Supreme Court No. 96214-6

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JERRY PORTER and KAREN ZIMMER

Appellants,

v.

PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL

Respondents

TREATED AS A PETITION FOR REVIEW

PEPPER E. KIRKENDOLL'S MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER/CITATION TO COURT OF APPEALS DECISION

Pepper E. Kirkendoll (hereinafter "Kirkendoll"), Defendant and Respondent below, files this Petition for Discretionary Review asking the Supreme Court to review the Court of Appeals' published decision, *Jerry Porter, et ux., et al., v. Pepper E. Kirkendoll, et ux., et al.*, Court of Appeals Cause No. 49819-7-II (published decision issued July 17, 2018).

II. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals decision below conflicts with *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 669, 626 P.2d 30 (1981), *Ventoza v. Anderson*, 14 Wn. App. 882, 545 P.2d 1219 (1976) and other cases which hold that a principal is liable based upon respondeat superior for a timber trespass committed by his agent if the hiring party directed the agent to commit the trespass?

B. Whether the Court of Appeals decision below conflicts with *Vanderpool v. Grange Ins. Ass'n,* 110 Wn.2d 483, 756 P.2d 111 (1998), *Glover for Cobb v. Tacoma Gen. Hosp.,* 98 Wn.2d 708, 658 P.2d 1230 (1983) and other cases which hold that a principal is released by operation of law as a result of a release of the agent if that agent is solvent?

C. Whether the Court of Appeals decision below conflicts with *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 117, 330 P.3d 190 (2014), *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 110 P.3d 1145 (2005) and other cases which hold that a litigant may not seek equitable indemnity under the ABC Rule where that litigant's actions had a close nexus to the subject matter of the original litigation?

III. STATEMENT OF THE CASE

This litigation arose from the March 18, 2014 accidental cutting of 51 Douglas Firs. Kirkendoll, the defendant below, owns a parcel of unoccupied Designated Forest Land in rural Lewis County, Washington described as Lot 13 of Segregation Survey recorded under Auditor's File No. 3103393. (CP 289, 299) Jerry Porter and Karen Zimmer, the plaintiffs below (collectively referred to as "Porter") own the adjacent forested Lot 12 of the same Segregation survey.

The Porter and Kirkendoll properties share an express 60 foot wide access easement over a private road called Madison Drive. (CP 289, 307) The east boundary of Kirkendoll's Lot 13 is the west easement line. (CP 313) Based on an old survey and his observation of survey monuments over the years, Kirkendoll assumed that he owned to the west shoulder of the as-built Madison Drive. (CP 48, 305)

On March 18, 2014, Kirkendoll hired G & J Logging ("G & J") to log Lot 13. Kyle Peters ("Peters") is the owner of G & J. G & J and Peters are referred to below as the "G & J defendants." G & J subcontracted the tree cutting to Boone's Mechanical Cutting, Inc., owned by Daniel "Boone" Sheets and Jennifer Sheets. (CP 94) The subcontractor defendants are collectively referred to below as the "Boone Defendants."

The G & J Defendants and the Boone Defendants are collectively referred to below as the "Loggers."

Before directing the Loggers where to cut on March 20, 2014, Kirkendoll and Peters walked the property. Peters downloaded and reviewed aerial photos before walking the property with Kirkendoll. They found a survey stake along Madison Drive and stakes on two interior corners. (CP 183-87) Kirkendoll told Peters that he owned all of the timber to the west of Madison Drive. Peters did not see anything on the ground that would cause him to doubt such representations (CP 188).

Kirkendoll did not realize that the as-built roadway meanders within the 60' wide recorded easement and that his ownership ends approximately 10' to the southeast of the as-built roadway. Therefore, when the Loggers clear-cut Kirkendoll's trees up to the shoulder of the as-built Madison Drive, they cut 51 trees located on Porter's fee title (CP 139, 188, 332)

Porter sued Kirkendoll and the Loggers, alleging that "defendants then, acting in concert for their joint benefit," converted Porter's trees. The Amended Complaint seeks one award of damages jointly and severally against all Defendants based upon the timber trespass statute, RCW 64.12.030 and the waste statute, RCW 4.24.630. (CP 1-3)

The G & J defendants and the Boone defendants pled fault of other parties as affirmative defenses and also filed crossclaims against all co-defendants for indemnity and contribution. (CP 104-09, 110-15)

On October 19, 2016, Porter settled with and released the Boone Defendants and the G & J Defendants pursuant to identical CR 2A Settlement Agreements, in exchange for payment of a collective $125,000.00, with assignments to Porter of "[a]ll claims and causes of action the settling defendants have against defendants [Kirkendoll]." (CP 65, 67)

Porter filed a motion seeking partial summary judgment that Kirkendoll was liable for equitable indemnity, and also that the waste statute applied. (CP 27) Kirkendoll filed a counter motion requesting summary judgment dismissing Porter's remaining claims on the bases that: (1) the timber trespass statute, not the waste statute controlled; (2) the Loggers had no indemnity rights to assign because their settlement did not comply with RCW 4.22.060 and other parts of the Tort Reform Act (TRA); and (3) Porters' settlement with and release of the Loggers extinguished the timber trespass claims against Kirkendoll based upon the law of agency. (CP 81) Kirkendoll also filed a motion to exclude Porter's untimely disclosed rebuttal expert, Galen Wright.

On December 8, 2016 the Trial Court, Hon. Nelson Hunt, entered

an Order Granting Counter Motion of Defendants Kirkendoll for Summary Judgment, dismissing all Porter's remaining claims against Kirkendoll. The Court also granted Kirkendoll's motion to exclude Galen Wright. (CP 205)

Porter appealed the dismissal of Porter's claims for waste, timber trespass, equitable indemnity and contribution, as well as the exclusion of his rebuttal expert. The Court of Appeals upheld the dismissal of Porter's waste and contribution claims; reversed the dismissal of Porter's timber trespass and equitable indemnity claims; and held that the Superior Court had abused its discretion in excluding Mr. Wright's testimony.

Kirkendoll respectfully requests that this Court accept review of the Courts of Appeals' reversal of the Trial Court's dismissal of (1) Porter's timber trespass claims and (2) Porter's equitable indemnity claims on the basis that the decision conflicts with prior decisions of this Court as well as prior decisions of the Court of Appeals.

IV. ARGUMENT

A. The Court of Appeals opinion conflicts with Washington cases holding that an agency relationship exists between one who hires a logger on and the logger, where the hiring party directs the logger to commit a timber trespass.

The Court of Appeals premised its reversal of dismissal of Porter's timber trespass and equitable indemnity claims on the theory that since

Porter would have had a cause of action against Kirkendoll independent of the Loggers, the Loggers were not his agents. This holding ignores the fact that all defendants were sued jointly and severally for the same trespass. The holding conflicts with *Ventoza v. Anderson*, 14 Wn. App. 882, 545 P.2d 1219 (1976), *aff'd* 92 Wn.2d 869, 602 P.2d 357 (1979), which holds that one is not responsible for the timber trespass of an independent contractor "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 interfere. *Ventoza*, 114 Wn. App. at 894-95.

The essential elements of an agency relationship are control and consent. *Yong Tao v. Heng Bin Li.*, 140 Wn. App. 825, 831, 166 P.3d 1263 (2007); *O'Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004). The Court of Appeals incorrectly interprets *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 669, 626 P.2d 30 (1981) to hold that an agency relationship did not exist between Kirkendoll and the Loggers because Kirkendoll did not have the right to control the *manner* in which the trees were to be cut. This reading of the case misses the critical element of "control," the *selection* of which trees to cut.

In *Bloedel*, the trial court awarded damages in favor of an adjoining property owner (Bloedel) against a timber purchaser Timber Industries, Inc. (referred to below as "TI") which had contracted with M &

M Logging, a timber contractor, pursuant to a logging contract specifying that the loggers were independent contractors. *Id.*, 28 Wn. App. at 673-74. TI's field agent, who was assigned the task of supervising the loggers, failed to advise the loggers of the correct boundary lines, causing the loggers to mistakenly cut several trees on Bloedel's adjoining parcel. *Id.*, at 672-73. The trial court awarded treble damages for timber trespass jointly and severally against both TI and M & M based upon agency. TI appealed, claiming that M&M Logging had committed the timber trespass as an independent contractor rather than as its agent. *Id.*, 28 Wn. App. at 673.

The Court of Appeals rejected this argument and affirmed the trial court's finding that the loggers were the agents of TI because TI retained the right to control which trees were being cut due to the presence of TI's field supervisor on the job:

> The crucial factor is the right of control which must exist to prove agency. . . . [C]ontrol establishes agency only if the principal controls the manner of performance, in this case the actual cutting.

Id., at 674. Clearly the *Bloedel* Court was referring to the selection of trees to cut, not the selection of cutting methods or which tools to use. As in Kirkendoll's case, the only material aspect of the "actual cutting" was the *location* of the cutting. In summary, *Bloedel* is authority for Kirkendoll's position, not Porter's. Kirkendoll exclusively controlled the

selection of which trees the Loggers were to cut, rendering all of the other potential indices of control (*e.g.*, details as to which tools and equipment to use, etc.) immaterial. In summary, the Court of Appeals misapplied *Bloedel* in holding that no agency relationship existed between Kirkendoll and the Loggers.

B. The Court of Appeals decision below is inconsistent with Washington case law mandating that Porter's settlement with and release of a solvent agent (the Loggers) extinguished the remaining timber trespass claims against the principal (Kirkendoll) as a matter of law.

Citing *Vanderpool v. Grange Ins. Ass'n,* 110 Wn.2d 483, 487, 756 P.2d 111 (1998), the Court of Appeals acknowledges that a principal is released by operation of law as a result of a release of the agent if that agent is solvent. Yet the Court concludes paradoxically that release of the Loggers *did not* extinguish Porter's remaining timber trespass claims against Kirkendoll, because Porter had a cause of action against Kirkendoll individually for the timber trespass. The failure of this analysis is that it does not consider the nature of the timber trespass tort both as pled in Porter's Amended Complaint and in reality, which amounts to an indivisible harm (loss of 51 trees) caused by concerted action by jointly and severally liable defendants, giving rise to a single recovery of damages. Kirkendoll exercised exclusive control and direction over which trees the Loggers were to cut. Therefore, Kirkendoll and the Loggers were

jointly and severally liable, and Porter could have collected 100% of his damages out of any one of the Defendants. One only need to pose a hypothetical in which a defendant in Kirkendolls' position had absconded from the jurisdiction or filed for bankruptcy. In such instance, Porter could sue the Loggers, or any of them, to collect 100% of his damages. However, Porter only gets one recovery. Therefore, his settlement with a solvent agent (the Loggers) extinguished his claims against the principal (Kirkendoll) as a matter of law because Porter is deemed to have been made whole.

The Court of Appeals incorrectly rejected Kirkendoll's respondeat superior arguments based upon *Glover v. Tacoma General Hosp,* 98 Wn.2d 708, 658 P.2d 1230 (1983)[1] on the basis that *Glover* Court relied upon the TRA, specifically RCW 4.22.040(1), which does not apply to timber trespass. However, the very basic agency principles explained by *Glover,* are grounded in pre-TRA common law and do *not* rely upon RCW 4.22 for their validity. In *Glover* the plaintiff asserted a claim for damages caused by negligent administration of anesthesia in Tacoma General Hospital by an anesthesiology resident/trainee, her supervising doctor and others. Plaintiff sued all defendants. Plaintiff brought two distinct claims against Tacoma General Hospital: (1) breach of "an independent duty to

[1] Superseded on other grounds by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

provide proper treatment," and (2) vicarious liability for the acts of the anesthesiologists. *Id.*, 989 Wn.2d at 712. The plaintiff settled with all defendants but the hospital for $575,000, which the trial court found reasonable based upon a reasonableness hearing. On appeal, this Court reversed the trial court's refusal to dismiss the vicarious liability claim and remanded the case for trial on the claim for breach of the "independent duty to provide proper treatment." 98 Wn.2d at 700.

This Court's discussion of joint and several liability in *Glover* is instructive with regard to Porter's claims. Citing *Seattle-First Nat. Bank v. Shoreline Concrete Co.,* 91 Wn.2d 230, 588 P.2d 1308 (1978) – which was not a TRA case - the Court noted that the joint and several liability doctrine allows the plaintiff to proceed against one or all joint tortfeasors to obtain a full recovery, emphasizing that "the cornerstone of tort law is the assurance of full compensation to the injured party."[2] This Court distinguished between *concurrent* tortfeasors versus *joint* tortfeasors:

> On settling with one of the number of joint tortfeasors, the plaintiff may evaluate the relative conduct of each and determine that her best interest are served by a partial settlement. In such an instance she might settle for less than the full amount of her damages. Various factors, such as the percentage of such joint tortfeasor's fault compared to the conduct of the non-settling defendant, may influence this decision. **In vicarious liability cases, on the other hand, the claim is based on the conduct of one individual and the liability is imposed as a matter of public policy to ensure**

[2] *Glover*, 98 Wn.2d at 722, citing *Shoreline Concrete*, 91 Wn.2d at 236.

that the plaintiff has the maximum opportunity to be fully compensated. When the plaintiff chooses to settle for less than the full amount, and that agent is solvent, the need to pursue the principal does not exist.[3]

Porter's theory of liability against Kirkendoll was not Kirkendoll's isolated breach of some independent duty, but rather the concerted breach of the same duty (violation of the timber trespass statute) by jointly and severally liable tortfeasors, with Porter's entitlement being to only a single recovery. Porter was entitled to collect all of his damages out of Kirkendoll, the Loggers, or both; but once he settled with the solvent agent, his right to pursue the principal on the same cause of action ceased to exist. The Court of Appeals erred in rejecting the *Glover* agency analysis, which state the controlling law, independent of the potential applicability of the TRA.

C. The Court of Appeals decision below conflicts with Washington cases holding that the actions of a party seeking equitable indemnity under the "ABC Rule" must be unconnected to the original litigation.

The Court of Appeals misapplied *LK Operating, LLC v. Collection Grp., LLC* 181 Wn.2d 177, 330 P.3d 190 (2014) in holding that the Loggers had a valid claim to assign to Porter for attorneys fees under the "ABC Rule." Washington courts follow the American rule in not awarding attorney fees absent a contract, statute, or recognized equitable

[3] *Glover*, 98 Wn.2d at 722-23. Emphasis added.

exception. *City of Seattle v. McCready*, 131 Wn.2d 266, 273, 931 P.2d 156 (1997). The recognized ground in equity that the Court of Appeals applied is the so-called ABC Rule, which has been stated as:

> (1) A wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event, viz., the wrongful act or omission or A toward B.

Woodley v. Benson & McLaughlin P.S., 79 Wn. App. 242, 246, 901 P.2d 1070 (1995). The fact that Porter sued the Loggers and Kirkendoll for joint and several liability involving an indivisible single recovery for harm negates any application of the ABC Rule to the instant case. If one were to apply the ABC Rule. A would be Kirkendoll; B would be the Loggers; and C would be Porter. Kirkendoll's wrongful act or omission toward the Loggers – *i.e.,* directing them to cut the wrong trees - would have to be the *sole* cause of litigation between the Loggers and Porter. As the *Woodley* court continued:

> Washington courts require an exceptionally close causal nexus between part B's [Loggers'] exposure to litigation and the wrongful act or omission by party A [Kirkendoll]. The required causal showing is greater than in an ordinary tort action. If party A's conduct us not the only cause of party B's involvement in the litigation, and particularly if party B's own conduct contributed to party B's exposure in litigation, an action under *Manning*[4] will not lie.

4 *Manning v. Loidhamer*, 13 Wn. App. 766, 538 P.2d 136 (1975)

Woodley, supra, at 247-48. (Emphasis added.) "[A] party may not recover attorney fees or costs of litigation under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are reasons why B became involved in litigation with C." *Jain v. J.P. Morgan Securities, Inc.*, 142 Wn. App. 574, 587, 177 P.3d 117 (2008). "The critical inquiry under the causation element of equitable indemnity is whether, apart from A's actions, B's own conduct caused it to be 'exposed' or 'involved' in litigation with C." *Jain*, 142 Wn. App. at 587. "[E]ven if it is possible to apportion attorneys' fees related to a particular claim, where there are additional reasons why the party seeking fees was sued, fees are not available under the theory of equitable indemnity." *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 361, 110 P.3d 1145 (2005).

Here, the Loggers' own actions got them involved in this litigation. Because the Loggers cut Porter's trees they are strictly liable under the timber trespass statute, RCW 64.12.030 which states:

> Whenever any person shall cut down, girdle or otherwise injure or carry off any tree, timber or straw from the land of another person... without lawful authority, in an action by such person... against the person committing such trespasses... if any judgment be given to the plaintiff, it shall be given for treble, the amount of damages claimed or assessed therefore, as the cause may be.

The Court of Appeals held in the instant case that every timber trespass is deemed intentional. The Loggers are automatically strictly liable for at least stumpage damages because of their own actions. If the Loggers can prove they did not act "willfully" they can avoid liability for treble damages per RCW 64.12.040, which provides:

> If upon trial of such action it shall appear that a trespass is causal or is voluntary, or that the defendant has probably cause to believe that land on which such trespass was committed was his own or that of the person whose service or by whose direction the act was done... judgment shall only be given for single damages

A finding of willful conduct requires proof of actual intent to trespass, or at a minimum reckless disregard as to the boundary location. See, e.g., *Erickson v. Chase*, 156 Wn. App. 151, 231 P.3d 1261 (2010). The Court of Appeals found that "[a] genuine issue remained as to whether the Loggers were without personal fault here and had become subject to tort liability for the wrongful conduct of Kirkendoll, entitling the Loggers to amounts paid to discharge that liability" and remanded the case for further factfinding. *Porter v. Kirkendoll*, 2018 Wash. App. LEXIS 1638, *16, 2018 WL 3432940. In summary, by no stretch of the evidence can it be said the Loggers are strangers to this litigation.

The Court of Appeals sidesteps the issue of the Loggers' direct involvement by positing that since Kirkendoll could be held individually liable to Porter by directing the timber trespass, Kirkendoll thereby

breached some independent duty to the Loggers. This analysis conflicts with *Woodley*, *Blueberry Place* and *Jain*, *supra*, as well as the case the Court of Appeals cites: this Court's decision in *LK Operating*, which is authority for Kirkendoll's position not Porter's. In *LK Operating,* attorneys Powers and Therrian represented a limited liability company (LKO), managed by a corporation (Powers & Therrian Enterprises, Inc.), of which Powers and Therrian were officers. *LK Operating,* 181 Wn.2d at 120. LKO entered into a verbal joint venture with law firm clients, Brian Fair and his limited liability company (TCG), to operate a collection agency. *Id.,* 181 Wn.2d at 120. Fair provided administrative services, Powers provided legal services, and each party was to own 50% of TGC. Fair proposed to Powers a written contract modifying the agreed 50/50 ownership structure of TCG to be based on each party's contributions up to that time. Powers objected on the basis that LKO and TCG were the parties to the agreement and she did not personally claim any interest TCG. *Id.,* at 121.

LKO sued Fair and TCG for a declaration of LKO's ownership interests, for breach of contract and for breach of fiduciary duty. Fair and TGC filed a separate lawsuit against the attorneys for malpractice, and the two actions were consolidated. *Id.* On cross motions for summary

judgment, the court granted rescission of the joint venture agreement, fully disposing of the merits of the contract action. *Id.* at 121-22.

In the malpractice action, the only compensatory damages asserted by Fair and TGC were the attorneys fees incurred in the contract action under the ABC rule. The court rejected this argument and dismissed the malpractice action. This Court affirmed, holding that by any construction of the facts, any claim to indemnity by TCG and Fair was barred because TCG and Fair were privy to all the events giving rise to the primary contract litigation. Thus, they could not satisfy the third prong of the ABC Rule, *i.e.*, that C [Fair and TCG] were unconnected to the wrongful act or omission of A [Powers] toward B [Fair and LKO].

In summary, in the instant case, the allegedly wrongful conduct on the part of Kirkendoll is alleged to be his incorrect designation of which trees to cut. For this to support an award of attorneys' fees under the "ABC Rule" the Plaintiffs would have to demonstrate that Pepper's action was the only basis on which they got sued. The fallacy of this argument is demonstrated by the fact that Porter sued all defendants jointly and severally, alleging a concerted timber trespass producing an indivisible harm.[5] In conclusion, the Loggers were not only parties to the original

[5] One only needs to consider a hypothetical situation in which Pepper Kirkendoll had disappeared or filed for bankruptcy. Porter would nevertheless have had independent

litigation but were integrally involved in the subject matter thereof. This negates any potential application of equitable indemnity under the ABC Rule.

V. CONCLUSION

The Loggers were Kirkendoll's agents for purposes of the harm caused. Porter's settlement with and release of the Loggers extinguished all Porter's further timber trespass claims against Kirkendoll under *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983).[6] The Trial Court appropriately dismissed the remainder of Porter's timber trespass claims against Kirkendoll as a matter of law. This is because by definition, such were based on respondeat superior. Given Porter's entitlement to only a single award of damages jointly and severally against multiple tort-feasors, Porter had no independent causes of action against Kirkendoll beyond timber trespass that could survive a basic agency analysis. Porter cannot avail himself of equitable indemnity because the Loggers' pretended assignment of their causes of action against Kirkendoll was a nullity. Porter's claim for attorneys' fees and costs under the "ABC Rule" theory of equitable indemnity fails both on Porter's own pleadings and on the evidence in the record. The Loggers were sued

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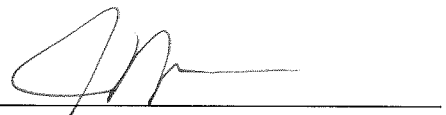
grounds for pursuing the Co-Defendants. This negates the potential applicability of the "ABC Rule".

[6] Superseded on other grounds by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

under the timber trespass statute for their own actions – not solely because of the actions of their Co-Defendant Pepper Kirkendoll. In conclusion, Kirkendoll respectfully urges this Court to accept review of the Court of Appeals decision below.

DATED this 14 day of August, 2018.

J. MICHAEL MORGAN, PLLC



J. Michael Morgan, WSBA No. 18404
Attorney for Pepper Kirkendoll

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and am competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below.

Mr. Jon E. Cushman Cushman Law Offices, P.S. 924 Capitol Way South Olympia, WA 98501 joncushman@cushmanlaw.com	☐ Via First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☒ Electronically via email ☐ Facsimile

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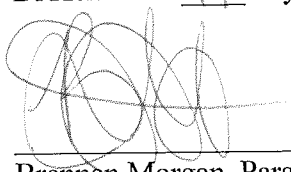
DATED this 14 day of August, 2018.



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VI. APPENDIX

Appendix A	Amended Complaint	CP 1-3
Appendix B	Order Granting Counter Motion of Defendant, Kirkendoll for Summary	CP 205-212
Appendix C	Order Denying Plaintiffs' Motion for Reconsideration	CP 213
Appendix D	Published Opinion: *Jerry Porter et ux. v. Pepper E. Kirkendoll, et ux. et al.,* Court of Appeals, Division Two, No. 49819-7-II, July 17, 2018	

APPENDIX A

SUPERIOR COURT OF WASHINGTON
FOR LEWIS COUNTY

JERRY PORTER and KAREN ZIMMER, husband and wife;

Plaintiffs,

v.

PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL, husband and wife; KYLE PETERS and ANDREA PETERS, husband and wife; G & J LOGGING, INC., a Washington corporation; MITCH PAYNE; JOHN BOGER; DANIEL SHEETS, a/k/a BOONE SHEETS, and JENNIFER SHEETS, husband and wife; BOONE'S MECHANICAL CUTTING, INC., a Washington Corporation; and JOHN DOES 1 - 5,

Defendants.

No. 14-2-00783-1

AMENDED COMPLAINT

COME NOW Plaintiffs, Jerry Porter and Karen Zimmer, through their attorneys, Jon E. Cushman and Kevin Hochhalter of Cushman Law Offices, P.S., and for their Complaint against Defendants, state as follows:

1. Plaintiffs Jerry Porter and Karen Zimmer are husband and wife and own property located in Lewis County, Washington.

2. Defendants Pepper E. Kirkendoll and Clarice N. Kirkendoll are husband and wife and residents of Lewis County, Washington.

3. Defendants Kyle Peters and Andrea Peters are residents of Lewis County, Washington.

4. Defendant G & J Logging, Inc., is a Washington corporation owned by Kyle and Andrea Peters with principal place of business in Lewis County, Washington.

EXHIBIT C

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5. Defendant Mitch Payne is an employee of G & J Logging, believed to reside in Lewis County, Washington.

6. Defendant John Boger is an employee of G & J Logging, believed to reside in Lewis County, Washington.

7. Defendants Daniel Sheets, a/k/a Boone Sheets, and Jennifer Sheets are believed to be husband and wife residing in Lewis County, Washington.

8. Defendant Boone's Mechanical Cutting, Inc., is a Washington corporation with principal place of business in Lewis County, Washington.

9. John Does 1-5 are identified in the event Defendants Kirkendoll and/or Peters are owners or have an interest in companies which participated in and/or contributed to the damages suffered by Plaintiffs herein.

10. Venue and jurisdiction are proper before this Court.

11. Plaintiffs own parcels of property located at 142 Madison Road in Mossyrock, Lewis County, Washington, legally described as follows:

> Section 17, Township 12N Range 03 E- PT SE 4 and PT SW 4 Lots 11, 12 and 14 BLA 2101193

Tax Parcel Nos. 029298001011, 029298001012, and 029298001014.

12. On or about March 20, 2014, Defendants intentionally, recklessly or negligently trespassed upon Plaintiffs' real property identified above, and cut trees. Defendants Kirkendoll are owners of the neighboring property from which the trespass occurred. Defendants Peters and G & J Logging, Inc. were hired by Kirkendoll to cut the trees. Defendants Payne and Boger were employees of G & J Logging and were present on site at the time of the cutting. Defendants Sheets and Boone's Mechanical Cutting, Inc. were hired by Peters and G & J Logging to fell the trees. Defendants Peters, G & J Logging, Payne, and Boger yarded, processed, and loaded the felled trees and removed them from the lot.

13. Defendants' cutting of Plaintiff's trees damaged Plaintiff's landscape in an amount to be proven at the time of trial, but known to exceed $50,000. After cutting the trees and destroying the landscape value these trees provided, Defendants then, acting in concert for their joint benefit, carried

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away the resulting logs, and sold them, which logs were personal property of Plaintiffs and in doing so, converted Plaintiffs' personal property, damaging Plaintiffs in an amount to be proven at trial.

8. Defendants' trespass was in violation of RCW 4.24.630 and/or RCW 64.12.030, and has caused Plaintiffs' emotional distress, in addition to all damages arising from destruction of landscape and conversation of personal property.

9. Defendants have damaged Plaintiffs in an amount to be proven at trial.

WHEREFORE, having pled their claims and causes of action, Plaintiffs pray for the following relief:

1. Judgment against all Defendants in an amount to be proven at the time of trial;

2. That said damages be tripled by operation of RCW 4.24.630 and/or RCW 64.12.030;

3. For Plaintiffs' attorney's fees and costs, including expert witness costs pursuant to RCW 4.24.630;

4. That Plaintiffs be allowed to amend this Complaint to include additional entities or individuals who are discovered to be responsible for this trespass and Plaintiffs' damages; and

5. For such other and further relief as this Court deems just and equitable.

DATED this 10 day of August, 2015.

CUSHMAN LAW OFFICES, P.S.

By _____
Jon E. Cushman, WSBA #16547
Kevin Hochhalter, WSBA #43124
Attorneys for Plaintiffs

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APPENDIX B

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IN THE SUPERIOR COURT OF STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

JERRY PORTER and KAREN ZIMMER, Plaintiffs, v. PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL; KYLE PETERS and ANDREA PETERS; G&J LOGGING, INC.; MITCH PAYNE; JOHN BOGER; DANIEL SHEETS aka BOONE SHEETS, and JENNIFER SHEETS; BOONE'S MECHANICAL CUTTING, INC. Defendants.	Case No.: 14-2-00783-1 ORDER GRANTING COUNTER MOTION OF DEFENDANTS KIRKENDOLL FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on December 2, 2016 based upon the Motion of Defendants Kirkendoll to Dismiss the Plaintiffs' Claims. The following pleadings and evidence were considered by or brought to the attention of the Court:

1. Plaintiffs' Motion for Partial Summary Judgement, dated November 3, 2016.
2. Declaration of Jon E. Cushman in Support of Plaintiffs' Motion for Summary Judgment, together with exhibits, dated November 3, 2016.
3. Motion for Leave Under CR 56(c), dated November 3, 2016.
4. Response of Pepper Kirkendoll to Plaintiffs' Motion for Leave Under CR 56(c), dated November 10, 2016

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5. Reply in Support of Motion for Leave Under CR 56(c), dated November 16, 2016.

6. Brief in Opposition to Plaintiffs' Motion for Summary Judgment, Counter Motion of Defendants Kirkendoll to Dismiss All or Some of Plaintiffs' Remaining Claims, dated November 10, 2016;

7. Declaration of Pepper Kirkendoll in Support of Summary Judgment, together with exhibits, dated September 24, 2014.

8. Notice of Errata To: Brief in Opposition to Plaintiffs' Motion for Summary Judgment Counter Motion of Defendant Kirkendoll To Dismiss All or Some of Plaintiffs' Remaining Claims, dated November 10, 2016.

9. Declaration of J. Michael Morgan in Support of Counter Motion for Summary Judgment, together with exhibits, dated November 10, 2016;

10. Defendants' Kirkendoll Reply to Plaintiffs' Objections to Counter Motions for Summary Judgment. Dated November 17, 2016.

11. Plaintiffs' Response to Counter Motion of Defendant Kirkendoll, dated November 21, 2016.

12. Declaration of Kyle Peters, together with exhibits, dated November 14, 2016.

13. Declaration of Ronald Webster, together with exhibits, dated November 18, 2016.

14. Declaration of Stephanie Bloomfield, together with exhibits, dated November 14, 2016.

15. Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, dated November 28, 2016.

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16. Supplemental Declaration of Ronald Webster, together with exhibit, dated November 28, 2016.

17. Supplemental Declaration of Kyle Peters, together with exhibit, dated November 30, 2016.

18. Declaration of Jon Cushman in Support of Plaintiffs' Motion in Limine, together with exhibits, dated November 22, 2016.

19. Declaration of Kevin Hochhalter in Support of Plaintiffs' Motion for Summary Judgment, together with exhibits, dated November 28, 2016.

20. Reply Brief in Support of Defendant Kirkendoll Motion for Summary Judgment, dated November 28, 2016.

21. Declaration of J. Michael Morgan, together with exhibits, dated November 28, 2016.

22. Motion of Defendants Kirkendoll for Leave to Amend Answer, dated November 23, 2016.

23. Plaintiffs' Response to defendants' Kirkendolls Motion to Amend Answer, dated November 28, 2016.

24. Declaration of Jon Cushman in Response to Defendants Kirkendoll's Motion to Amend and Errata to Declaration Dated 11/3/16, together with exhibits, dated November 28, 2016.

25. Plaintiffs' Supplemental Motion in Limine, dated November 22, 2016.

26. Reply of Defendant Kirkendoll to Plaintiffs Motions in Limine; Kirkendoll's Second Supplemental Motion in Limine & Motion to Strike Portions of 11/28/16 Declaration of Jon E. Cushman, dated November 30, 2016.

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27. Plaintiffs' Response to Defendants' Second Supplemental Motion in Limine and Motion to Strike & Plaintiffs' Reply in Support of Supplemental Motions In Limine, dated December 1, 2016.

The Court having considered the pleadings and evidence, having heard the argument of counsel and deeming itself fully advised hereby

ORDERS AS FOLLOWS

Defendants Kirkendoll's Counter Motion for Summary Judgment is hereby granted. Plaintiffs' claims against Defendants Pepper and Clarice Kirkendoll are hereby DISMISSED.

DONE IN OPEN COURT this 8 day of December, 2016.

Hon. Nelson Hunt
Judge of the Superior Court

Presented by;

WORTH LAW GROUP, P.S.

J. Michael Morgan, WSBA# 18404
of Attorneys for Defendant Kirkendoll

Copy received;

CUSHMAN LAW OFFICES, P.S. for Jon E. Cushman Pe- permission see attached

Jon E. Cushman, WSBA #16547
Attorneys for Plaintiffs

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IN THE SUPERIOR COURT OF STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

JERRY PORTER and KAREN ZIMMER, Plaintiffs, v. PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL; KYLE PETERS and ANDREA PETERS; G&J LOGGING, INC.; MITCH PAYNE; JOHN BOGER; DANIEL SHEETS aka BOONE SHEETS, and JENNIFER SHEETS; BOONE'S MECHANICAL CUTTING, INC. Defendants.	Case No.: 14-2-00763-1 ORDER GRANTING COUNTER MOTION OF DEFENDANTS KIRKENDOLL FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on December 2, 2016 based upon the Motion of Defendants Kirkendoll to Dismiss the Plaintiffs' Claims. The following pleadings and evidence were considered by or brought to the attention of the Court:

1. Plaintiffs' Motion for Partial Summary Judgement, dated November 3, 2016.
2. Declaration of Jon E. Cushman in Support of Plaintiffs' Motion for Summary Judgment, together with exhibits, dated November 3, 2016.
3. Motion for Leave Under CR 56(c), dated November 3, 2016.
4. Response of Pepper Kirkendoll to Plaintiffs' Motion for Leave Under CR 56(c), dated November 10, 2016

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5. Reply in Support of Motion for Leave Under CR 56(c), dated November 16, 2016.

6. Brief in Opposition to Plaintiffs' Motion for Summary Judgment, Counter Motion of Defendants Kirkendoll to Dismiss All or Some of Plaintiffs' Remaining Claims, dated November 10, 2016;

7. Declaration of Pepper Kirkendoll in Support of Summary Judgment, together with exhibits, dated September 24, 2014.

8. Notice of Errata To: Brief in Opposition to Plaintiffs' Motion for Summary Judgment Counter Motion of Defendant Kirkendoll To Dismiss All or Some of Plaintiffs' Remaining Claims, dated November 10, 2016.

9. Declaration of J. Michael Morgan in Support of Counter Motion for Summary Judgment, together with exhibits, dated November 10, 2016;

10. Defendants' Kirkendoll Reply to Plaintiffs' Objections to Counter Motions for Summary Judgment. Dated November 17, 2016.

11. Plaintiffs' Response to Counter Motion of Defendant Kirkendoll, dated November 21, 2016.

12. Declaration of Kyle Peters, together with exhibits, dated November 14, 2016.

13. Declaration of Ronald Webster, together with exhibits, dated November 18, 2016.

14. Declaration of Stephanie Bloomfield, together with exhibits, dated November 14, 2016.

15. Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, dated November 28, 2016.

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16. Supplemental Declaration of Ronald Webster, together with exhibit, dated November 28, 2016.

17. Supplemental Declaration of Kyle Peters, together with exhibit, dated November 30, 2016.

18. Declaration of Jon Cushman in Support of Plaintiffs' Motion in Limine, together with exhibits, dated November 22, 2016.

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20. Reply Brief in Support of Defendant Kirkendoll Motion for Summary Judgment, dated November 28, 2016.

21. Declaration of J. Michael Morgan, together with exhibits, dated November 28, 2016.

22. Motion of Defendants Kirkendoll for Leave to Amend Answer, dated November 23, 2016.

23. Plaintiffs' Response to defendants' Kirkendolls Motion to Amend Answer, dated November 28, 2016.

24. Declaration of Jon Cushman in Response to Defendants Kirkendoll's Motion to Amend and Errata to Declaration Dated 11/3/16, together with exhibits, dated November 28, 2016.

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26. Reply of Defendant Kirkendoll to Plaintiffs Motions in Limine; Kirkendoll's Second Supplemental Motion in Limine & Motion to Strike Portions of 11/28/16 Declaration of Jon E. Cushman, dated November 30, 2016.

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27. Plaintiffs' Response to Defendants' Second Supplemental Motion in Limine and Motion to Strike & Plaintiffs' Reply in Support of Supplemental Motions In Limine, dated December 1, 2016.

The Court having considered the pleadings and evidence, having heard the argument of counsel and deeming itself fully advised hereby

ORDERS AS FOLLOWS

Defendants Kirkendoll's Counter Motion for Summary Judgment is hereby granted. Plaintiffs' claims against Defendants Pepper and Clarice Kirkendoll are hereby DISMISSED.

DONE IN OPEN COURT this _____ day of December, 2016.

_____
Hon. Nelson Hunt
Judge of the Superior Court

Presented by;

WORTH LAW GROUP, P.S.

_____
J. Michael Morgan, WSBA# 18404
of Attorneys for Defendant Kirkendoll

Copy received;

CUSHMAN LAW OFFICES, P.S.

_____ WSBA #43124
for Jon E. Cushman, WSBA #16547
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APPENDIX C

Assigned to the Honorable Nelson Hunt

DEC 21 2016

SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

JERRY PORTER and KAREN ZIMMER, husband and wife,

Plaintiffs,

v.

PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL, husband and wife; KYLE PETERS and ANDREA PETERS, husband and wife; G & J LOGGING, INC., a Washington corporation; MITCH PAYNE; JOHN BOGER; DANIEL SHEETS, a/k/a BOONE SHEETS, and JENNIFER SHEETS, husband and wife; BOONE'S MECHANICAL CUTTING, INC., a Washington Corporation; and JOHN DOES 1 - 5,

Defendants.

NO. 14-2-00783-1

ORDER ~~GRANTING~~ DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

THIS MATTER having come on for hearing on Plaintiffs' Motion for Reconsideration; and the Court having considered Plaintiffs' Motion and any response filed by Defendants, now, therefore, it is hereby

ORDERED that Plaintiffs' Motion for Reconsideration is hereby ~~GRANTED.~~ DENIED. It is further

ORDERED that Defendants Kirkendolls' Cross-Motion for Partial Summary Judgment is hereby ~~DENIED.~~ GRANTED.

DATED this 21 day of December, 2016.

Nelson E Hunt

Honorable Nelson Hunt

7588.001, cc: client, SEC

APPENDIX D

Filed
Washington State
Court of Appeals
Division Two

July 17, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JERRY PORTER and KAREN ZIMMER, husband and wife Appellants, v. PEPPER E.KIRKENDOLL and CLARICE N. KIRKENDOLL, husband and wife; KYLE PETERS and ANDREA PETERS, husband and wife; G & J LOGGING, INC., a Washington Corporation; MITCH PAYNE; JOHN BOGER; DANIEL SHEETS, a/k/a BOONE SHEETS, and JENNIFER SHEETS, husband and wife; BOONE'S MECHANICAL CUTTING, INC., a Washington Corporation; and JOHN DOES 1-5, Respondents.	No. 49819-7-II PUBLISHED OPINION

LEE, A.C.J. — Jerry Porter and Karen Zimmer (collectively "Porter") appeal the superior court's order on summary judgment dismissing Porter's claims for waste, timber trespass, equitable indemnity, and contribution. Porter also appeals the superior court's exclusion of his rebuttal expert's testimony.

We hold that the superior court did not err in dismissing Porter's waste and contribution claims. However, we hold that the superior court erred in dismissing Porter's timber trespass and equitable indemnity claims and that it abused its discretion in excluding Porter's rebuttal expert's

testimony. Accordingly, we affirm in part, reverse in part, and remand to the superior court for further proceedings consistent with this opinion.

FACTS

A. LOGGING THE PROPERTIES

Porter owned a lot to the east of, and adjacent to, Pepper and Clarice Kirkendoll's (collectively "Kirkendoll") property in Lewis County. The land near the property line between the two properties was forested. There was a 60-foot right of way easement located on the western edge of Porter's property, and a road was built on the easement. Porter's property line extended westward past the road about 8 feet at the north end and about 30 feet at the south end. Porter and Kirkendoll used the road to access their respective properties.

In March 2014, Kirkendoll hired Kyle Peters and G & J Logging, Inc. (collectively "G & J") to remove some trees. G & J hired Boone Sheets and Boone's Mechanical Cutting, Inc. (collectively "Boone") to assist in the tree cutting.

Kirkendoll told G & J that he owned the property up to the edge of the road and that all of the trees up to the edge of the road were his. Kirkendoll had seen two monuments that marked the corners of Porter's property west of the road before the trees were cut. Peters was with Kirkendoll when Kirkendoll saw the monuments, and Peters saw at least one of the monuments.

Based on Kirkendoll's representations, G & J instructed Boone on where to cut, and Boone cut and removed the trees up to the edge of the road, including trees on Porter's property. G & J sold the logs and split the proceeds with Kirkendoll.

After Porter accused Kirkendoll of cutting trees on Porter's property, Kirkendoll had his property surveyed. The survey confirmed that Porter's property line extended into the area where Kirkendoll had instructed G & J to cut trees.

B. PORTER'S SUIT

Porter filed suit against Kirkendoll, G & J, and Boone. Porter alleged timber trespass under RCW 64.12.030 and waste under RCW 4.24.630. Specifically, Porter alleged that the defendants "intentionally, recklessly or negligently trespassed upon [Porter's property] and cut trees." Clerk's Papers (CP) at 2. Porter also alleged that cutting his trees damaged his landscape, and removing and selling his trees converted his personal property. Porter sought treble damages and attorney fees.

C. KIRKENDOLL'S ANSWER

Kirkendoll's answer admitted that he "caused timber to be harvested from a right of way easement adjacent to the Plaintiffs [Porter's] holdings" and that he and his "agents only removed timber on property adjacent to [Kirkendoll's] property located on a legally described boundary right-of-way easement." CP at 5-6. Kirkendoll asserted that

> [a]s early as 2006 and 2007, when Plaintiffs were already in possession of the property in question and actually performing work on the boundary road at issue in this complaint and answer, Mr. Kirkendoll openly and in full view [of] Plaintiffs and of the then-travelled portion of the right-of-way, began managing the disputed trees for harvest . . . . By not putting the Kirkendolls on notice of their claim of ownership of the trees in question after seeing that significant timber prep work had been done, Plaintiffs waived damages and are estopped *in pais* from demanding any more than the actual profit obtained by Kirkendoll on such trees.

CP at 6. Kirkendoll also stated that Porter could not allege waste because he alleged timber trespass and that facts warranting treble damages were not pled. Kirkendoll did not assert fault of others as an affirmative defense.

D. G & J'S AND BOONE'S ANSWERS AND CROSS-CLAIMS

G & J's answer admitted that Kirkendoll hired it to remove trees from property that Kirkendoll represented was his, that G & J entered Porter's property and removed trees based on Kirkendoll's representation, and that G & J hired Boone to assist in cutting the trees. G & J alleged that it reasonably believed the trees were on Kirkendoll's property.

G & J asserted cross-claims against Kirkendoll for contribution and indemnity. G & J alleged that Porter sought to hold G & J liable because of Kirkendoll's acts and, if G & J was found liable, such liability was caused by Kirkendoll. Therefore, Kirkendoll should (1) contribute to any damages awarded against G & J, or alternatively, the court should reduce G & J's liability by its proportionate share of fault; and (2) indemnify G & J for any amounts recovered by Porter against G & J.

Boone's answer admitted that G & J hired it to cut trees on Kirkendoll's property, that Boone followed G & J's instructions on where to cut, that Boone reasonably believed the trees were on Kirkendoll's property, and that Boone only cut trees within the boundaries represented by G & J. Boone also asserted that "[a]ny damages allegedly suffered by Plaintiffs were caused, in whole or in part, by the negligence or improper actions of others." CP at 17. Boone later amended its answer to include a cross-claim against G & J and Kirkendoll for "equitable or implied in fact indemnity." Supplementary . Clerk's Papers (Supp. CP) at 587.

E. DAMAGES EXPERTS

Porter hired Patrick See as an expert witness on damages. See used "the trunk formula method[[1]] to determine the value the destroyed landscape made to the property value of the entire Porter holding." Supp. CP at 378. See stated that Porter would not enjoy the natural landscape that lined his driveway for at least forty years after the trees were replaced and that Porter's land was damaged. The damage could not be measured by stumpage value[2] alone because that value ignored the landscape value lost.

Kirkendoll hired Michael Jackson as an expert witness. Jackson stated that the trunk formula method was the appropriate appraisal method for trees in residential landscape, recreational, or shade tree situations when the species and size can be determined. But Jackson disagreed with See's damages calculation.

G & J hired Walter Knapp as an expert witness. Knapp stated that the trees should be valued solely for their stumpage value.

G & J also hired Victor Musselman to conduct an evaluation. Musselman stated that there was no effect on the marketability of Porter's property due to the cut trees.

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[1] See did not describe the "trunk formula method." Generally, the trunk formula method is "used to appraise the monetary value of trees considered too large to be replaced with nursery stock. Value is based on the cost of the largest commonly available transplantable tree and its cost of installation, plus the increase in value due to the larger size of the tree being appraised. . . . [the value is] then adjusted for species, condition, and location ratings." Barri Kaplan Bonapart, *Understanding Tree Law: A Handbook for Practitioners*, § 11 (Thomson Reuters 2014).

[2] See did not define "stumpage value." Generally, stumpage value is the market value of a tree before it is cut; the amount that a purchaser would pay for a standing tree to be cut and removed. David H. Bowser, *"Hey, That's My Tree!"—An Analysis of the Good-Faith Contract Logger Exemption from the Double and Treble Damage Provisions of Oregon's Timber Trespass Action*, 36 WILLAMETTE L. REV. 401, 405 (2000).

F. PRE-TRIAL PROCEEDINGS

Kirkendoll sent Jackson's report to Porter before the discovery cutoff date. Kirkendoll later sent Jackson's notes and file to Porter and asked, "If [the notes and file] in any way impacts your experts' ability to testify fully at their depositions tomorrow, please let me know right away so we can attempt to work something out." Supp. CP at 376. Porter did not respond to the email.

Nine days later, Porter sent a letter to the defendants naming Galen Wright as an additional rebuttal expert.[3] Specifically, Porter said Wright would rebut the manner in which Jackson and Knapp applied the trunk formula and their opinions as to the distinction between landscape damage and damages associated with the appropriation of Porter's logs. This letter was sent days after disclosure of rebuttal witnesses was due.

Kirkendoll filed a motion in limine to exclude Wright from testifying. Kirkendoll argued that Porter untimely disclosed Wright as an expert, that Wright's testimony was cumulative to that of Porter's other expert, that Kirkendoll would be prejudiced if Wright was allowed to testify, and that Porter provided no compelling reason for the last minute "switch" of experts.

The superior court granted Kirkendoll's motion and excluded Wright's testimony. The superior court reasoned that Porter untimely disclosed Wright as an expert, that Porter did not respond to Kirkendoll's letter asking whether Jackson's notes and file would impact See's deposition testimony, and that Porter would not be prejudiced because Porter had another expert witness who could testify to the same subject area as Wright.

[3] Porter had already identified See as a rebuttal witness.

G. THE SETTLEMENT

A month before the superior court's ruling excluding Wright's rebuttal testimony, Porter and G & J entered into a settlement agreement. G & J agreed to pay Porter $75,000, assign all of its cross-claims against Kirkendoll to Porter, allow Porter to use G & J's experts, and assist Porter in prosecuting the assigned claims. In exchange, Porter agreed to indemnify G & J against all cross-claims brought against G & J by other parties and to dismiss his claims against G & J.

A couple of days later, Porter, G & J, and Boone entered into a supplemental settlement agreement. In the supplemental settlement agreement, G & J agreed to pay Porter an additional $40,000. Boone agreed to pay Porter $10,000, assign all of its claims against Kirkendoll to Porter, assist Porter in prosecuting the assigned claims, and dismiss its cross-claims against G & J. In exchange, Porter agreed to dismiss his claims against Boone.

H. SUMMARY JUDGMENT

Porter then filed a motion for partial summary judgment against Kirkendoll. Porter argued that he was entitled to summary judgment on his assigned indemnity claims because Kirkendoll caused G & J and Boone (collectively "the Loggers") to be involved in the case, the case should proceed under the waste statute because Kirkendoll caused injury to land and trees, and Porter was entitled to treble damages because Kirkendoll acted wrongfully.

Kirkendoll responded to Porter's motion and filed his own motion for summary judgment. Kirkendoll argued that he was entitled to summary judgment dismissal of all claims against him because (1) Porter's settlement with the Loggers released Kirkendoll's liability under *Glover*;[4] (2)

[4] *Glover v. Tacoma General Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983), *abrogated by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

the Loggers did not have indemnity rights to assign to Porter because such rights were abolished under the Tort Reform Act (TRA), chapter 4.22 RCW; and (3) the Loggers did not have contribution rights to assign to Porter because they did not provide notice and there was no reasonableness hearing for the settlement that was reached.

The superior court denied Porter's partial summary judgment motion, granted Kirkendoll's summary judgment motion, and dismissed all of Porter's claims against Kirkendoll. Porter filed a motion for reconsideration of the superior court's summary judgment dismissal, which the superior court denied.

Porter appeals the superior court's orders granting Kirkendoll's motion for summary judgment and denying Porter's motion for partial summary judgment.

ANALYSIS

A. SUMMARY JUDGMENT

Porter argues that the superior court erred in (1) granting Kirkendoll's summary judgment and dismissing all his claims against Kirkendoll; and (2) denying Porter's motion for partial summary judgment on (a) his assigned equitable indemnity claim, (b) the application of the waste statute, and (c) liability for treble damages for timber trespass. We agree that the superior court erred in dismissing Porter's timber trespass and indemnity claims, but the superior court did not err in dismissing Porter's waste, contribution, equitable indemnity, and treble damages claims.

1. Legal Principles

We review a trial court's summary judgment decision de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We consider the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Id.*

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Keck*, 184 Wn.2d at 370.

We also review the meaning of statutes de novo. *Gunn v. Riely*, 185 Wn. App. 517, 524, 344 P.3d 1225, *review denied*, 183 Wn.2d 1004 (2015). "Our fundamental objective is to ascertain and carry out the legislature's intent." *Id.* If the statute's meaning is plain on its face, we must give effect to the plain meaning of the statute as an expression of legislative intent. *Id.* We look to interpretive aids only if the statute is ambiguous. *Id.*

2. Kirkendoll's Motion for Summary Judgment

Porter argues that the superior court erred in granting Kirkendoll's motion for summary judgment and dismissing all his claims against Kirkendoll. We agree that the superior court erred in dismissing Porter's claims for timber trespass and indemnity, but the superior court did not err in dismissing Porter's claims for waste and contribution.

a. Timber trespass claims

i. Application of the TRA to a timber trespass claim

As an initial matter, Porter argues that the TRA does not apply to intentional torts such as timber trespass. We agree.

Under the TRA, "In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the

claimant's contributory fault, but does not bar recovery." RCW 4.22.005. "Fault" is defined as "acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim." RCW 4.22.015.

Under RCW 64.12.030, a person is liable for timber trespass when the person "cut[s] down, girdle[s], or otherwise injure[s], or carr[ies] off any tree, . . . timber, or shrub on the land of another person . . . without lawful authority." One who authorizes or directs a trespass is jointly and severally liable with the actual trespassers. *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 669, 676, 626 P.2d 30, *review denied*, 95 Wn.2d 1027 (1981); *see Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495, *review denied*, 147 Wn.2d 1024 (2002).

Our Supreme Court has held that timber trespass sounds in tort and trespass is an intentional tort. *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 115, 942 P.2d 968 (1997) (timber trespass is an intentional tort); *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 597 n.9, 278 P.3d 157 (2012) (an involuntary or accidental trespass is still trespass). The TRA does not apply to intentional torts. *See Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 952 P.2d 162 (1998). Thus, the TRA does not apply to timber trespass.[5]

[5] The superior court relied on *Glover v. Tacoma General Hospital* as the basis for dismissing Porter's timber trespass claim. The *Glover* court relied on the TRA, specifically RCW 4.22.040(1), "to discharge a principal when the agent and the injured party have entered into a settlement which the trial judge has approved as reasonable." 98 Wn.2d at 722. But as discussed above, the TRA does not apply to intentional tort claims, and timber trespass is an intentional tort. Therefore, dismissal of Porter's timber trespass claims based on *Glover* was not proper.

ii. Porter's timber trespass claim based on agency

Porter also argues that his settlement with the Loggers did not release Kirkendoll from liability for timber trespass because the Loggers were not Kirkendoll's agents. We agree.

A principal is released by operation of law as a result of a release of the agent if that agent is solvent. *Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 487, 756 P.2d 111 (1988). The crucial factor in determining the existence of an agency relationship is "the right to control the manner of performance." *O'Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004), *review denied*, 153 Wn.2d 1022 (2005).

For timber trespass, the manner of performance refers to the actual cutting. *Bloedel*, 28 Wn. App. at 674. Kirkendoll argues that an agency relationship existed because he controlled the location of the cutting. However, the manner of performance is how the cutting was to be done and no evidence was presented to show that aside from selecting the location, Kirkendoll had any control over the cutting of the trees. *Id.* Thus, an agency relationship between Kirkendoll and the Loggers did not exist. Therefore, Porter's release of the Loggers from liability did not, in turn, release Kirkendoll from liability for timber trespass.

iii. Porter's timber trespass claim based on Kirkendoll's conduct

Porter argues that because Kirkendoll could be held liable for his own misconduct and not just the conduct of the Loggers, the superior court erred when it granted Kirkendoll's motion for summary judgment dismissal of his timber trespass claim. We agree.

Under RCW 64.12.030, a person is liable for timber trespass when the person "cut[s] down, girdle[s], or otherwise injure[s], or carr[ies] off any tree, . . . timber, or shrub on the land of another person . . . without lawful authority." One who authorizes or directs a trespass is jointly and

severally liable with the actual trespassers. *Bloedel*, 28 Wn. App. at 676; *see Hill*, 110 Wn. App. at 404. Joint and several liability enables "a plaintiff to sue one tortfeasor and recover all of his or her damages from one of multiple tortfeasors." *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992).

Here, Porter alleged that Kirkendoll was liable under the timber trespass statute based on Kirkendoll's conduct of telling the Loggers where to cut. Because Kirkendoll directed the trespass in this case by instructing G & J (who then instructed Boone) on where to cut, Porter also had a timber trespass claim against Kirkendoll independent of any claim against Kirkendoll for timber trespass based on an agency theory. Therefore, the superior court erred when it granted summary judgment dismissal of Porter's timber trespass claim against Kirkendoll based on Kirkendoll's conduct.[6]

b. Assigned common law indemnity claims

Porter argues that the superior court erred when it dismissed his assigned common law indemnity claims on summary judgment. We agree.

Washington courts have identified three general types of indemnity. *Fortune View Condo. Ass'n v. Fortune Star Dev. Co.*, 151 Wn.2d 534, 543, 90 P.3d 1062 (2004). These include

[6] Kirkendoll argues that there could be no theory of liability against him beyond respondeat superior (otherwise referred to as "vicarious liablity"). Kirkendoll cites *Hill*, 110 Wn. App. at 394, and *Ventoza v. Anderson*, 14 Wn. App. 882, 545 P.2d 1219, *review denied*, 87 Wn.2d 1007 (1976), to support his position. However, those cases both state that a party can be liable for directing independent contractors to cut trees on the land of another. *See Hill*, 110 Wn. App. at 404; *Ventoza*, 14 Wn. App. at 896.

contractual indemnity,[7] implied contractual indemnity,[8] and equitable indemnity. *Id.* at 543-44. Equitable indemnity is also referred to as "common law indemnity." *Id.* at 544.

Under common law indemnity, a person without personal fault, who has become subject to tort liability for the wrongful conduct of another, "'is entitled to indemnity from the other for expenditures properly made in the discharge of such liability.'" *Id* (internal quotation marks omitted) (quoting *Hanscome v. Perry*, 75 Md. App. 605, 617, 542 A.2d 421 (1987)). The "ABC Rule" embodies the theory of equitable/common law indemnity. *See LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123, 330 P.3d 190 (2014). The ABC rule requires: (1) a wrongful act or omission by A toward B, (2) that such act or omission exposes or involves B in litigation with C, and (3) that C was not connected with the wrongful act or omission of A toward B. *Id.*

Here, because the TRA does not apply, the Loggers' common law indemnity rights were not abolished by the TRA.[9] Therefore, Porter received the Loggers' common law indemnity rights through an assignment from the Loggers in his settlement with the Loggers.

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[7] Contractual indemnity is expressly provided in a contract between parties. *Id.* at 543 n.1. Porter does not argue that his assigned indemnity claims are based on any contracts between Kirkendoll and G & J or Boone.

[8] Implied contractual indemnity is based on a "'contract between two parties that *necessarily implies the right.*'" *Id.* at 544 (quoting *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470 (2003), *review denied*, 358 N.C. 235 (2004)). Porter does not argue that his assigned indemnity claims are based on any contract between Kirkendoll and G & J or Boone.

[9] Under the TRA, "The common law right of indemnity between active and passive tort feasors is abolished." RCW 4.22.040(3). The TRA replaced the common law right of indemnity between active and passive tortfeasors with the right to contribution. *Johnson v. Cont'l W., Inc.*, 99 Wn.2d 555, 558, 663 P.2d 482 (1983).

For common law indemnity, a person without personal fault, who has become subject to tort liability for the wrongful conduct of another, "'is entitled to indemnity from the other for expenditures properly made in the discharge of such liability.'" *Fortune View*, 151 Wn.2d at 544 (internal quotation marks omitted)(quoting *Hanscome*, 75 Md. App. at 617). A genuine issue remained as to whether the Loggers were without personal fault here and had become subject to tort liability for the wrongful conduct of Kirkendoll, entitling the Loggers to amounts paid to discharge that liability. *Id.* Therefore, the superior court erred when it granted Kirkendoll's motion for summary judgment and dismissed Porter's assigned indemnity claims.

c. Waste claim

Porter argues that the superior court erred when it dismissed his waste claim against Kirkendoll on summary judgment. We disagree.

Under RCW 4.24.630(1), a person is liable for waste when the person "goes onto the land of another and . . . removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land." A person who directs or assists in such acts may be held jointly and severally liable. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 246, 23 P.3d 520, *review denied*, 145 Wn.2d 1008 (2001).

The waste statute "does not apply *in any case* where liability for damages is provided under RCW 64.12.030," the timber trespass statute. RCW 4.24.630(2) (emphasis added). The waste statute "explicitly excludes its application where liability for damages is provided under RCW 64.12.030, the timber trespass statute." *Gunn*, 185 Wn. App. at 525.

A person is liable under the timber trespass statute when the person "cut[s] down, girdle[s], or otherwise injure[s], or carr[ies] off any tree, . . . timber, or shrub on the land of another person

. . . without lawful authority." RCW 64.12.030. Here, trees were cut on Porter's property. Kirkendoll hired G & J, who then hired Boone, to remove the trees. Kirkendoll told G & J where to cut the trees, and G & J relayed that information to Boone. Boone cut and removed the trees as directed. Because liability for damages would be provided under the timber trespass statute here, the waste statute did not apply. RCW 4.24.630(2).

Porter also argues that the waste statute could apply in cases involving both damage to land and trees. In support of this argument, Porter cites to a footnote in *Gunn* that discussed the legislature's rationale for enacting the waste statute as a method of dealing with vandalizing of trees, running over of agriculture, and ripping up of ground. 185 Wn. App. at 525 n.6. The *Gunn* court noted that

> it appears that there could be a situation, under circumstances of waste or vandalism, where a court may find that RCW 4.24.630 appropriately applies to a dispute over comprehensive property damage that includes damage to property and removal of timber, rather than a dispute where the sole issue is timber trespass.

Id.

Here, however, there are no circumstances of waste, vandalism, or comprehensive property damage. The sole allegation was the cutting and removal of Porter's trees and damage to Porter's bushes. Although Porter also alleged damage to his landscape, such damage resulted from the same acts that constitute timber trespass. Merely characterizing the trees as "canopy" is not sufficient to render damage to such trees "comprehensive property damage" or damage to real property as contemplated in *Gunn*.

Also, if a statute's meaning is plain on its face, we must give effect to the plain meaning of the statute as an expression of legislative intent. *Id.* at 524. Because the meaning of the waste

statute is plain on its face—the waste statute does not apply *in any case* where damages are provided for under the timber trespass statute—we must give effect to the plain meaning of the statute. Therefore, we hold that the superior court's summary judgment dismissal of Porter's waste claim was proper.

d. Assigned contribution claims

Porter argues that the superior court erred when it granted Kirkendoll's motion for summary judgment dismissal of Porter's assigned contribution claims under the TRA. We disagree.

Under the TRA, "A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them." RCW 4.22.040(1). But here, the TRA does not apply. *See Supra* Section A.2.a.i. As a result, the right to contribution under the TRA did not exist. Therefore, the superior court did not err when it granted summary judgment dismissal of Porter's assigned contribution claim.

3. Porter's Motion for Partial Summary Judgment

Porter argues that the superior court erred when it denied his motion for partial summary judgment on his claims for equitable/common law indemnity, waste, and treble damages. We disagree.

a. Equitable/common law indemnity claim

As discussed above, the Loggers' common law indemnity rights were not abolished by the TRA because the TRA does not apply. Consequently, Porter obtained through assignment any such rights that the Loggers' possessed. *See Supra* Section A.2.b.

However, the record is not clear as to whether the Loggers are without fault and are subject to liability only for the wrongful conduct of Kirkendoll. The record shows that Peters was with Kirkendoll when Kirkendoll saw the monuments, and Peters saw at least one of the monuments marking the corners of Porter's property west of the road. Therefore, a genuine issue of material fact exists, and the superior court did not err when it denied partial summary judgment on Porter's assigned equitable/common law indemnity claims.

b. Waste claim

As discussed above, the waste statute did not apply. *See Supra* Section A.2.c. Therefore, the superior court did not err when it denied Porter's motion for partial summary judgment on his waste claim.

c. Treble damages claim

Because we hold that the superior court erred in dismissing Porter's timber trespass claim on summary judgment, we necessarily hold that the superior court erred in dismissing Porter's claim for treble damages for the timber trespass on summary judgment, and remand this issue to the superior court for further proceedings.

B. EXCLUSION OF WRIGHT'S TESTIMONY

Porter argues that the superior court erred when it excluded Wright's rebuttal testimony.[10] We agree.

[10] Porter did not designate the superior court's decision excluding Wright's testimony in his notice of appeal. However, we review this decision in the interest of justice because Porter sets forth the decision in his assignments of error, presents argument on the issue, and references legal authority; and Kirkendoll addresses the issue. *In re Truancy of Perkins*, 93 Wn. App. 590, 594, 969 P.2d 1101 (1999), *abrogated on other grounds by Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. 205, 199 P.3d 1010 (2009).

A trial court exercises broad discretion in imposing discovery sanctions and its determination will not be disturbed absent a clear abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The trial court must consider the factors set forth in *Burnet*[11] before excluding witnesses for late disclosure. *Jones v. City of Seattle*, 179 Wn.2d 322, 344, 314 P.3d 380 (2013). The record must show consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from the violation. *Mayer*, 156 Wn.2d at 688. Failure to consider these factors constitutes an abuse of discretion. *Keck*, 184 Wn.2d at 362.

Here, the superior court excluded Wright's rebuttal testimony because of Porter's late disclosure of Wright after the date set for disclosure of rebuttal witnesses. Thus, the superior court's exclusion was a discovery sanction. But the superior court did not consider the *Burnet* factors before excluding Wright's rebuttal testimony as a sanction for late disclosure. The superior court only considered the fact that Porter did not respond to Kirkendoll's letter and that Porter would not be prejudiced by Wright's exclusion.

While the superior court's consideration of Porter's lack of response may constitute consideration of Porter's willfulness, the superior court still did not consider the existence of lesser sanctions or whether Kirkendoll was *substantially* prejudiced by the late disclosure. Therefore, the superior court abused its discretion when it excluded Wright based on late disclosure without considering the *Burnet* factors.

[11] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

ATTORNEY FEES

Porter requests attorney fees on appeal under the equitable indemnity principles and the waste statute. As discussed above, the waste statute is inapplicable here. And we exercise our discretion here and decline to award attorney fees under equitable indemnity principles.

CONCLUSION

We hold that the superior court erred in granting summary judgment dismissal of Porter's timber trespass claim and indemnity claims, and abused its discretion when it excluded Wright's testimony. We also hold that the superior court did not err in granting summary judgment dismissal of Porter's waste claim and contribution claims.

We affirm in part, reverse in part, and remand to the superior court for further proceedings consistent with this opinion.

Lee, A.C.J.

We concur:

Worswick, J.

Melnick, J.

J. MICHAEL MORGAN, PLLC

August 14, 2018 - 1:47 PM

Filing Motion for Discretionary Review

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