuse of discretion in this matter. See *Rodiguez v. Loudeye Corp.* 144 Wn. App. 709, 728-29, 189 P. 3d 168 (2008) (citing *Tagliani v. Colwell*, 10 Wn. App. 227, 233, 517 P. 2d 207 (1973).

Because Gunn had these answers to interrogatories and a copy of the well drilling contract before he amended is complaint, it is improbable that Riley's affirmative defense misled Gunn into thinking that Riley was asserting that some other entity was at fault. When operative facts are not in dispute, the determination of whether a defense has been waived

presents a question of law that the appellate courts review de novo. *King v. Snohomish County*, 146 Wn. 2d 420, 423-24, 47 P. 3d 563 (2002).

CR8(c) is intended to prevent unfair surprise and to allow the plaintiff time to prepare for trial. The rule is not intended to be interpreted in a rigid and technical way. *Mahoney v. Tingley*, 85 Wn. 2d 95, 100, 529 P. 2d 1068 (1975). The defense of non-party fault was pled as an affirmative defense, the only issue was whether the failure to identify Oasis Well Drilling in the amended answer constituted waiver. In this case it is not reasonable to assume that the answer misled Gunn's attorney into thinking that Riley was asserting some other entity was at fault. Gunn was not unfairly surprised.

Petra Riley was not present when the cutting took place and did not personally participate in the alleged trespass. She testified that she did not even request or direct that such tree cutting activity be undertaken or done. (RP p. 130, ln. 10-23; RP p. 132 ln. 6-9).

For unknown reasons, the Plaintiff never joined in Oasis Well Drilling as a party defendant in the action for timber trespass despite previous knowledge of the identity of that entity.

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E. If RCW 4.24.630 is inapplicable, then the trial court improperly awarded costs and attorneys' fees to the Plaintiff on the basis of that statute. If allowable damages are reduced, Plaintiff did not comply with RCW 4.84.250 in order to obtain an attorney fee award. If the Defendant is deemed the prevailing party under RCW 4.84.270, then they should be granted reasonable attorneys' fees as the prevailing party at trial and on appeal.

Two and one-half years from filing his complaint through a Motion for Order Shortening Time, the Plaintiff moved to amend his complaint.(CP-152). The amendment related to an allegation in the prayer for relief that stated his damages were $10,000 or less. The court allowed the amendment two days later on the Friday, April 26, 2013 calendar. (CP-152). At that time, the trial date was set to commence on May 6, 2013, approximately 10 days from the Plaintiff's amendment of his pleading.

Presumably, the plaintiff was attempting to come within the requirements of RCW 4.84.250 in order to put the defendant on notice of a small claim. However, Gunn did not make an offer of settlement as defined by the statute. See *Smukalla v. Barth*, 73 Wn. App. 240 (1994). In the case at hand, the Defendant Rielys did not know the amount that the Plaintiff had requested for damages. The case of *Lay v. Hass*, 112 Wn. App. 818, 823, 51 P. 3d 130 (2002) has held that the Plaintiff must mention the amount of damages and RCW 4.84.250 to obtain sufficient notice. Without an offer of settlement submitted by the Plaintiff, the litigation has not been avoidable because the defendant has not known

what was demanded of it by way of damages on the assumption it would be easier and less costly to settle than go forward with the defense of the action.

Additionally, until the Gunn's last minute dismissal of various causes of action for injunctive relief against the installation of the well, considerable time and effort was spent by the Defendants on that aspect of the case to establish that Gunn had no claim under statutes, WACs or Clallam County Code provisions. (CP-139; CP-117).

In the amended complaint, the Plaintiff did not plead any specific amount of damages, nor did he cite the statute upon which he was referring or state any specific amount of damages sought in the action. (CP-146). Those actions are required by the holding of *Lay v. Hass*, 112 Wn. App. 818, 51 P. 3d 130 (2002). In *Hass*, the plaintiff submitted to the defendants a settlement offer, but it was rejected by the defendants.

The case at the bar is a timber trespass action and therefore there was no prohibition to plead specific damages (which Gunn has not done in any event). Furthermore, Gunn did not submit an Offer of Settlement at any time in advance of trial to comply with RCW 4.84.250. Without such settlement offer, the defendants had nothing to reply regarding the damage amount and therefore cannot be said to have rejected an offer based on RCW 4.84.250.

At the time he filed his complaint in 2009, RCW 4.84.250 provided:

> Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages *where the amount pleaded by the prevailing party* as hereinafter defined, exclusive of costs, is .....ten thousand dollars or less....

The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims actions. *Beckman v. Spokane Transit, 107 Wn. 2d 785; 788; 733 P. 2d 960 (1987).*

Gunn never made any monetary demand in compliance with RCW 4.84.250. Several weeks prior to trial, Gunn amended his complaint to allege that his damages were under $10,000 in conformance to RCW 4.84.250. The Rileys (defendants) had asserted RCW 4.84.250 in both their original and amended answer and affirmative defenses. (CP 141; CP-157). More than ten days in advance of trial, Defendant's attorney submitted by mail to the Plaintiff's attorney an offer of settlement meeting the requirements of RCW 4.84.250. (CP 13; CP-11) Gunn elected to proceed to trial.

If the appellate court finds that RCW 64.12.030 controls this action, then it is possible that the Plaintiff's recovery, excluding costs,

would be less than the Rielys' offer of settlement submitted in this matter. (CP-13).

RCW 4.84.250 allows the pre-trial offer of settlement where the sum pleaded is less than $10,000. Plaintiff has alleged that his claim is under $10,000 and in fact on April 26, 2013 filed a motion to allege his claim was under $10,000 and arose from a timber trespass. (CP-144; CP-152). The value of the trees cut was stipulated to be the sum of $153.00 (subsequently trebled to $459.00). (CP-19).

RCW 4.84.250 provides that in any action for damages where the amount pleaded is by the prevailing party is $10,000 or less, a reasonable attorney fee shall be taxed as a part of costs to the prevailing party. The term *"prevailing party"* is not used in the usual sense. Under the statute, the plaintiff is the prevailing party only if the plaintiff's recovery, exclusive of costs, is as much or more than the amount offered in settlement by the plaintiff. RCW 4.84.260. The defendant is the prevailing party if the recovery is as much as or less than the amount offered in settlement by the defendant. RCW 4.84.270. A statutory offer of settlement must not be communicated to the trier of fact until after the final judgment is reduced to writing and entered. If the offer is communicated to the trier of fact prematurely, attorney fees may not be awarded. *Hanson v. Estell*, 100 Wn. App. 281, 997 P. 2d 426 (2000).

In the event of a reversal of this action, the Defendant should be entitled to an award of reasonable attorney's fees both at trial and for the proceedings before the Court of Appeals court under RAP 18.1 and RCW 4.84.250 if on re-computation of his damages, the Plaintiff recovers anything less than amount offered by the Rileys to settle the claim. (CP-13). Any award of costs should also be reduced to the Plaintiff upon reversal based upon the Offer of Judgment submitted pursuant to CR 68. (See CP-11).

VI. CONCLUSION

The trial court in this case misapplied the statutory law governing timber trespass cases when it applied RCW 4.24.630. RCW 64.12.030 provided liability for the claims at issue, and RCW 4.24.630(2) specifically precludes use of that broader statute when the more specific timber trespass statute, RCW 64.12.030 applied. Thus the award of damages for restoration/mitigation and surveying costs were not authorized and specifically precluded by Washington statutory and case law. Furthermore, by utilizing RCW 4.24.630, the trial court erred in awarding attorneys fees and other litigation costs, which were not available under RCW 64.12.030. The trial court further erred in finding that the Rileys did not have an easement. Defendants had an implied

easement from a common grantor, which under the common law gave them a right of maintenance to cut alders along the grassy path to clear the area for vehicle movement or their use at any reasonable times. As such, their actions could not have been wrongful and therefore not subject to trebling of damages under RCW 64.12.030 as RCW 64.12.040 should have also been considered. The Court should also reverse any judgment quieting title to the Plaintiff should an implied easement in favor of the Rielys be devolved to them from the common grantor.

Defendants request that the Court find that RCW 64.12.030 or RCW 64.12.040 applies, and that Plaintiff's relief be thus limited to the actual damages to the vegetation as determined by the trial court. At most, Plaintiff is entitled to a treble award of those damages, but is not allowed to recover the other damage amounts of restoration/mitigation or surveying. Defendant also requests that the Court reverse the determination of attorneys' fees and litigation costs, as damages not available under the governing statute, RCW 64.12.030.

Finally, the Rileys' request that if the Plaintiff's allowable damages are below the amount offered by the Rileys in settlement pursuant to RCW 4.84.250; RCW 4.84.260 and/or CR 68, that the costs and attorneys fees be denied the Plaintiff and that the Rileys be deemed

the prevailing party and entitled to an award of attorneys fees and costs at trial and on appeal pursuant to the authority of RAP 18.1.

Respectfully submitted this 31st day of December 2013.

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

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Attorney for Appellants Riley

COURT OF APPEALS DIVISION II, STATE OF WASHINGTON

ROBERT GUNN, a single man, Respondent, v. TERRY L. RIELY and PETRA E. RIELY, husband and wife, Appellants.	NO. 45177-8-II PROOF OF SERVICE

I hereby certify that on the 31st day of December, 2013, I served the foregoing ***Appellate Brief (Riley)*** and ***Proof of Service*** on the following persons/parties, at the following addresses, by the following means:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of December, 2013, at Port Angeles, Washington

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