

63611-4

63677-4

NO. 63677-4-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

R. Gary Wood, *Appellant*

v.

James C. Brummond and Carol D. Brummond, and Roger B. Clark and
Kathryn Clark d/b/a/ Treebalance Tree Service, *Respondents*

BRIEF OF RESPONDENTS
CLARK AND BRUMMOND

David Tewell, WSBA # 9000
Suzanna Shaub, WSBA # 41018
Attorneys for Roger and Kathryn Clark
The Tewell Firm
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 623-2369

Mark Miller, WSBA No. 16382
Attorney for James and Carol Brummond
Hollenbeck, Lancaster, Miller & Andrews
15500 SE 30th Place, Suite 201
Bellevue, WA 98007
(425) 564-0203

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I. INTRODUCTION

a. Preface

Respondents Brummond and Clark jointly submit this brief, promoting appeal efficiency for both the Court and parties. One respondent brief eliminates needless repetition of facts and arguments.

This timber trespass case arises from a dispute between neighbors over two trees in Burien. In July 2005, homeowner Respondents James and Carol Brummond hired logger Respondent Roger Clark to cut two Douglas Firs (herein “Tree 595” and “Tree 596”). Brummonds thought they owned both, but a later survey showed Tree 595 was on Appellant Gary Wood’s adjoining property.

Wood spent \$93,986.41 planting two replacement trees. He sued Brummonds and Clarks for timber trespass, claiming treble damages.

The jury awarded Wood \$6,854 in reasonable tree restoration costs, and found Wood was not entitled to treble or general damages. CP 616-18. This appeal followed.

II. RELIEF REQUESTED

Respondents ask this Court to affirm the decisions of the court below in all respects.

III. COUNTERSTATEMENT OF ISSUES

Wood's appeal presents the following issues:

No. 1. When a trial court denies summary judgment due to factual disputes, and a trial is subsequently held on the issue, the ruling is not reviewable on appeal. The trial court here denied Wood's summary judgment motions based on factual disputes, and a trial was then held on the issues. Should this Court refuse review of the trial court's summary judgment rulings? (Assignment of Error 1)

No. 2. Summary judgment is appropriate only when, viewing all facts and reasonable inferences most favorably to the non-moving party, no genuine issue of material fact exists. Genuine issues of material fact existed regarding Wood's reasonable restoration/replacement costs, mitigation, and his entitlement to general damages. No material fact issues existed regarding the Brummonds' ownership of Tree 596. Should this Court affirm the trial courts' denial of Wood's summary judgment motion, and grant of Clarks' and Brummonds' motion? (Assignment of Error 1)

No. 3. Judgment as a matter of law is inappropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists sustaining the verdict. Substantial evidence exists sustaining the jury's verdict on the reasonable restoration/replacement cost, mitigation, and emotional distress

damages. Should this Court affirm the trial court's denial of Wood's judgment as a matter of law motions? (Assignment of Error 4)

No. 4. A trial court's evidentiary rulings are overturned only if manifestly unreasonable, or based on untenable grounds. Defense expert Favero Greenforest's testimony was relevant and not unduly prejudicial. Evidence that the trees were cut without a "critical area" permit was irrelevant and unduly prejudicial. Should this Court affirm the trial courts evidentiary rulings permitting Greenforest's testimony and precluding evidence of permits? (Assignments of Error 2 and 3)

No. 5. Appellate courts only review jury instructions if a timely objection was made. Instructions are proper if they permit the parties to argue their case theories and accurately inform the jury of the law. Wood failed to object to all but two instructions to which he assigns error. The court's instructions on willfulness accurately summarized the law and allowed the parties to argue their case theories. Should this Court affirm the trial court's jury instructions? (Assignments of Error 5, 6, 7, 8 and 9).

No. 6. A jury's damage verdict carries a strong presumption of validity. The jury's verdict on Wood's restoration/replacement cost damages, general damages, and mitigation was within the range of evidence. Wood provides no evidence that an error of law occurred warranting a new trial, that the jury's verdict was motivated by passion or prejudice, or that

substantial justice was not done. Should this Court affirm the trial court's denial of Wood's motion for a new trial or additur? (Assignment of Error 10)

No. 7. A new trial is inappropriate under the cumulative error doctrine where the errors are few, and have little or no effect on the trial outcome. Here the errors, if any, were few and did not affect the trial outcome. Should this Court affirm the trial court's denial of Wood's new trial motion on this basis? (Assignment of Error 10)

IV. STATEMENT OF THE CASE

a. Substantive Facts

The Brummonds own a modest house in Burien. CP 289. Now used as a rental, they lived in it for years before their family of six outgrew it. CP 289; RP 3/9 II, 7.

Brummonds' house sits atop a steep bluff above Puget Sound. Its major attraction is the excellent view. RP 3/9 II, 13. A laurel hedge frames the back yard. *Id.* The Brummonds own a large portion of the steep hillside below the hedge that descends west towards Woods' property below. See Appendix A-2; Ex. No. 48; CP 210.

A survey, commissioned and paid for by Wood, describes the Wood and Brummond properties. See Appendix A-2; Ex No. 48; CP

210. Brummonds own Lot 19 on the survey; Wood owns the adjacent Lot 23. Id.

The four stars on Lots 19 and 23 represent trees. Id. The upper, left star represents Tree 595 (Wood's tree). Id. The upper right star represents Tree 596 (Brummonds' tree). Id. Tree 595 was 1.2 feet southwest of the property line on Wood's property. Id. Tree 596 was 2.6 to 3 feet northeast of the property line on Brummonds' property. Wood's expert Scott Baker claims Tree 596 had a kink and grew at an angle, crossing into the airspace on Wood's property. CP 196.

As shown on the survey, the property line between Brummonds' and Wood's properties forms an unusual angle. Appendix A-2; Ex No. 48; CP 210. Due to this angle, Tree 595 (Wood's tree) is actually farther uphill, and closer to Brummonds' house, than Tree 596 (Brummonds' tree). Id.

Neither Carol Brummond, nor her husband James, had ever examined their property's boundaries. CP 289-90; RP 3/9 II, 11-12, 26. They had never descended the steep slope below their hedge, looked for corner posts describing their lot, or seen a property survey. Id.

Carol based her understanding of their property's boundaries on a conversation with the prior property owner. CP 290. Trusting this information, she believed they owned 160 feet of property down the

bank to “where it flattens out.” CP 290. This area includes Trees 595 and 596. Appendix A-2; Ex No. 48; CP 210.

In July 2005, Carol was preparing their Burien house for new renters. RP 3/13 I, 83-4. She noticed that the trees were beginning to intrude into their Puget Sound view, above the hedge. CP 289. Thinking that it would erode the view over time, and diminish the rental’s attractiveness, Carol hired Roger Clark (and his business Treebalance Tree Service) to cut Trees 595 and 596. CP 289; RP 3/13 I, 88-89.

Roger Clark and Treebalance

Roger and Kathy Clark own Treebalance Tree Service, a one man tree trimming and cutting business. CP 277. Roger supports Kathy and their three children as a tree cutter. Id.

Roger has a high school education. Id. He has no training or experience in surveying or determining property boundaries. CP 278. He has never sought permits for tree work, and prior to this case had no knowledge that any jurisdiction required permits for tree cutting or topping. Id. Roger never requested surveys from his clients to independently verify tree ownership. Id.

Before the Wood incident, Roger had cut trees for both Carol and her sister. Id. Each time, Roger was shown trees, and asked to cut them. Id. There were no ownership disputes with either of these prior logging jobs. Id.

The Tree Cutting

On July 29, 2005, Carol met Roger at the Burién house. She asked him to top Trees 595 and 596. CP 279-280. Carol told Roger that she wanted the trees cut sufficiently so that she would not have to hire him again for five years. Id. She did not care where the cut portion of the trees fell. Id. She did not want to pay extra for Roger to cut the trees into pieces. CP 280.

Carol and Roger did not explicitly discuss tree ownership. CP 279. Roger relied on Carol's conduct in asking him to cut the trees, assuming that Carol must own them based on his prior work for her, and his belief that Carol would not ask him to cut trees belonging to others. Id. Carol agreed that her request to Roger was a statement by conduct that she owned the trees. RP 3/13 I, 114-115.

Roger descended the slope, and climbed and cut Trees 595 and 596. CP 279-280, R/P 3/13 II, 116. He cut a large portion of each assuring they would not intrude into the view again for years, and left the topped sections as they fell. CP 279-280.

Brummonds paid Roger \$200 for topping the two trees. CP 280.

Wood Background

Gary Wood is an educated man. RP 3/11 I, 40-41. He attended the Virginia Polytechnic Institute and Virginia State University,

graduating with a 3.97 GPA. Id. He has been employed by Boeing as a licensed professional electrical engineer nearly his entire career. RP 3/11 I, 41-2.

Wood bought his property below the Brummonds in 1981. CP 295. He built a home there in 1984. Id.

In 1982, a friend gave Wood two 10 foot Douglas Firs (Trees 595 and 596). RP 3/9 I, 100-101. He planted them on the hillside above his house. RP 3/9 I, 101-102. Wood planted Tree 595 on his property, but admits he planted Tree 596 on the Brummond side of the boundary line. RP 3/9 I, 107-108. The trees grew over time.

Wood's Tree Planting and Restoration

After discovering in July 2005 that Trees 595 and 596 were cut, Wood was upset. RP 3/10 I, 34-35. He called the police and requested that criminal charges be filed against the Brummonds. CP 295. The authorities declined. RP 3/9, I, 40.

Wood hired a lawyer, and arborist Brian Gilles to advise him on tree restoration. CP 302-303. He asked Gilles to provide an estimate of the cost for exactly replacing Trees 595 and 596 with the largest trees available. Id. Gilles provided his estimate of replacement cost in a written report on December 19, 2005. CP 302-317.

The trial court considered Gilles' report and its cover letter at summary judgment. CP 302-317. The court excluded Gilles' testimony and report, and precluded any reference to his opinions, at trial because Wood withdrew Gilles as an expert witness. CP 364-67, 552-53.

Gilles' report estimated that the replacement cost for Trees 595 and 596 was \$11,746.57. CP 312. But Gilles warned Wood that this option was not "standard appraisal practice." CP 302. He advised Wood:

Standard practice is to value the loss of the trees based upon the largest commonly available transplantable tree in the region. ... In your case, that value is \$7,358.00. CP 302.

In January 2006, Wood hired another arborist Scott Baker and his company Tree Solutions, Inc. to organize and supervise the tree replacement. RP 3/10 II, 26. Baker planted of two, large Silver Fir trees. RP 3/11 II, 28. The trees were 10 inches in diameter. RP 3/11 II, 21-22. One was 27 feet tall and the other was 25 feet tall. Id. They weighed 9,000 pounds a piece. RP 3/12 I, 22. Replacement required a crane, scaffolding, road closure, substantial construction, a week of labor and a team of 12 to 14 men. RP 3/11 II, 21, 33; RP 3/10 II, 60; CP 300. The project cost Wood \$96,171.77. CP 197.

One of the two Silver Fir trees died from damage inflicted during the planting process. CP 299. Wood did not replace the dead Silver Fir

with another large, mature tree; he planted multiple smaller trees at lower cost. Id.

Defendants Damage Appraisal and Restoration

Clarks and Brummonds hired certified arborist Favero Greenforest to appraise Trees 595 and 596, and estimate the costs to restore the land. CP 274-275. He opined that cost of reasonably restoring Wood's property from the trespass was \$3,447.08. RP 3/13, II, 49. Greenforest appraised tree 595 (Wood's tree) at \$1,031 using the Trunk Formula Method. RP 3/13, II, 51-54.

b. Procedural Facts

Wood filed suit against Brummonds and Clarks in June 2007. CP 3-10. The Complaint alleged the defendants committed timber trespass, violating RCW 64.12.030. CP 9. Wood claimed entitlement to treble damages in the amount of \$308,639.37, and general damages. Id.

Wood moved for summary judgment in October 2008. CP 170-191. He sought a ruling that as a matter of law:

1. The sole measure of damages was "replacement cost" of the cut trees;
2. Tree 596 straddled the boundary line between Brummonds' and Wood's properties, entitling Wood to a 50% ownership

interest in it;

3. Brummonds failed in proving a mitigating circumstance;
4. Clarks failed in proving a mitigating circumstance;
5. Wood's replacement cost damages are \$93,986.41; and
6. Wood was entitled to emotional distress damages. CP 175-176.

The trial court denied Wood's motion in all respects, finding unresolved issues of material fact precluding summary judgment and necessitating trial. CP 348-351. The court held that there was no issue of material fact that the base of Tree 596 was on Brummonds' property. CP 350.

In March 2009, the case was tried to a jury. CP 616-618. The trial took nine days. See Report of Proceedings.

Wood moved for judgment as a matter of law at the conclusion of the evidence, and the court denied the motion. RP 3/16, 48-54.

The jury returned a verdict in favor of Wood, awarding him \$6,854.00. CP 616-618. It apportioned 65% of the combined fault to Brummonds and 35% to Clarks. Id. The jury determined both defendants met their burden of proving mitigation, so it did not award treble damages. Id. The jury did not award Wood general damages.

Id.

Following the verdict, Wood moved for judgment as a matter of law, additur, or a new trial. CP 648-700. The court denied the motion. CP 718-719. The court entered judgment on the verdict on May 22, 2009. CP 720-722. Wood appealed to this Court. CP 724-729.

V. ARGUMENT

a. Wood's Summary Judgment Denial is Not Reviewable

Wood may not appeal the trial court's order denying his summary judgment motion. This Court should refuse review.

When a trial court denies summary judgment due to factual disputes, and a trial is subsequently held on the issue, the summary judgment ruling is not reviewable on appeal. Draszt v. Naccarato, 146 Wn. App. 536, 540-41, 192 P.3d 921 (Wash. Ct. App. 2008) citing Caulfield v. Kitsap County, 108 Wn. App. 242, 249 n.1, 29 P.3d 738 (2001). Instead, the losing party must appeal from the sufficiency of the evidence presented at trial. Id. A summary judgment denial is reviewable after entry of final judgment only if denial was based on a substantive legal issue. Bulman v. Safeway, Inc., 96 Wn. App. 194, 198, 978 P.2d 568 (1999), rev'd, 144 Wn.2d 335, 27 P.3d 1172 (2001).

Here, the trial court denied Wood's summary judgment motions due to factual disputes. CP 350. The entered order specifically provides: "There are unresolved issues of material fact precluding summary judgment." CP 350. Nothing in the record indicates the denial was based on a substantive legal issue. All Wood's summary judgment issues were subsequently tried by jury. See Report of Proceedings. Therefore, Wood's summary judgment denial is not reviewable, and this Court refuse review.

b. Trial Court Properly Denied Summary Judgment to Wood

Even if the facts were different, and the summary judgment denial was appealable, alternative grounds exist supporting the trial court's summary judgment rulings.

i. Standard of Review

Appellate courts review summary judgment rulings de novo, engaging in the same inquiry as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d. 788, 794-95, 64 P.3d 22 (2003). The burden is on the moving party to prove, viewing all facts and reasonable inferences most favorably to the non-moving party, that no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Id.; CR 56(c). Even when the evidentiary facts are undisputed, summary judgment is improper if reasonable minds could draw different

conclusions from those facts. Chelan County Deputy Sherriff's Ass'n v. Chelan County, 109 Wn. 2d 282, 295, 745 P.2d 1 (1987) citing Money Savers Pharmacy, Inc. v. Koffler Stores (Western) Ltd., 37 Wn. App. 602, 608, 682 P.2d 960 (1984).

ii. Wood's Motion on Restoration/Replacement Cost was Properly Denied

The trial court properly denied Wood's motion for summary judgment on restoration/replacement cost damages for two reasons: (1) genuine issues of material fact remained; and (2) the motion sought entry of an order that misstated Washington timber trespass law.

1. Genuine Issues of Material Fact Existed Regarding Wood's Restoration/Replacement Costs

Washington law requires that timber trespass damages be reasonable. Butler v. Anderson, 71 Wn.2d 60, 66 426 P.2d 467 (Wash. 1967).; Allyn v. Boe, 87 Wn. App. 722, 734, 943 P.2d 364 (Wash. Ct. App. 1997). Where it is possible to restore the property, damages should be limited to reasonable costs of restoration. Butler, 71 Wn.2d at 66. Juries generally determine the appropriate method of calculating damages, and the reasonableness of the restoration or replacement cost. Sherrell v. Selfors, 73 Wn. App. 596, 603, 871 P.2d 168 (Wash. Ct. App. 1994).

The conflicting expert opinion on Wood's *reasonable* restoration/replacement damages precluded summary judgment. Defense expert Favero Greenforest estimated Wood's reasonable restoration cost was \$3,447.00. CP 274-276. Wood's original expert Brian Gilles' report opined that the replacement cost for the two trees was \$11,746.57. CP 313. According to plaintiff's expert Scott Baker, Wood's actual expenses totaled \$96,171.77. CP 213. Baker did not provide a reasonable restoration/replacement cost estimate. *Id.* The court considered all this evidence at summary judgment. CP 348-351.

Based on the conflicting evidence on reasonable restoration/replacement cost damages, different minds could reach far different conclusions on damages. Summary judgment was therefore properly denied.

Citing Allyn, Wood argues that his actual costs were reasonable as a matter of law because they did not exceed his property value. Wood's Opening Brief. 22-23. Wood misreads Allyn. The Allyn court did not hold that damages are reasonable as a matter of law if not exceeding the underlying property value. Rather, it held, "although timber trespass damages may exceed the value of the underlying property in the proper case, the damages must still be reasonable in relation to the value of the

property.” Allyn, 87 Wn. App. at 735. The reasonableness determination is properly left to the jury.

Since material questions of fact remained on Wood’s reasonable restoration/replacement cost damages, this Court should affirm the trial court’s denial of summary judgment, if it reviews the issue.

2. Wood’s Summary Judgment Motion was Inconsistent with Washington Law.

Wood’s motion was also inconsistent with Washington law. Wood sought entry of an order holding, “as a matter of law, the sole measure of damages under RCW 64.12.030 in this case is the reasonable replacement cost undertaken to restore the property as close as is feasible to its pre-trespass condition.” CP 189. The measure of damages in a timber trespass case under RCW 64.12.030 is actually the “restoration or replacement cost” for the vegetation. Hill v. Cox, 110 Wn. App. 394, 405, 41 P.3d 495 (Wash. Ct. App. 2002) citing Birchler v. Castello Land Co., Inc., 81 Wn. App. 603, 915 P.2d 564 (1996), *aff’d*, 133 Wn.2d 106, 942 P.2d 968 (1997). “Replacement cost,” which Wood sought, is not the same as “restoration or replacement,” the proper measure of damages under Washington law.

Even Wood recognizes on appeal that the replacement cost is not the sole measure of damages. His brief argues, “the trial court should

have entered summary judgment that in this residential timber trespass case the sole measure of damages is the reasonable cost to restore and replace Mr. Wood's trespassed property as near as possible to its pre-trespass condition. Wood's Opening Brief, 17.

The trial court had proper grounds to deny Wood's motion and this Court should affirm, if it reviews the issue.

iii. No Genuine Issues of Material Fact Existed Regarding Ownership of Tree 596

The trial court properly ruled on summary judgment that Brummonds alone owned Tree 596. CP 350. Based on the summary judgment evidence, reasonable jurors could reach but one conclusion: there was no material factual issue regarding Tree 596's ownership, and Brummonds owned the tree as a matter of law.

Tree 596's base/trunk was entirely on Brummonds' property. Appendix A-2; Ex No. 48; CP 210. Even Wood admits that Tree 596 comes out of the ground between 2.6 and 3.0 feet on the Brummond side of the property line. CP 181. It is irrelevant that part of the tree's upper half may cross into the airspace above Wood's property.

No Washington case is directly addresses ownership of trees that cross into the airspace of another's property. This case should be governed by the longstanding rule in other jurisdictions that where a tree's

base/trunk stands fully on one person's property, the adjoining landowner retains no ownership interest. Annotation, Encroachment of Trees, Shrubbery, or Other Vegetation Across Boundary Line, 65 A.L.R. 4th 603, 618 (1988). The ALR provides:

Unlike cases where a tree's trunk grows into the boundary line between adjoining premises, trees or other plants whose trunks or bases are situated entirely on one parcel of land have been found to belong to the owner of that parcel, irrespective of the penetration into neighboring property by any of its other portions.... Annotation, Encroachment of Trees, Shrubbery, or Other Vegetation Across Boundary Line, 65 A.L.R. 4th 603, 616-617 (1988):

Since Tree 596's base/trunk grows entirely out of Brummonds' property, Wood retains no interest.

The only Washington case addressing boundary line trees is Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 93, 173 P.3d 959 (Wash. Ct. App. 2007). Happy Bunch is inapplicable because it addresses trees whose trunks grow directly on a boundary line, not those that may cross into the airspace of adjoining property. In Happy Bunch, Grandview cut ten trees growing directly on the boundary line between Happy Bunch's and Grandview's properties. Id. at 85-86. Based on the fact that the tree stumps/bases stood on the boundary line, the court held, "a tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked

or not; and trespass will lie if one cuts and destroys it without the consent of the other.” Id. at 93. The proper measure of damages for these “boundary line” trees is calculated by multiplying the trees' value by the percentage of the trees' trunks that had been growing on the plaintiff's property. Id. at 94.

Unlike in Happy Bunch, Tree 596 is not a boundary line tree. It comes out of the ground entirely on Brummonds' side of the property line. CP 181, Appendix A-2; Ex No. 48; CP 210. The damage calculation announced in Happy Bunch for boundary trees is therefore inapplicable here.

No genuine issues of material fact exist regarding ownership of Tree 596 because its base grows entirely out of Brummonds' property. The trial court therefore properly ruled, and this Court should affirm.

iv. Genuine Issues of Material Fact Existed Regarding Mitigation

The trial court properly denied Wood's summary judgment motion on mitigation. Genuine issues of material fact remained regarding whether Brummonds and Clarks could meet their burden of proving a mitigating factor (that their cutting was casual or involuntary, or that they had probable cause to believe the land on which the cutting was committed was the Brummonds). RCW 64.12.040.

The following evidence at summary judgment created a factual question about whether Brummonds could prove mitigation:

1. No fence separated Brummonds' and Wood's properties. RP 3/9 I, 36; 3/16, 11-12.
2. There was no noticeable difference in the landscape between Brummonds' and Wood's properties. Id.
3. There were no visible boundary markers at the time of the cutting, as they had been covered with dirt and leaves. RP 3/16, 11-12.
4. Carol Brummond testified at deposition that based on conversations with their property's sellers, she understood that they owned 160 feet of property down the bank to "where it flattens out." CP 290. This area includes both Trees 595 and 596. Appendix A-2; Ex No. 48; CP 210.
5. As shown on the survey in the Appendix, Tree 595 (Wood's cut tree) and Tree 596 (Brummonds' cut tree) are only feet apart, straddling the property line. Id. Tree 595 is only 1.2 feet on Wood's side of the property line. Id. Due to the unusual angle of the property line between Brummonds and Wood, Tree 595 appears slightly uphill and closer to Brummonds' house than 596. Id.

In addition to the preceding evidence, the following evidence created a factual question about whether Clarks could prove mitigation:

1. Carol Brummond testified in deposition that by hiring Clark, she conveyed to him her belief that she owned Trees 595 and 596. CP 291.
2. Brummonds previously hired Clark for tree cutting, and there had been no ownership dispute then. CP 278. This course of conduct evidence supports Roger's conclusion that when Carol asked him to cut trees, she owned them.

Since this evidence created a material question of fact whether Clarks and Brummonds could prove a mitigating factor, the trial court properly denied summary judgment. This Court should affirm.

v. Genuine Issues of Material Fact Existed Regarding Wood's Entitlement to Emotional Distress Damages

The trial court properly denied Wood's summary judgment motion on his entitlement to emotional distress damages. CP 348-351.

The trial court permitted recovery of emotional distress damages only if the jury found the trespass "willful," not casual or involuntary, or done with probable cause to believe the tree was on Brummonds' property. CP 616-617. There were genuine issues of material fact at summary judgment regarding whether the trespass was willful or if they

could prove mitigation. See Section V.b.iv, page 19. Without that willfulness finding, the trial court could not order that, as a matter of law, Wood was entitled to general damages at summary judgment. This Court should therefore affirm the summary judgment denial.

c. Trial Court Properly Denied Wood's Motions for Judgment as a Matter of Law

i. Standard of Review

Appellate courts review judgment as a matter of law rulings de novo, applying the same legal standard as the trial court. Hizey v. Carpenter, 119 Wn.2d 251, 271-272, 830 P.2d 646 (1992). Judgment as a matter of law is inappropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict. Schmidt v. Coogan, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Where the evidence produced by the nonmoving party produces facts that would allow a reasonable person to find for that party, the questions are for the jury and judgment as a matter of law is inappropriate. Id. at 493. Courts should grant these motions only where no doubt as to the proper verdict exists. Id.

ii. Substantial Evidence Exists to Sustain Restoration/Replacement Cost Verdict

The jury awarded Wood \$6,854.00 in damages. CP 616. The evidence at trial, when construed most favorably to Clarks and

Brummonds, permits the inference that Wood's reasonable restoration or replacement damages were \$6,854.00. The following evidence supports the damage award:

Defense expert Favero Greenforest, a certified arborist, testified that Wood's reasonable restoration cost was \$3,447.08. RP 3/13, II, 46; 49. This estimate included the cost of planting smaller and more numerous trees, tree delivery and installation, irrigation system installation, water, and post-restoration maintenance. RP 3/13, II, 54-56. Greenforest based the calculation on the Guide for Plant Appraisal and Species Rating for Landscape Trees¹, a book recognized and accepted by arborists for tree appraisal, and City of Burien ordinances. RP 3/13, II, 49-50; 54-56. He also performed a site visit, contacted the City of Burien and large tree provider Big Trees, reviewed water costs, and received an estimate from a contractor for an irrigation system. RP 3/13, II, 50; 54-56.

1. Greenforest's Testimony Comports with Washington Law.

Wood argues Greenforest's restoration estimate was inadmissible because it (1) is based on the Trunk Formula Method ("Trunk Formula");

¹ RICHARD F. GOODING, JAMES B. INGRAM, JAMES R. URBAN, LEWIS B. BLOCH, WILLIAM M. STEIGERWALDT, RICHARD W. HARRIS, ELLIS N. ALLEN, GUIDE FOR PLANT APPRAISAL AND SPECIES RATING FOR LANDSCAPE (INTERNATIONAL SOCIETY OF ARBORICULTURE 9th ed. 2000).

and (2) does not return Wood to his exact pre-trespass condition. Wood's Opening Brief, 19. These arguments fail.

Wood's argument that Greenforest's restoration estimate improperly relies on Trunk Formula misstates the facts. Wood's Opening Brief, 19. In fact, Greenforest's restoration cost figure was not based on Trunk Formula, but on City of Burien Ordinances and other recognized and accepted methods of calculating tree restoration cost. RP 3/13, II, 49-50; 54-56.

Further, Greenforest's estimate comports with Washington law. Timber trespass case law permits recovery of reasonable restoration or replacement costs for injury to ornamental trees. Birchler, 81 Wn. App. at 607; Allyn, 87 Wn. App. at 734. Greenforest's testimony provided an estimate of reasonable restoration or replacement cost according to Washington law. RP 3/13, II, 46-47; 49. Planting smaller and more numerous trees would restore Wood's property as required. Clarks and Brummonds concede that Greenforest's method of restoration does not put Wood in the exact same position as before the trespass, as Wood argues is necessary. However, Washington law does not require this. It requires restoration or replacement of Wood's property, and nothing more.

Further, Wood's own restoration project did not put him the exact same position as before the trespass. Wood elected to replace 38 and 47

foot Douglas firs with 25 and 27 foot Silver firs at an incredible expense, when smaller trees of the same species could have been planted for a reasonable cost. RP 3/11 II, 28, RP 3/12 I 84.

Based upon Greenforest's testimonial evidence, a fair-minded and rational juror could conclude that Wood's reasonable restoration/replacement damages were \$6,854.00. The verdict is further strengthened by the trial court's later denial of a new trial. Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 271, 840 P.2d 860 (1992). This Court should therefore affirm.

iii. Substantial Evidence Exists to Sustain Verdict on Mitigation

The jury found that both Clarks and Brummonds met their burden of proving mitigation under RCW 64.12.040. CP 616-617. The jury heard substantial evidence from which it could reasonably find that the cutting was casual or involuntary, or that they had probable cause to believe the land on which the cutting was committed was the Brummonds.

1. Clarks Proved Mitigation

The jury's finding that Clarks proved mitigation could reasonably be based on the following evidence:

1. Carol Brummond testified that by hiring Clark, she conveyed to him her belief that Brummonds owned the trees and he was authorized to cut them. RP 3/13 I, 114-115.²
2. Clark testified that he relied on Brummond's request to cut the trees as proof she owned the same. RP 3/16, 26-27.³ He further explained that it is his business practice to rely on customers in determining property boundary lines, a practice that had worked in the past. RP 3/16, 26-27.
3. Clark had previously hired Clark for tree cutting, and there had been no ownership dispute then. RP 3/13 I, 88-89. This course of conduct evidence supports Roger's conclusion that when Brummond asked him to cut trees, Brummonds owned them.
4. Due to the unusual property line between Woods' and Brummonds' property, Wood's cut tree actually appears closer

2

- Q. All right. And do you understand that, but telling Roger to top a particular tree, that you were essentially telling him that you owned that tree?
- A. Yes, I did understand that.
- Q. And that is what you believed, right?
- A. Correct.
- Q. Okay, And when Roger reported to you that there was this other tree and did you want that cut, did you authorize that tree to be cut too?
- A. Yes.
- Q. And by authorizing Mr. Wood to cut that second tree, were you essentially telling him that you owned that second tree?
- A. Yes

³ Roger Clark testified at trial during cross-examination, "I trusted her that it was her property down below. Where I was going to descend would be on her property." RP 3/16, 26-7.

to Brummonds' house. RP 3/13, II, 10; Appendix A-2; Ex No. 48; CP 210. Brummond testified a person could reasonably believe that if Tree 596 belonged to Brummonds, then so would Tree 595 based on the fact that Tree 595 is farther uphill. RP 3/13, II, 10.

5. No fence separated Brummonds' and Wood's properties. RP 3/9 I, 36; 3/16, 11-12.
6. There was no noticeable difference in the landscape between Brummonds' and Wood's properties. RP 3/9 I, 36; 3/16, 11-12.
7. There were no visible boundary markers, as they had been covered with dirt and leaves. RP 3/16, 11-12.

2. Brummonds Proved Mitigation

In addition to the preceding evidence regarding Clarks, the jury's finding that Brummonds proved mitigation could reasonably be based on the following additional evidence:

1. Carol Brummond testified that based on conversations with the property sellers, Trees 595 and 596 were on her property. RP 3/13 I, 64-65, 87. She understood they owned 160 feet of property down the bank until where the "steep incline leveled out." Id. This includes Tree 595. RP 3/13 I, 87.

Based upon the above evidence, a fair-minded and rational juror could conclude that Clarks and Brummonds proved the cutting was casual or involuntary, or that they had probable cause to believe the land on which the cutting was committed was Brummonds. This court should therefore affirm the denial of Wood's judgment as a matter of law motion.

iv. Substantial Evidence Exists to Sustain Jury's Verdict on Emotional Distress Damages

The trial court permitted recovery of emotional distress damages only if Clarks and Brummonds failed in proving mitigation under RCW 64.12.040. CP 616-617. The court instructed the jury to consider emotional distress elements only if the trespass was "willful." CP 631. The jury determined Clarks and Brummonds met their respective burdens of proving mitigation, so it did not award Wood general damages. CP 616-617.

The evidence, when construed most favorably to Clarks and Brummonds, permits the inference that Wood was not entitled to emotional distress damages because the jury did not find willfulness as required by Washington law.

1. Trial Court Properly Required Willfulness Finding

The trial court properly held that emotional distress damages are recoverable only for "willful" violations of the timber trespass statute.

In Birchler v. Castello Land Co., the Washington Supreme Court stated, “We believe the correct rule is that emotional distress damages are recoverable under RCW 64.12.030 for the intentional interference with property interests such as trees and vegetation.” Birchler, 133 Wn.2d at 116, fn.5. The Birchler court went on to state that willful conduct satisfies the intent requirement:

We have interpreted RCW 64.12.030 to require “willful” trespass while our cases pertaining allowing emotional distress damages in the property context require an “intentional” interference with a property interest. In this case, Castello and Hayes conceded below that willful and wanton conduct for purposes of RCW 64.12.030 was deemed intentional conduct. Report of Proceedings at 553-53. Moreover, the jury was instructed that emotional distress damages were recoverable only if the defendants engaged in “intentional wrongdoing.” Clerk's Papers at 286-87. An intentional interference with a property interest is required before emotional distress damages may be awarded under RCW 64.12.030.

Id. at 116, fn.5.

Analyzing Birchler, the same court in White River Estates v.

Hiltbruner also found that willfulness satisfies that intent requirement:

“The court then looked to the statute and found that a violation of RCW 64.12.030 requires proof that a person has “willfully” trespassed and damaged the property of another person. These actions, the court found, amounted to an intentional interference with another's property interests and thus determined that emotional distress damages were available for a violation of RCW 64.12.030.”

White River Estates v. Hiltbruner, 134 Wn.2d 761, 768, 953 P.2d 796 (1998) citing Birchler, 133 Wn.2d at 116-17. The White River court summarized the Birchler holding with the following, “emotional distress damages available for ‘willful’ violation of timber trespass statute.” White River Estates, 134 Wn.2d at 766. Reading these cases together, emotional distress damages should only be available for “willful” trespasses.

Contrary to Wood’s claim, no case holds that general damages are recoverable under RCW 64.12.030 without a finding of willfulness or intent. Wood’s Opening Brief, 32. Wood argues Trotzer v. Vig stands for this proposition, but he misrepresents the holding. Trotzer v. Vig, 149 Wn. App. 594, 203 P.3d 1056 (Wash. Ct. App. 2009) (trial court found mitigation and also awarded general damages; appellate court affirmed ruling that plaintiff was not entitled to treble damages). In fact, the Trotzer court did not even address the availability of emotional distress damages, as the general damage award was not appealed. Id. at 614. The only relevant issue was whether the trespass was willful. Id. at 608. Trotzer is therefore not precedent on the availability of general damages.

2. Requiring “Willfulness” is Consistent with the Law.

Awarding emotional distress damages only upon a finding of willfulness is consistent with other general damage jurisprudence. Courts have generally declined awarding emotional distress damages for negligence-based claims. White River Estates, 134 Wn.2d at 767-68. They require intentional conduct to award these damages. Id.

A non-willful trespass, one that is casual or involuntary or done with probable cause to believe the cut tree was on his property, is essentially negligence. General damages should therefore not be recoverable for these trespasses.

The trial court properly required a “willful” trespass before awarding general damages. Substantial evidence exists sustaining the jury’s verdict on willfulness and mitigation. See Section V.b.iv., page 19. The court therefore properly denied Wood’s judgment as a matter of law motion on his entitlement to general damages. This Court should affirm.

If the facts were different, and Wood was entitled to judgment as a matter of law on his general damages, this Court should remand on the general damages issue only.

d. Trial Court's Admittance/Exclusion of Evidence Not an Abuse of Discretion.

i. Standard of Review

Evidentiary rulings are generally subject to an abuse of discretion standard. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Reasonable minds often differ as to how to strike the balance between probative value and unfair prejudice of evidence, and the trial judge in general is in a better position to weigh the competing considerations. Holz v. Burlington N. R. Co., 58 Wn. App. 704, 708, 94 P.2d 1304 (Wash. Ct. App. 1990).

ii. Trial Court Properly Permitted Defense Expert's Damage-Related Testimony

Permitting Greenforest's damage-related testimony was not an abuse of discretion because the testimony was relevant and not unduly prejudicial. ER 401; 403. Greenforest's testimony was relevant to Wood's reasonable restoration/replacement cost and his conduct's reasonableness. ER 401. See Section V.c.ii.1, page 23. Contrary to Wood's allegations, Greenforest's reasonable restoration/replacement cost testimony was consistent with Washington timber trespass law. *Id.* It did not prejudice or

mislead the jury, as it provided a relevant and accepted method of calculating timber trespass damages. *Id.*

Since the testimony was consistent with Washington law, relevant, and not prejudicial, permitting it was not manifestly unreasonable. The trial court acted within its discretion, and this Court should affirm.

iii. Trial Court Properly Excluded Evidence that Trees were Cut without a “Critical Area” Permit

The trial court properly precluded reference to the fact that Clarks and Brummonds lacked a City of Burien “Critical Area” cutting permit as required. CP 553. It was irrelevant and unfairly prejudicial. ER 401; 403.

Evidence of the ordinance violation is irrelevant because it does not bear on Brummonds and Clarks’ liability for timber trespass, or Wood’s damages. ER 401. Timber trespass law imposes liability on persons cutting down, injuring, or carrying off any tree on the land of another person. RCW 64.12.030. The jury’s evaluation of such a claim depends on where the tree arises and the defendants’ knowledge about the tree’s ownership. It does not depend on whether the defendants fulfilled their administrative duty to obtain a tree cutting permit. The evidence is therefore irrelevant. ER 401.

Ordinance violation evidence is also excludable as unduly prejudicial. ER 403. The risk that the jury will improperly find Clarks and

Brummonds liable for timber trespass because they violated the permit ordinance is too great. Like character evidence generally,

evidence of other bad or illegal acts tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Holz, 58 Wn. App. at 708.

This situation can be likened to Holz v. Burlington, in which a motorcyclist (Holz) died after striking a rail car parked on a railroad crossing at night. Holz, 58 Wn. App. at 705. The trial court excluded evidence that Holz lacked a motorcycle endorsement. Id. at 709. The appellate court affirmed the ruling, reasoning that there was no causal connection between the accident and the alleged negligence because the victim would have suffered the same fate regardless. Id. Evidence the victim lacked a license was therefore irrelevant and carried the danger of unfair prejudice, confusion of the issues, and misleading the jury. Id. at 708.

Since evidence of Brummonds and Clarks' lack of permit was irrelevant and unduly prejudicial, the trial court's exclusion was not manifestly unreasonable. The trial court acted within its discretion, and this Court should affirm.

e. The Appellate Court Should Affirm the Trial Court's Jury Instructions.

i. Standard of Review

Absent manifest error affecting a constitutional right, an appellate court only reviews assignments of error based upon the giving or refusal to give jury instructions if a timely objection was made prior to the instructions being read to the jury. RAP 2.5(a); State v. Dean, 70 Wn.2d 66, 68-69, 422 P.2d 311 (1966); Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 427, 40 P.3d 1206 (2002). If a proper objection is made, the appellate court reviews de novo alleged errors of law in a trial court's jury instructions. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The appellate court reviews the instructions to determine whether they permit the parties to argue their theories of the case, whether they are misleading, and whether they accurately inform the jury of the applicable law. Adcox v. Children's Orthopedic Hosp., 123 Wn.2d 15, 36, 864 P.2d 921 (1993), citing Douglas v. Freeman, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991).

ii. Wood Waived His Right to Appeal the Giving or Failure to Give Certain Jury Instructions by Failing to Object at Trial.

Wood's assignments of error numbers 5, 6, 7, 8, and 9 all pertain to the trial court's giving or refusal to give jury instructions proposed by

the parties.⁴ Of these assignments of error, the only ones not fully waived by Wood's failure to object at trial are assignment of error No. 7 pertaining to the giving of instruction No. 11, and assignment of error No. 8 pertaining to the giving of instruction No. 16, an instruction proposed by Wood himself. RP 3/17, 2-10.

Wood failed to object at trial to the trial court's refusal to give Wood's Proposed Instruction No.19 (Assignment of Error No. 5). He also failed to object to the trial court's refusal to give Wood's Proposed Instruction No.26 (Assignment of Error No. 6), and further failed to object to the giving of Defendant's Special Verdict Form in place of Wood's Proposed Special Verdict Form. (Assignment of Error No.9). Further, he failed to object to the giving of Instruction No. 10 (part of Assignment of Error No. 7), and did not object to the giving of Instruction No. 17 (part of Assignment of Error No. 8). Wood does not even address Assignments of Error Nos. 8 and 9 in the Argument section of his Opening Brief.

Pursuant to CR 51(f), a party must object to the giving of any instruction and to the refusal to give a requested instruction, and must

⁴ Assignment of error No. 5 pertains to the court's refusal to give plaintiff's proposed instruction 19. Assignment of error No. 6 pertains to the court's refusal to give plaintiff's proposed instruction 26. Assignment of error No. 7 pertains to the court's giving defendants' proposed instructions 10 and 11. Assignment of error No. 8 pertains to the court's giving of plaintiff's own proposed instructions 16 and 17. Assignment of error No. 9 pertains to the court's giving defendants' Special Verdict Form instead of Plaintiff's form.

“state distinctly the matter to which he objects and the grounds of his objection.” CR 51(f); Micro Enhancement Intern., Inc., 110 Wn. App. at 427. Proper objections must also be made for special verdict forms. Queen City Farms, Inc. v. Cent. Nat’l Ins. Co., 126 Wn.2d 50, 63, 882 P.2d 703, 891 P.2d 718 (1994). The purpose of Rule 51(f) is to give the trial court a chance to change positions and thereby avoid the necessity of a second trial. Truex v. Ernst Home Center, Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994).

RAP 2.5(a) provides that the appellate court may refuse to review any claim of error which was not raised in the trial court unless it involves a “(3) manifest error affecting a constitutional right.” Case law is in full accord:

This court has held time and again that-except under the most grave and farreaching circumstances, when to do otherwise would result in a palpable miscarriage of justice-it will not review claims of error as to instructions given or refused unless the trial court has been given timely opportunity to consider and correct the alleged error.

State v. Dean, 70 Wn.2d at 68-69, citing State v. Louie, 68 Wn.2d 304, 413 P.2d 7 (1966).

None of the assignments of error raised by Wood remotely involves a constitutional right or manifest miscarriage of justice. His failure to object at trial when given full opportunity prevents him from raising the issues now.

iii. The Trial Court Properly Instructed the Jury on the Definition of Willful Misconduct as a Required Element of Wood's Emotional Distress Claim.

Wood's Assignment of Error No. 7 claims that the trial court erred when it gave instructions 10 and 11 that included a requirement that the jury find the defendant willfully trespassed before awarding emotional distress damages, and defining willful misconduct in Instruction No. 11 as follows:

Willful misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do.

According to Wood, a finding of willfulness is not a required element of an emotional distress claim.

Wood's Assignment of Error No. 7 fails for a number of reasons, not the least of which is that Washington courts specifically require a finding of intentional or willful conduct before emotional distress damages can be awarded in a property damage case. See Section V.c.iv.1, page 28. A finding of a willful trespass is required before Wood can recover emotional distress damages, and this requirement was properly included in Instruction No. 10.

Moreover, the definition willful misconduct contained in Instruction No. 11 is taken from Washington Pattern Instruction No.

14.01, which defines willful and wanton misconduct and is an accurate statement of the law. See WPI 14.01; Appendix A-3.

An additional basis for rejecting Wood's Assignment of Error No. 7 is that he did not object to giving Instruction No. 10. RP 3/17 2-10. He waived his right to claim that requiring a finding of a willful trespass for emotional distress damages was error. RAP 2.5(a); State v. Dean, 70 Wn.2d at 68-69.

Further, Wood's claim that the inclusion of a willfulness instruction confused the jury on the timber trespass mitigation issue is nonsense. Instruction No. 10 on damages only required a finding of willful trespass with respect to the emotional distress element of damages, specifically stating as follows:

In addition, if you find that the trespass was willful and that plaintiff suffered emotional distress as a result of the trespass, you should consider the following damages elements:

The nature and extent of the emotional distress and the loss of enjoyment of life suffered by the plaintiff as a result of the trespass, including any inconvenience, discomfort, and mental anguish.

The term "willful" is not included anywhere in relation to the mitigation instruction, and Wood's argument to the contrary should be rejected. The instructions' inclusion of a requirement of willful trespass before awarding emotional distress damages was a correct statement of the law.

f. Trial Court Properly Denied Wood's Motion for a New Trial or Additur.

i. Standard of Review

A trial court's decision on a new trial motion will generally not be disturbed on appeal absent a showing of a clear abuse of discretion. Cox v. GM Corp., 64 Wn. App. 823, 826, 827 P.2d 1052 (Wash. Ct. App. 1992). Appellate review of new trial rulings is narrow, restrained, and rarely exercised because of the favored position of the trial court to hear and evaluate witnesses, jurors, parties, counsel, and the evidence. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 330, 858 P.2d 1054 (1993); Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

If the reasons for the trial court's decision involve a question of law, however, the standard of review is de novo and the appellate court reviews the record for error in application of the law. Schneider v. Seattle, 24 Wn. App. 251, 255, 600 P.2d 666 (1979), review denied, 93 Wn.2d 1010 (1980).

Jury verdicts on damages carry a strong presumption of validity. Bingaman, 103 Wn.2d at 835. The appellate court will not disturb a jury's determination of damages unless it is outside the range of substantial

evidence in the record, shocks the conscience of the court, or was the unmistakable result of passion or prejudice. Id.

ii. No Error of Law Occurred Warranting New Trial

Wood argues certain evidentiary and instructional errors warranted a new trial. Wood's Opening Brief, 48. These claims of error fail. See Sections V.d, page 31; V.e., page 34. This Court should therefore affirm the court's denial of Wood's new trial motion on this ground.

If the facts were different, and the trial court made an evidentiary ruling or instructional error, the error must materially affect the trial outcome or Wood's substantial rights to require a new trial. CR 59(a); Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 561, 815 P.2d 798 (Wash. Ct. App. 1991).

iii. Jury's Verdict on Restoration/Replacement Damages, General Damages, and Mitigation was Within the Range of Evidence and Not Contrary to Law

1. Restoration/Replacement Cost Damages

The trial court properly denied Wood's new trial motion because the jury's restoration/replacement cost award was within the range of credible evidence at trial.

The jury heard testimony from defense expert Greenforest that Wood's reasonable restoration cost was \$3,447.00. RP 3/13, II, 46; 49. The jury's verdict of \$6,854.00 is nearly \$2,500 more than Greenforest's calculation and therefore within the range of evidence presented to the jury.

Wood argues the jury's verdict was lower than the proved, uncontested damages. Wood's Opening Brief, 49-50. This argument fails for two reasons. First, the jury may reject any damage evidence as unreasonable or unnecessary. The presented damage evidence does not set the floor on damages.

Second, Wood's argument fails because it is inaccurate. Wood mischaracterizes at least two elements of damage as proven and uncontested when actually disputed at trial. For example, Wood claims the \$266.00 for investigative services locating his neighbors for an easement was uncontested. Wood's Opening Brief, 48-51. However, Clark objected at trial to the expenditure, arguing it was not a recoverable element of damages. RP. 3/10 II, 100-101.⁵ Wood also claims his survey cost of \$1,685.00 was recoverable. This expense was unnecessary and

⁵ The trial court admitted the evidence on Wood's investigative costs, stating it was for the jury to determine whether it was a recoverable element of damages. RP 3/10 II, 100-101.

duplicative. RP 3/11 II, 99; 3/11 I, 11-12. Wood had already surveyed the property and the second survey revealed nothing new. RP 3/12 I, 55.

Removing the survey and investigator costs, Wood's damages total \$6,768.50, less than the jury's award of \$6,854:

Debris Removal	\$408.00
Arborist Cost	\$2,912.50
Greenforest's Restoration Estimate	\$3,447.00
Wood's Total Damages	\$6,768.50

Accordingly, the damages were within the range of credible evidence, and the trial court properly denied Wood's new trial motion on this basis. This Court should affirm.

2. General Damages

The trial court properly denied Wood's motion for a new trial on general damages because the jury's verdict was within the range of presented evidence at trial. See Section IV.c.iv., page 28.

The trial court permitted recovery of emotional distress damages only if Clarks and Brummonds failed in proving mitigation under RCW 64.12.040. CP 617. The jury properly determined Clarks and Brummonds met their respective burdens of proving mitigation. CP 616-617. Its failure in awarding general damages was therefore appropriate and within the range of credible evidence.

Even if this Court determines the trial court improperly precluded general damages, the jury's award was still within the range of evidence. The jury could reasonably infer from the evidence that Wood was not entitled to emotional distress damages. It may have been convinced that Wood's injury was not as serious as contended, or a portion of his time was spent unnecessarily or unreasonably.

Because the general damage award was within the range of credible evidence, the trial court properly denied Wood's new trial motion. This Court should affirm.

3. Mitigation

The jury's finding of mitigation was supported by the evidence and not contrary to law. See Section IV.c.iii., pages 25-27. It was therefore not an abuse of discretion for the trial court to deny Wood's motion for a new trial on this basis, and this Court should affirm.

iv. No Evidence Jury's Verdict was Motivated by Passion or Prejudice

The mere existence of passion or prejudice is insufficient grounds to award additur; the verdict on its face must be so inadequate as unmistakably indicating it resulted from passion or prejudice. Robinson v. Safeway Stores, 113 Wn.2d 154, 162, 776 P.2d 676 (1989). Where the verdict is within the range of credible evidence, the trial court has no

discretion in finding passion or prejudice affected the verdict. Id. (citing James v. Robeck, 79 Wn.2d 864, 490 P.2d 878 (1971)). Because the verdict was within the range of evidence (see Section V.f.iii, pages 41-44), the trial court had no discretion to find passion or prejudice motivated the verdict.

Further, the record here discloses nothing suggesting the jury was prejudiced against Wood or that it was incited by passion to regard his case unfairly. Wood claims the jury was prejudiced against him because he planted trees that interfered with a neighbor's view, sued his neighbors, neighbors thought he was unfriendly, and he was single and childless. Wood's Opening Brief, 55. These claims are unsubstantiated, and not supported by affidavit. Wood provides no evidence of juror misconduct, failure to follow court instructions, or prejudice against Wood. Wood's opinion that he may have appeared "unappealing and unlikeable," without more, is irrelevant. Wood's Opening Brief, 55. The court should ignore this argument completely.

v. Substantial Justice Was Done

The trial court properly denied Wood's new trial motion because substantial justice was done at trial. The jury ruled in favor of Wood on liability, awarding him single damages for his reasonable restoration/replacement costs under Washington law.

Admittedly, Wood's damage award was a fraction of what he expended. But Wood's costs were unreasonable, and Washington law permits recovery of only *reasonable* restoration/replacement cost damages. Allyn, 87 Wn. App. at 734 (emphasis added). Therefore, the trial court's denial of Wood's new trial motion was not an abuse of discretion on this ground. This Court should affirm.

vi. No Cumulative Errors Justifying New Trial

The trial court properly denied Wood's new trial motion arguing that the cumulative effect of multiple errors precluded him from receiving a fair trial. The cumulative error doctrine does not apply where, like in the instant case, any errors are few and have little or no effect on the trial outcome. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006) citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). This Court should therefore affirm the trial court's denial of Wood's new trial motion on this basis.

g. Costs

i. This Court Should Deny Wood's Cost Request

Wood requests that this Court award him costs should he prevail. Wood's Opening Brief, 57-8. Only the party who substantially prevails on appeal may be entitled to costs. RAP 14.2. If both parties prevail on major issues, there may be no substantially prevailing party. See Nursery Prods.,

Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

Wood's appeal arguments all fail, so he cannot be the substantially prevailing party. Even if the facts were different, and Wood prevailed on an issue (and lost on others), this Court should still deny Wood's cost request because he is not the substantially prevailing party.

ii. The Court Should Award Clarks and Brummonds Costs.

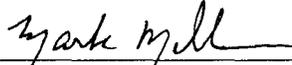
Clarks and Brummonds request costs under RAP 14.2. Wood's assignments of error lack merit. Clarks and Brummonds will therefore substantially prevail on appeal. As the substantially prevailing parties, they are entitled to costs incurred in responding to Wood's appeal.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the court below in all respects, deny Wood's request for costs, and grant Clarks and Brummonds' request for costs.

DATED this 6th day of May, 2010.

Respectfully Submitted,



MARK MILLER, WSBA No. 16382
Attorney for Respondents Brummond
Hollenbeck, Lancaster, Miller & Andrews
15500 SE 30th Pl #201
Bellevue, WA 98007
(425) 564-0203

DATED this 6th day of May, 2010.

Respectfully Submitted,



DAVID TEWELL, WSBA No. 9000
Attorney for Respondents Clark
The Tewell Firm
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 623-2369

DATED this 6th day of May, 2010.

Respectfully Submitted,



SUZANNA SHAUB, WSBA No. 41018
Attorney for Respondents Clark
The Tewell Firm
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 623-2369

1482-02/appeal/respondents' brief

APPENDIX

Applicable Timber Trespass Statutes

1. RCW 64.12.030: Injury to or removing trees, etc. – Damages
(in 2005, before 2009 amendments)

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 therefor, as the case may be.

2. RCW 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 probably 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 uninclosed 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.

WPI 14.01

WPI 14.01: Willful Misconduct and Wanton Misconduct—Defined

[Willful misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do when he or she [has actual knowledge of the peril that will be created and intentionally fails to avert injury] [or] [actually intends to cause harm].]

[Wanton misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do, in reckless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in substantial harm to another.]

NOTE ON USE

Use either paragraph or both depending upon the claims and the evidence. The issues instruction from WPI Chapter 20, the burden of proof instruction from WPI Chapter 21, and the damage instruction from WPI Chapter 30 will all have to be modified to refer to willful misconduct or wanton misconduct, or both, instead of negligence.

NO. 63677-4-I

COURT OF APPEALS, DIVISION 1

OF THE STATE OF WASHINGTON

R. GARY WOOD,)	
)	CERTIFICATE OF
Appellant,)	SERVICE
)	
)	
)	
v.)	
)	
JAMES C. BRUMMOND and CAROL)	
D. BRUMMOND, husband and wife;)	
ROGER B. CLARK and KATHRYN)	
CLARK, husband and wife, d/b/a)	
Treebalance Tree Service,)	
)	
Respondents.)	
_____)	

2010 MAY -6 PM 4:33
 COURT OF APPEALS
 DIVISION 1

I, Lisa Jager, do hereby declare pursuant to the laws of the state of Washington and under penalty of perjury that on the 6th day of May, 2010, I sent via legal messenger and/or hand delivered:

1. BRIEF OF RESPONDENTS CLARKS AND BRUMMONDS; and
2. CERTIFICATE OF SERVICE

to the following counsel:

COUNSEL FOR APPELLANT
 Kevin M. Winters
 Hawkes Law Firm, P.S.
 19929 Ballinger Way NE
 Shoreline, WA 98155

COUNSEL FOR RESPONDENT BRUMMOND

Mark Miller
Hollenbach, Lancaster, Miller & Andrews
15500 SE 30th Pl #201
Bellevue, WA 98007

DATED this 6th day of May, 2010.

THE TEWELL FIRM

A handwritten signature in cursive script, reading "Lisa Jager", is written over a horizontal line.

Lisa Jager
Legal Assistant

1482-02/pleadings/cert. of service