

No. 71726-0

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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LESLIE M. PENDERGRAST, an individual,

Appellant/Cross-Respondent,

v.

ROBERT MATICHUK and JANE DOE MATICHUK, as individuals and in their marital capacity; BLAINE PROPERTIES, L.L.C., a Washington State limited liability company,

Respondents/Cross-Appellants.

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APPELLANT/CROSS-RESPONDENT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignment of Error

The Trial Court committed legal error by failing to follow RCW 64.12.030 and treble the jury's \$40,000 non-economic damages award to Appellant Leslie Pendergrast ("Pendergrast") which were found to have been caused by Respondent Robert Matichuk's ("Matichuk") timber trespass.

B. Issues Pertaining to Assignments of Error

On February 27, 2014, the Trial Court entered Findings of Fact and Conclusions of Law Relating to Equitable Claims and Relief ("Findings and Conclusions") recognizing that the jury had awarded Pendergrast \$40,000 in "non-economic" damages that had been caused by Matichuk's timber trespass for her claim under RCW 64.12.030. CP 222. The Trial Court concluded that these damages should not be trebled under RCW 64.12.030 based upon the following erroneous conclusion of law: "The Court declines to triple the non-economic damages because such a trebling is not specifically provided in RCW 64.12.030, which is a penal or punitive statute, should be interpreted and applied literally and narrowly." CP 237.

II. STATEMENT OF THE CASE

This case relates to Respondents' physical trespass and occupancy of Pendergrast's property and the corresponding removal of a cherry tree on Pendergrast's property, all for the purpose of Respondents to construct four condominium units. The limited legal issue appealed by Pendergrast requires recognition of only several procedural facts associated with the trial.<sup>1</sup> A six-person jury trial occurred on Pendergrast's two claims for trespass and timber trespass under RCW 64.12.030. The Trial Court instructed the jury as follows relating to the timber trespass claim:

Damages for trespass and/or timber trespass include economic and non-economic loss that you find was proximately caused by the trespass and/or timber trespass.

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It is the duty of the Court to instruct you as to the measure of damages. You must determine the amount of money that will reasonably and fairly compensate the Plaintiff for those damages you find were proximately caused by wrongful actions of one or more of the Defendants.

You should consider the following economic damages:

- If you find that one or more of the Defendants trespassed on the Plaintiff's property, you must determine which Defendants are liable on this

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<sup>1</sup> Pendergrast anticipates providing a more detailed recitation of the evidence when she responds to Respondents' cross-appeal.

claim, and the amount of economic damage proximately caused by the trespass.

- If you find that Defendant Robert Matichuk committed timber trespass, you must determine the economic damage proximately caused by that timber trespass.

If you find that one or more of the Defendants committed trespass or timber trespass, you should also consider the following non-economic damages:

- Mental anguish, emotional distress, and inconvenience experienced by the Plaintiff as a result of the trespass or timber trespass.

The burden of proving damages rests with the party claiming them. It is for you to determine, based on the evidence, whether any particular element has been proven by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure non-economic damages. Your decisions on these issues must be governed by your own judgment, by the evidence in the case, and by these instructions.

CP 196 and 199-200. Respondents did not object to these, or any, jury instructions.

The jury returned a special verdict form on the RCW 64.12.030 timber trespass claim, which included the following conclusions as to Matichuk:

**TIMBER TRESPASS**

**CLAIM**

**QUESTION 4:** Did Defendant Robert Matichuk commit a timber trespass upon Plaintiff's real property?

**ANSWER:** YES ✓ NO \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 4, move to the next verdict form. If you answered "yes" to Question 1, answer Questions 5, 6, 7, and 8.)*

**QUESTION 5:** What are the economic damages resulting from the timber trespass?

**ANSWER:** \$ 3,310

**QUESTION 6:** What are the non-economic damages resulting from the timber trespass?

**ANSWER:** \$ 40,000

**QUESTION 7:** Were Defendant Robert Matichuk's actions casual and involuntary, or did Defendant Robert Matichuk

have probable cause to believe that the land on which the trespass was committed was his own?

YES \_\_\_\_\_ NO ✓

**QUESTION 8:** Did Defendant Robert Matichuk know, or have reason to know that he lacked authorization to cut the tree?

YES ✓ NO \_\_\_\_\_

CP 204-05. Pendergrast thereafter sought entry of a final judgment which included trebling of the non-economic damages found to have been caused by Matichuk's timber trespass. CP 211.

Matichuk did not file any written objection to this request and never provided any written opposition to the trebling of non-economic damages caused by his timber trespass. Nonetheless, the Trial Court

refused to treble these damages,<sup>2</sup> based upon the singular legal conclusion that : “The Court declines to triple the non-economic damages because such a trebling is not specifically provided in RCW 64.12.030, which is a penal or punitive statute, should be interpreted and applied literally and narrowly.” CP 237.

### III. ARGUMENT

The only issue on appeal is the proper interpretation of RCW 64.12.030. Construction of a statute is a question of law, State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (citing City of Pasco v. Pub. Employment Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)), and therefore subject to de novo review. RCW 64.12.030 provides as follows:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

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<sup>2</sup> The Trial Court did treble the economic damages award of \$3,310. CP 237 and 242.

(Emphasis added). Although RCW 64.12.040 provides an opportunity for a trespassing party to avoid trebling of damages where he/she can prove that the trespass was “casual and involuntary” or otherwise reasonable, and not “willful,” this exception is not pertinent to this appeal, as the jury concluded as a matter of fact that this exception did not apply. CP 204-05.

Thus, the only question for this appeal is whether or not the Trial Court erred in concluding that the statutory language in RCW 64.12.030 did not require trebling of the awarded non-economic damages because it was not specifically provided in the statute. In evaluating the proper statutory interpretation, this Court must abide by a host of relevant rules of statutory construction, some of which were violated by the Trial Court:

- First, in interpreting a statute, the Court must discern and implement the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)).
- If a statute's meaning is plain, then the Court must effectuate it as an expression of the legislature's intent. State v. Villanueva, 177 Wn.App. 251, 254, 311 P.3d 79 (2013).
- As a remedial statute, RCW 64.12.030 must be interpreted “liberally when necessary to effectuate its purpose.” State v.

Villanueva, supra, 177 Wn.App. at 257 (citations omitted). Indeed, because it is a remedial statute, liberal construction is “commanded.” Vogt v. Seattle-First National Bank, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991) (interpreting Consumer Protection Act).

- “Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation.” Estate of Bunch v. McGraw Residential Center, 174 Wn. 2d 425, 432, 275 P.3d 1119 (2012).
- The spirit or purpose of an enactment should prevail over express but inept wording, and absurd stained or unlikely consequences must be avoided. Alderwood Water Dist. v. Pope & Talbot, Inc., 62 Wn.2d 319, 321, 382 P.2d 639 (1963); State v. Villanueva, supra, 177 Wn.App. at 256.
- In reviewing statutes, “it is always safer not to add to, or subtract from, the language of the statute unless imperatively required to make it a rational statute.” Applied Indus. Materials Corp. v. Melton, 74 Wn.App. 73, 79, 872 P.2d 87 (1994). In other words, courts “cannot add words to an unambiguous statute when the

legislature has not included the language.”<sup>3</sup> Greenhalgh v. Department of Corrections, 324 P.3d 771, 775, Wn.App. Div. 2 (2014) (citation omitted). Nor is it the court’s “function nor prerogative to modify legislative enactments...” Department of Labor and Industries v. Dillon, 28 Wn.App. 853, 857, 626 P.2d 1004 (1981) (citation omitted).

- Here, the word “damages” is a common and familiar legal term, and therefore must be “given its familiar legal meaning.” Razor v. Retail Credit Co., 87 Wn.2d 516, 530, 554 P.2d 1041 (1976) (citation omitted).

Applying these basic rules results in only one simple and proper legal conclusion: All damages awarded as being caused by a timber trespass must be trebled. Certainly, such an interpretation is compelled by the plain language of the statute where it requires that “any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.” The legislative mandate could not be clearer and that is to simply treble any damages assessed for a timber trespass. Or, as already recognized by the Washington State Supreme Court, the statute applies to “damages resulting from the cutting or destruction of trees, timber or

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<sup>3</sup> The Trial Court did not find RCW 64.12.030 to be ambiguous, nor did Matichuk ever argue as such below. That is because it is not ambiguous.

shrubs.” Nystrand v. O’Malley, 60 Wn.2d 792, 796, 375 P.2d 863 (1962) (citations omitted).

The damages assessed for and caused by the timber trespass of Matichuk were found by the jury to include \$3,310 in economic damages and \$40,000 for non-economic damages. The legislature’s use of the word “damages” without qualification in RCW 64.12.030 could not be clearer: It intended that all damages assessed for a timber trespass claim be trebled, including in this case the non-economic damages.<sup>4</sup>

Such a statutory interpretation is in harmony with the principal rule of statutory construction, which is to discern and implement the legislature's intent. State v. J.P., *supra*, 149 Wn.2d at 450. The overall purpose of allowing enhanced damages under the statute is “to punish trespassers, to prevent careless or intentional removal of trees and vegetation from property, and to roughly compensate landowners for their losses.” Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 111, 942 P.2d 968 (1997). Such is accomplished by interpreting the term “damages” to include all categories of damages caused by a timber trespass, including non-economic damages. Shahi v. Madden, 949 A.2d

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<sup>4</sup> Pendergrast and Trial Court were careful to segregate the damages caused by the timber trespass, and therefore subject to trebling, by having separate jury verdict forms for the timber trespass claim and the trespass claim. Thus, the lack of segregation issues presented in Nystrand v. O’Malley, *supra*, 60 Wn.2d 792 is not present here.

1022, 1032 (S.Ct. Vt. 2008). (“We have long ruled that the treble-damages provision [in Vermont timber trespass statute] furthers the purpose of fully compensating wronged parties – a primary purpose of § 3606.”)

Such an intent by the legislature is further supported by use of the non-distinguishing and clear word “damages” to describe the amounts that are to be trebled. State v. Villanueva, supra, 177 Wn.App. at 254 (if a statute’s meaning is plain, court must effectuate it as an expression of the legislature’s intent). The legislature could have added a qualifier to the word “damages” to mean only economic damages, but it did not. Moreover, a broad interpretation resulting in trebling of all categories of damages is compelled by the obligation of the Court to liberally construe this remedial statute to effectuate its purpose to punish, and to compensate. Id. at 257.

Such a result is also forthcoming based upon the uncontested jury instruction in this case which identified that “Damages for trespass and/or timber trespass include economic and non-economic loss that you find was proximately caused by the trespass and/or timber trespass.” CP 196 (emphasis added). By this definition, Matichuk is precluded from arguing

that the word “damages” can be differentiated between economic and non-economic for purposes of trebling under RCW 64.12.030.

Trebling of non-economic damages caused by a timber trespass is equally supported by the familiar and common meaning of the legal term “damages.” Under Black’s Law Dictionary, “damages” means a “pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.” Black’s Law Dictionary (Revised Fourth Edition, 1968). See Greenhalgh v. Department of Corrections, supra (uses Black’s Law Dictionary to assist in interpreting familiar legal term in statute). The term “damages” includes all categories of recovery, and the use of this singular word to identify the amount to be trebled should be given its familiar meaning. State v. Barnett, 36 Wn.App. 560, 562, 675 P.2d 626 (1984) (gives word “damage” its usual and ordinary meaning in RCW 9.92.060 to include insurance payments for burglary).

The Trial Court’s tortured interpretation excluding non-economic damages from the definition of “damages” conflicts with a host of rules of construction. Most importantly, the Trial Court’s interpretation necessarily required it to improperly read into the statute words which are

not there, and to modify the statutory language. Coughlin v. City of Seattle, 18 Wn.App. 285, 289, 567 P.2d 262 (1977); Department of Labor and Industries v. Dillon, supra, 28 Wn.App. at 857. In order to reach its “interpretation,” the Trial Court rewrote the pertinent statute to include the following underlined word into the statutory language: “in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of economic damages claimed or assessed.” There is nothing to support inclusion of this restriction, and to do so was inappropriate.

The Trial Court attempted to justify its improper rewriting of the statute by declaring that the provision needed to be “literally and narrowly” interpreted because it was “penal or punitive.” Initially, a “literal” interpretation of the statute would lead to trebling of all “damages” caused by a timber trespass.

Equally important, it is questionable whether this civil statute is “penal,” as it imposes no criminal liability and is not a function of a criminal process. State v. Barnett, supra, 36 Wn.App. at 562 (restitution statute, RCW 9.92.060, is remedial, whereas, the restitution provision in RCW 9A.20.030 that is in lieu of a criminal fine is penal).

Nonetheless, even if penal or punitive, such statutes are construed “according to the plain meaning of their words to assure that citizens have adequate notice of the terms of law....” State v. Enloe, 47 Wn.App. 165, 171, 734 P.2d 520 (1987) (emphasis in original). In this, “we do not read into a statute matters which are not there, nor do we modify a statute by construction or read into the statute things we may conceive that the Legislature unintentionally left out.” State v. Hursh, 77 Wn.App. 242, 246, 890 P.2d 1066 (1995) (citations omitted). Thus, the Trial Court erred in adding the qualifier “economic” to damages, even under its incorrect categorization.

The most compelling support for an interpretation of the word “damages” as including non-economic damages, and proof of the Trial Court’s erroneous distinction, is the analysis and ruling in Birchler v. Castello Land Co., Inc., supra, 133 Wn.2d. In Birchler, the trial court ruled that emotional distress damages could be awarded on a timber trespass claim under RCW 64.12.030, and on appeal, Division One agreed. However, in doing so, the Court of Appeals concluded that they were recoverable as “segregated” and “distinct” components of damages from the “statutory treble damages” award:

Here, the additional damages were emotional distress damages caused by the removal of the vegetation. Such damages cannot be fairly characterized as ‘a customary by-product’ of removing vegetation because they are unique to the values and sensitivities of the property owner. These damages were also segregated from restoration costs through special interrogatories and special verdict forms and were not trebled with the restoration costs.

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Moreover, statutory treble damages awarded under the statute are intended to punish the voluntary offender and to discourage a person from carelessly or intentionally removing another's shrubs or trees on the gamble that the enterprise may be profitable if only normal damages are incurred. That purpose is unrelated to the purpose of awarding emotional distress damages one may plead, prove, and segregate at trial in situations such as these. Unlike damages that compensate for diminished value to property, emotional distress damages provide compensation for injury to the person. The trial court did not err by permitting the jury to award Owners emotional distress damages in addition to the statutory treble damages.

Birchler v. Castello Land Co., Inc., 81 Wn.App. 603, 608-09, 915 P.2d 564 (1996).

On appeal, the Supreme Court first recognized that in deciding whether emotional distress damages were recoverable under RCW 64.12.030, it was specifically not deciding whether such damages, if

allowed, would be trebled because the issue had not been properly raised on appeal:

Although counsel for the homeowners suggested in oral argument that the emotional distress damages award should have been trebled, we do not reach that issue as the homeowners did not seek cross-review on that issue in the Court of Appeals, RAP 2.4(a), nor did they raise the issue in their Answer to the Petition for Review. RAP 13.4(d).

Birchler v. Castello Land Co., Inc., supra, 133 Wn.2d at 110, n. 3.

However, and importantly, the Supreme Court, in affirming the ability to recover emotional distress damages, made it clear that such damages were not “distinct” from the statutory trebled damages as noted by the Court of Appeals, but instead awardable as “damages” recoverable under the statute.

The Supreme Court first noted that courts had historically interpreted the “damages” recoverable and subject to trebling under the statute narrowly:

RCW 64.12.030 does not precisely articulate the damages that are subject to trebling, indicating only that punitive damages are available ‘[w]henver any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub...’ Our cases have generally confined the treble damages remedy to injury to, or removal of, vegetation, although the measure of damages has varied by the type of vegetation affected.

Id. at 111. It then defined the issue as whether “emotional distress damages are recoverable under RCW 64.12.030.” Id. at 112. Importantly, in evaluating this issue, the court first concluded that “damages under RCW 64.12.030 are not confined exclusively to injury to or destruction of vegetation,” and thus it turned to the question of “whether emotional distress damages are recoverable under RCW 64.12.030 for a trespass.” Id. at 115.

In concluding that such damages were recoverable, the Supreme Court rejected the exact same “lack of specificity” logic utilized by the Trial Court to conclude that non-economic damages were not subject to trebling:

Amicus argues that in the absence of explicit language in the statute allowing emotional distress damages, ‘it would be improper to conclude that the legislature intended to allow a measure of damages for willful tree trespass that was not recoverable at common law at the time the Statute was enacted.’ Br. of Amicus Curiae at 7. We disagree.... We believe the correct rule is that emotional distress damages are recoverable under RCW 64.12.030 for an intentional interference with property interests such as trees and vegetation.

Id. at 116. Thus, unlike the Court of Appeals, the Supreme Court made clear that non-economic damages, such as emotional distress, were recoverable as “damages” under RCW 64.12.030, and were not an

additional category of recovery in addition to the “treble damages” under the statute. Because this recovery is a “damage” directly recoverable under the statute, it must be trebled under the clear language of the statute.

It is equally telling in reaching this conclusion that the legislature, when faced with the conclusion in Birchler, did not amend the statute to exclude emotional distress or any other non-economic damage from the scope of recoverable “damages” under the statute. This did not occur, even though the statute was amended in other respects in 2009. 2009 c 349 § 4, eff. July 26, 2009 (amending the statute to apply to the cutting of Christmas trees).

#### IV. CONCLUSION

For the foregoing reasons, Pendergrast requests that this Court reverse the Trial Court and enter judgment to Pendergrast against Matichuk for treble the non-economic damages awarded by the jury.

DATED this 6<sup>th</sup> day of June, 2014.

  
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