

COURT OF APPEALS  
DIVISION II

No. 38686-1-II

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**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY cm  
DEPUTY

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REX McCRARY,

Appellant/Plaintiff,

vs.

ROBY E. DOIDGE,

Respondent/Defendant

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**BRIEF OF RESPONDENT DOIDGE**

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## I. INTRODUCTION

The appellate court may sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). In the present matter, the trial court correctly ruled that the proof (evidence) submitted by Appellant Rex McCrary in response to Respondent Roby Doidge's motion for summary judgment failed to raise any genuine issues of material fact. As such, the order of summary judgment should be affirmed.

## II. ARGUMENT

### A. ANY POTENTIALLY CONFLICTING TESTIMONY OF ROBY DOIDGE WAS IMMATERIAL AND NOT A BAR TO SUMMARY JUDGMENT

Respondent's motion for summary judgment was filed on September 15, 2006, along with the declaration of Roby Doidge. Roby Doidge's deposition was then taken on September 20, 2006. Appellant argues that Roby Doidge made factually inconsistent statements on these two occasions, which should have precluded summary judgment. However, none of the alleged inconsistencies involved material facts, and therefore entry of summary judgment was appropriate.

In a motion for summary judgment, facts can be in dispute, as long as those facts are not material to the issue being decided:

A material fact is one upon which the outcome of the litigation depends. In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of **material** fact exists, not to resolve **any** existing factual issue.

*Balise v. Underwood*, 62 Wn.2d 195; 199, 381 P.2d 966 (1963) (emphasis added).

The material factual issue in this case is whether Respondent Roby Doidge ever personally spoke with Mr. Bravo on his 12-acre parcel (next to Appellant's land) and instructed or directed Mr. Bravo regarding what trees to cut on the 12-acre parcel. Any conversations Roby Doidge may have had with Mr. Bravo regarding cutting on a completely unrelated, 10-acre parcel are completely irrelevant. Thus, even if Roby Doidge made inconsistent statement regarding the dates or substance of meetings with Mr. Bravo regarding cutting on the 10-acre parcel, this has no bearing on summary judgment regarding issues about the 12-acre parcel.

In his September 15, 2006 declaration, Roby Doidge testified as follows:

6. Sometime in the Fall of 2001, my father contacted me by phone and asked me if I would like to make some money by having cedar boughs harvested from trees on Ross' and my parcel. [The 12-acre parcel] He explained that Mr. Bravo had asked him to cut and buy boughs from his property. I said OK. The money amount involved concerning bough harvesting on my parcel was said to be about a thousand dollars.

7. Telling my father in 2001 that it would be fine to have Bravo harvest some boughs on my property was the extent of my involvement in any of this subject matter. I did not walk the boundary lines for Bravo or his crew, or show them in any way, nor did the subject come up. My understanding is that my father did that; he was of course aware of the location of the lines, having sold us our parcel in the first place. As indicated, I live in Mason County. I never observed Bravo or any of his crew in any of the harvesting operation on the twelve acre parcel or my dad's parcel, much less anything to do with or any knowledge about the harvesting of boughs on plaintiff's property, which has been said apparently to have happened in 2002, at least according to the plaintiff.

8. I met Mr. Bravo once, in the Fall of 2001, on a road which leads from Mulqueen Road to a ten acre parcel I own south of my father's parcel. This does not abut the plaintiff's property and is well back of it. I told Mr. Bravo with respect to the cedar trees near the road to have the branches trimmed to the trunk when the boughs were taken, rather than leaving stubs of branches. This was the extent of my interaction with Mr. Bravo. I did not visit the twelve acre parcel on that occasion or observe anything about the harvest of boughs on or about that parcel.

9. I had no other involvement, and no involvement at all in 2002. I had no knowledge of any harvesting of boughs by anybody on plaintiff's property until Mr. McCrary made a complaint to the police in March of 2003.

(CP 76-81).

At his deposition a few days later, Roby Doidge's testimony differed on a few facts, but none of these facts was material as to whether he ever met Mr. Bravo on the 12-acre parcel or instructed him where or how to cut on the 12-acre parcel:

- Q. Do you know Guillermo Bravo?  
A. No.  
Q. How many times have you met him?  
A. I've seen him once. I talked to him one time.

( CP 173-174)

- Q. You own a 12 ½ -acre parcel out there with your brother Ross?  
A. That's correct.  
Q. And you own a 10-acre parcel yourself?  
A. 9.87, that's correct.

(CP 248)

- Q. Now, as I understand it from reading your declaration and talking to your dad the last few hours, in 2001 your dad calls you up and says he's having some cedar boughs cut by a guy named Guillermo Bravo on his place, and he wants to know if you want cedar boughs cut on your place.  
A. That's correct.

(CP 174)

- Q. And –  
A. He wanted permission to go on it. "I've talked to Ross. He said that would be okay. Want permission from you too."  
Q. And that related to your 10-acre piece and your 12-acre piece?  
A. That's correct.  
Q. Okay. And so you gave your dad permission to proceed?  
A. Yes.  
Q. All right. And you left everything in his hands to take care of it?  
A. I asked him if he would walk the line with them.  
Q. All right. Now did you meet with Guillermo Bravo once yourself?  
A. I told Dad – I said, "Give me a call when he's doing the 10 acres. I would like to show him what trees 'cause I know they cut the trees out. I want to show him what trees on

the side of the road” I had a five-minute, maybe ten, walk with him on the 10.

- Q. Do you remember when that was?  
A. I don't.  
Q. Could have been 2002? Could have been 2001?  
A. Right. Several years ago.  
Q. Okay. But it could have been either one of those years; you're not sure which year?  
A. Yes.  
Q. Okay. It was the year that Guillermo Bravo was going to cut on your 10-acre and your 12-acre piece?  
A. That's correct, it was the year.  
Q. Okay. And if that was 2002, then that was the year that that conversation happened?  
A. That's correct.  
Q. And you met with Guillermo Bravo on your 10-acre piece?  
A. That's correct.  
Q. And you told him how you wanted the trees cut there?  
A. "Trim the trees to the trunk."  
Q. "Trim 'em to the trunk?"  
A. "So I got a short tree, take it about two-thirds of the way up, trim to the trunk."  
Q. Okay.

( CP 174, 249-250)

- Q. Okay. And did you give him any instruction regarding the 12 ½ -acre piece?  
A. No.  
Q. None whatsoever?  
A. No. That was already done, as far as I know.  
Q. How do you know that?  
A. I don't.  
Q. Okay, So you don't know if it was done or not?  
A. They were on the 10 cutting.  
Q. Well, do you know if they'd already cut on the 12?  
A. Yes.  
Q. Did you go onto the 12?  
A. Yes.  
Q. Okay. And what did you see when you went on the 12?

- A. That that's already been done, as far as I knew.  
Q. Okay.  
A. What I could see.  
Q. And what – is that the same day that you and Guillermo met on the 10?  
A. Yes.

(CP 251)

- Q. All right. And did you take him with you to the 12?  
A. No.  
Q. You went by yourself?  
A. Yes.

(CP 174-175)

Comparing Roby Doidge's declaration and his deposition testimony, there is a question regarding whether he spoke with Mr. Bravo in 2001 or in 2002 about cutting to be performed on the 10-acre parcel. Additionally, there is a question about whether and when Roby Doidge visited the 12-acre parcel and observed that cutting had been done there. What is not contradicted, though, is that Roby Doidge never discussed or instructed Mr. Bravo regarding cutting on the 12-acre parcel nor did he ever go to the 12-acre parcel with Mr. Bravo. Roby Doidge's testimony is consistent that he had no contact with Mr. Bravo regarding cutting on the 12-acre parcel, the one abutting appellant's property.

Appellant cites *Powell v. Viking Insurance Co.*, 44 Wn.App. 495, 503, 722 P.2d 1343 (1986) for the proposition that if there is a witness

credibility issue, summary judgment should not be granted. However, as Appellant points out, this is only true where credibility issues involve more than “collateral matters”. More recently, the court has held that, while a court should not resolve a genuine issue of credibility at a summary judgment hearing, an issue of credibility is present “only if the party opposing the summary judgment comes forward with evidence which contradicts or impeaches the movant’s evidence on a material issue.” *Laguna v. State of Washington*, 146 Wn.App 260, 266, 193 P.3d 374 (2008), citing *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626, 818 P.2d 1056, (1991).

[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation, ‘Credibility,’ and have a trial on the hope that a jury may disbelieve factually uncontested proof.

*Id.*, at 267, (quoting *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977)).

Here, any possible contradictions in Roby Doidge’s testimony have no relevance to the matters at issue and are not material. As such, they are not sufficient to preclude summary judgment.

**B. EVIDENCE OBTAINED SUBSEQUENT TO THE SUMMARY JUDGMENT MOTION WAS NOT “NEWLY DISCOVERED” EVIDENCE THAT SHOULD HAVE BEEN CONSIDERED ON RECONSIDERATION OF THE SUMMARY JUDGMENT MOTION.**

Although not explicitly stated, it appears that appellant is arguing that Mr. Bravo’s deposition testimony given after the summary judgment was heard constituted “newly discovered evidence” under CR 59 which should have warrant reconsideration of the summary judgment order. This rule states the following:

(a) *Grounds for new trial or reconsideration* On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

...

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

CR 59(a)(4).

Any such argument fails, however, because there was no “newly discovered” evidence. Even if there had been, there was no reason that counsel could not have obtained it when he first met with Mr. Bravo and obtained his declaration.

Appellant concedes that Mr. Bravo met face to face with appellant's attorney, Jon Cushman, and with his own attorney on October 19, 2006 at Mr. Cushman's office. Mr. Cushman obtained a signed declaration from Mr. Bravo on that date, prepared on letterhead from Mr. Cushman's office, and that declaration was submitted in opposition to the motion for summary judgment. The declaration stated the following:

3. I was in charge of the tree trimming crew that trimmed cedar bows at the property owned by the Doidges in 2001-2002. Every step we took we took with direction from Robert Doidge, the owner of one parcel and the father of the owner of the other two parcels. Mr. Doidge directed us where to cut, what to cut and how much to cut. He did not adequately mark boundaries for us. He showed me where boundaries were from several hundred feet away. The first year, he ribboned a portion of the boundary but not all of it. The second year, there were no ribbons on any of the boundaries.

4. If my crews inadvertently cut cedar bows across the boundary on the McCrary boundary, this was a mistake and it was done because the boundaries were inadequately marked by Robert Doidge. **All steps taken were taken at the direction of Robert Doidge.**

(CP 210-211)( emphasis added.)

Even though appellant argues that Roby Doidge's declaration and deposition testimony is contradictory, when counsel obtained the declaration from Mr. Bravo he included no evidence or testimony regarding these alleged contradictions.

There is no evidence that appellant's counsel Jon Cushman was limited in the time he was allowed to meet with or question Mr. Bravo on October 19, 2006. Mr. Cushman's office prepared a declaration for Mr. Bravo's signature, and presumably Mr. Cushman included all of the testimony he felt was relevant. Mr. Cushman then submitted this declaration in opposition to respondent's motion for summary judgment. If he had wanted to include testimony regarding Mr. Bravo's involvement with Roby Doidge, he could have. Defendants' summary judgment motion had already been filed at that point, and counsel was aware of the theories being argued. Yet Mr. Bravo's declaration is silent as to Roby Doidge.

In his opening brief, appellant argues that he did not know that Roby Doidge was involved in marking boundaries on the property until Mr. Bravo testified at his deposition on February 12, 2007. He concedes: "This deposition was delayed due to the difficulty in finding Mr. Bravo for a deposition after the initial contact with him by both sides (which produced his declarations)." *Appellant McCrary's Opening Brief*, p. 19. The truth is, Mr. McCrary's counsel apparently never asked Mr. Bravo about Roby Doidge when he had the opportunity at their face-to-face meeting. This does not make the subsequent evidence "newly

discovered”. Simple due diligence could have elicited the same evidence as that given by Mr. Bravo in his later deposition.

Where evidence presented to the court in a motion for reconsideration was available when the parties filed their motions for summary judgment, the trial court does not abuse its discretion in rejecting the motion. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999). “[E]vidence presented for the first time in a motion for reconsideration without a showing that the party could not have obtained the evidence earlier does not qualify as newly discovered evidence.” *Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003).

Appellant is attempting to base his argument on appeal on evidence that he could have obtained and used at summary judgment but for whatever reason chose not to. This evidence was not sufficient to warrant reconsideration, and it is not sufficient to support the appeal.

**C. ROBY DOIDGE IS NOT VICARIOUSLY LIABLE FOR THE ACTIONS OF EITHER ROBERT DOIDGE OR GUILLERMO BRAVO.**

**i. Roby Doidge did not exercise sufficient control over the actions of Robert Doidge to be held vicariously liable for his acts.**

Appellant argues the following in his brief:

The Trial Court focused on the agency relationship between Roby Doidge and Guillermo Bravo, but neglected the agency relationship between Roby Doidge and Robert Doidge.

*Appellant's Opening Brief*, p. 20.

This is blatantly incorrect, and in fact the trial court expressly discussed in its letter ruling the possibility of an agency relationship between Roby Doidge and his father in detail:

There is no evidence that Roby directed Bravo in any manner. . . . Instead, Roby's liability must be premised on an agency relationship between Roby and Robert that would impute Robert's negligence to Roby. The standards for judging Roby's liability are the common law standards for vicarious tort liability of a principal for the acts of a non-servant agent. The evidence that is material to such an analysis is evidence that Roby retained the right to control the actions of Robert in supervising the work done by Bravo. Absent such evidence, the vicarious liability of the agent, Robert, cannot be imputed further down the line to his principal, Roby.

(CP 225)

The trial court went on to explain its reasoning in granting summary judgment:

If the evidence in this case, viewed in the light most favorable to the plaintiff, would permit a jury to find that Roby did control the actions of Robert in supervising Bravo's work, the summary judgment motion must be denied. In viewing such evidence, the summary judgment standard applies, and the quantum of evidence required is quite low. In the record offered in opposition to this motion, plaintiff has presented a substantial amount of

evidence; however, even when viewed in the light most favorable to the plaintiff, that evidence only supports Roby's contention that he had no control at all. There is some evidence of Roby's **expectations and assumptions** concerning Robert's actions, but none of this evidence rises to the level of control by Roby legally necessary to establish vicarious liability. At best, the evidence would permit a finding that Roby received an assurance from Robert in 2001 that the boundaries would be marked. As a matter of law, this evidence is inadequate to establish vicarious liability.

(CP 225-226)(emphasis added.)

It is clear, based upon the evidence that was submitted in a timely fashion to the trial court, that Roby Doidge retained no control over his father's actions.

The general rule of vicarious tort liability applicable to nonservant agents is set forth in Restatement (Second) of Agency § 250 (1958), as follows:

A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, if he neither intended nor authorized the result nor the manner of performance, *unless he was under a duty to have the act performed with due care.*

*McLean v. St. Regis Paper Co.*, 6 Wn. App. 727, 729, 496 P.2d 571, (1972).

Vicarious tort liability arises only where one engaging another to achieve a result controls or has the right to control the latter's physical movements.

*Id.*, at 732.

Appellant cites to the case of *Bloedel Timberlands Development, Inc., v. Timber Industries, Inc.*, 28 Wn. App. 669, 626 P.2d 30 (1981) in an attempt to show that Roby Doidge retained control over his father's actions. However, this case demonstrates the opposite.

The crucial factor is the right of control which must exist to prove agency. Control is **not** established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. Instead, control establishes agency only if the principal controls the manner of performance.

*Bloedel Timberlands*, supra, at 674 (emphasis added).

What the *Bloedel Timberlands* court actually held was that the logging company was an agent of a timber company because the timber company was in direct supervision of the logging company **and exercised daily supervision** of the removal of cut logs as well as the cutting, branding, and logging of the logs.

Nothing Roby Doidge did here approximates the action taken by the timber company in *Bloedel Timberlands*. He was not on site during the cutting on the 12-acre parcel and he did not otherwise supervise any of the activity after authorizing the cutting on his 12-acre parcel. The fact that he

may have asked his father by telephone to show the cutters the boundaries or put up flags does not demonstrate control over what was occurring on the land. Instead it demonstrates that he ceded control to his father, whom he knew was as familiar with the land as he was. This is, if anything, as the *Bloedel Timberlands* court described merely retaining control to verify that his father acted in conformity with his wishes.

This absence of control is in stark contrast to the way that Roby Doidge did specifically instruct Mr. Bravo regarding cutting on the 10-acre parcel when they were on the 10-acre site:

- Q. And you met with Guillermo Bravo on your 10-acre piece?  
A. That's correct.  
Q. And you told him how you wanted the trees cut there?  
A. "Trim the trees to the trunk."  
Q. "Trim 'em to the trunk"?  
A. "So I got a short tree, take it about two-thirds of the way up, trim to the trunk."  
Q. Okay.  
A. Everything 30 feet from the road –  
Q. Okay.  
A. -- Somebody's going to see.  
Q. Okay. And did you give him any instruction regarding the 12 ½ acre piece?  
A. No.

(CP 250-251)

While the question of agency is generally a question of fact to be decided by the jury, *O'Brien v. Hafer*, 122 Wn.App 279, 281, 93 P.3d 930 (2004), the court may decide the issue as a matter of law if only a single

conclusion can be drawn. *Hollingbery v. Dunn*, 68 Wn.2d 75, 80, 411 P.2d 431 (1966). Here, the trial court examined the facts in a light most favorable to the appellant and still found that Rob Doidge did not exercise sufficient control over his father's actions to be vicariously liable. There is no other reasonable conclusion to be drawn from the facts.

**ii. Guillermo Bravo was not the agent of Roby Doidge as to the 12-acre parcel.**

As already discussed above, Roby Doidge exercised no supervision or direction over Guillermo Bravo as to the 12-acre parcel of land. The only direct dealings the two men had involved the 10-acre parcel, which is not at issue in this appeal. There is simply no way that Roby Doidge can be considered the principal of Mr. Bravo as to the 12-acre parcel.

**iii. Roby Doidge did not violate a duty to act with due care.**

Appellant finally argues that RCW 4.24.630 and RCW 64.12.030 raise a duty to act with "due care" pursuant to Restatement (Second) of Agency § 250 (1958), therefore making the Roby Doidge liable for the torts of a non-servant agent. Because appellant claimed a timber trespass under RCW 64.12.030, the provisions of RCW 4.24.630 (Liability for Damage to Land) expressly do not apply:

This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

RCW 4.24.630(2).

Therefore, the only statute under which a heightened duty might exist is RCW 64.12.030. This statute states the following:

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.

RCW 64.12.030.

But the treble damages provision only applies in cases where the timber trespass was willful or wanton:

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from 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.

RCW 64.12.040.

Because punitive damages are disfavored, the Supreme Court has reasoned that treble damages should be awarded only where there is "an 'element of willfulness' on the part of the trespasser". *Henriksen v. Lyons*, 33 Wn. App. 123, 125–26, 652 P.2d 18, (1982), citing *Blake v. Grant*, 65 Wn.2d 410, 412, 397 P.2d 843 (1964).

It is difficult to see any argument that would hold Roby Doidge liable in the present matter for a willful and wanton trespass onto appellant's land. Other than speaking with his father on the telephone once, Roby Doidge had no contact with anyone regarding cutting on the 12-acre parcel until sometime after it was done. It is quite a stretch for appellant to argue that Roby Doidge had a heightened supervisory duty over his father or Mr. Bravo simply because the timber trespass statute allows treble damages if the trespass was willful or wanton. This is especially so when all of the admissible evidence considered at summary judgment demonstrated the lack of control that Roby Doidge exercised over both his father or Mr. Bravo.

Appellant cites several cases for the proposition that Roby Doidge acted willfully and wantonly, but none is directly on point. In *Smith v. Shiflett*, 66 Wn.2d 462, 403 P.2d 364 (1965), the tree cutter was told by an ostensible land owner to cut everything beyond a certain gate. While

doing so, he was approached by another person claiming to be a landowner and advising that the tree cutter was taking trees that belonged to him. The court held:

This was adequate to put defendant Shiflett [the tree cutter] on notice that the ostensible owner, who had given him his only instructions (and who never testified and was never proved to be an owner) did not know where the property lines were, that that he (Shiflett) would be proceeding at his own risk in cutting any timber without further investigations.... Shiflett just moved a half or three-quarters of a mile east and cut 30 more trees without any further investigation.

The best that can be said for Shiflett is that he didn't deliberately cut the trees, knowing them to belong to plaintiffs; but he proceeded without making any survey, or any adequate investigation, and without probable cause to believe that the trees being cut were on land where he had authority to be.

*Smith v. Shiflett*, 66 Wn.2d at 466.

The issue in *Shiflett* was that the tree cutter was put on notice while he was cutting that he might be on another's property, and he continued even so. That did not occur in the present matter.

The holding of *Blake v. Grant*, 65 Wn.2d 410, 397 P.2d 843 (1964) is simply that circumstantial evidence may be relied upon by the court to establish willfulness. There, the tree cutters attempted to establish the boundary line without locating a proper starting point; failed to talk to adjoining landowners about the true line; failed to see a previously blazed

dividing line; and made a major error in direction in running the east-west line. It is clearly distinguishable from the current case.

Appellant cites *Longview Fibre Company v. Roberts*, 2 Wn.App. 480, 470 P.2d 222 (1970) for the proposition that a principal can be held liable for the acts of his agents even when the agents expressly disregard the principal's instructions. But again, the facts in *Longview Fibre* distinguish the reasoning for a finding of willfulness on the part of the principal.

In *Longview Fibre*, Kreps owned a parcel of property directly to the north of Plaintiffs' property. The south boundary of Kreps' property constituted the north boundary of Plaintiffs' property. Defendant Roberts contracted to remove timber from Kreps' property. Prior to beginning, Defendant located and marked the east, north, and west boundaries of the Kreps' property. Two of the timber fallers hired by Defendant, neither of whom had any knowledge, skill, training or experience in running boundary lines, attempted unsuccessfully to locate and run the south line. They advised Defendant of their failure, and requested Defendant to secure the services of someone skilled and experienced in such matters. Defendant ignored this request and made no further attempts to run the south line. Nor did he attempt to speak with Plaintiffs.

Defendant actually spent time with the cutters at the site. A few days later, Defendant had to leave, and he advised his tree cutters to cut to the east rather than going further south, since he did not know where the property line was. Nonetheless, the tree cutters continued south, ultimately cutting trees on Plaintiffs' property in express disregard of Defendant's instructions.

In finding the defendant liable for the intentional tort of his tree cutters, the court pointed out Defendant's failure to take any steps to locate the south property line:

The essence of the element of willfulness in this case lies in the defendant's failure to locate a boundary; his failure to employ persons even reasonably skilled or experienced in running boundary lines; his ignoring the request of his own employees to employ persons so skilled; his failure to consult with plaintiff in any manner in an attempt to locate boundary corners; his decision to proceed with the logging operations without having any reasonable knowledge of the location of the corners or the line; and his actual participation in those operations up to 3 days prior to discovery of the trespass. Those facts conclusively demonstrate to us that the defendant elected to proceed with the operations in reckless disregard of the probable consequences.

*Longview Fibre Company v. Roberts*, 2 Wn.App. at 483-484.

In contrast, Roby Doidge was not present for cutting on the 12-acre parcel, did not instruct the tree cutters where to cut, and had a reasonable

assumption that his father, who sold the land to him, adequately knew and would mark the boundaries.

Finally, appellant cites *Henricksen v. Lyons*, 33 Wn.App 123, 652 P.2d 18 (1982), in which a plaintiff was awarded treble damages against a defendant who was a professional logger. The defendant had conducted his own survey using a surveying chain and two compasses. Both he and an employee had experience locating property lines in this manner. However, the court found multiple shortcomings in his attempt:

Here Lyons failed to locate a proper point of departure; followed a fence which he mistakenly believed established the property line; failed to talk to adjoining landowners; failed to close his traverse in conducting his survey; and made a significant error in direction in running the east-west line. Although reasonable minds might differ as to whether defendant's conduct was willful, as opposed to merely negligent or careless, in view of the holding in *Blake* it can hardly be said there is no substantial evidence to support the trial court's finding. Treble damages were proper.

*Henricksen*, 33 Wn.App. at 127.

The Court in *Henricksen* merely affirmed that the finder of fact had grounds to find willfulness. It did not find that such circumstances **required** a finding of willfulness.

The cases relied upon by appellant all involve situations where the at-fault party either had trees cut when it was already on notice of a potential problem with the boundary or was notified as cutting was going

on that there was a boundary question but failed to stop and confirm that the cutters were on the correct land. That is not the issue in the present case. Roby Doidge had no reason to expect that Mr. Bravo would cross the boundary line. Roby Doidge's father had sold Roby Doidge the land, and Roby reasonably believed his father would know where the boundary was and to inform the tree cutters. There was nothing to put Roby Doidge on notice that this would not be done, and there are no grounds to find any timber trespass was done willfully or wantonly on his part. He violated no duty of due care to appellant McCrary.

### **III. CONCLUSION**

The trial court did not error when it granted summary judgment in favor of Roby Doidge. The admissible evidence demonstrated that Roby Doidge did not exercise authority or control over either his father or Mr. Bravo sufficient to warrant holding him vicariously liable for their acts. Neither was there evidence that Roby Doidge acted willfully or wantonly. Any factual disputes alleged by appellant were not material to the trial court's decision and should not change the outcome. Thus, Roby Doidge respectfully requests that this court affirm the ruling below.

RESPECTFULLY SUBMITTED this <sup>25<sup>TH</sup></sup> day of June, 2009.

**DAVIES PEARSON, P.C.**  
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By:   
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

On June 25, 2009, I caused to be served on the undersigned and/or arranged for service of Respondent Doidge's Appellate Brief, to the Court and parties in the manner indicated:

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