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## **Introduction**

This is the appeal of a separately adjudicated claim and counterclaim. Appellant/defendant Young appeals award of attorney's fees following the 2006 summary judgment of the plaintiffs' nuisance based complaint. Additionally, from 2008 arbitration Young appeals the 2011 *trial de novo* verdict against his counterclaim for theft damages, restoration damages for his wetlands, and waste waste damages, under RCW 424.630(1) Liability to land and property and RCW 64:12:030 Injury to or removing trees etc. commonly referred to as the "timber trespass" statute.

In 1967 the Young family purchased a large 48 acre farm in a rural farming area known as Big Valley, North of Poulsbo in Kitsap County. For the next 43 years the Youngs continued the use of this property as it had been used in the past and as was typical for Kitsap's farms of the 20th century. That use included raising farm animals, harvesting of hay, and the unrestricted storage of vehicles and equipment. openly on the land

By the time of the Youngs' purchase of their Big Valley farm in 1967, Loma Young was already a long time and active member in Audubon Society. RP 1/5/11 p.99 To advance the area's wildlife, and more specifically encourage waterfowl, in 1970 through 1971, the Youngs commissioned and constructed a half acre G4 wildlife pond on their family farm with the financial assistance and oversight of the Department of Agriculture. RP 1/5/11 p.99-106 The appellant, Colin Young, actively participated in the construction of this wildlife pond.

The Youngs' half acre wildlife pond is located on the southwest side of Kinman Creek, which divides the properties wetlands from its farmland. Accordingly the wildlife pond was selectively positioned within historic wetlands on Young's family farm. This pond has a 100' center island which served as a nesting sanctuary for native birds. The pond was fed by several small springs that flowed from the adjacent wetlands and from within the pond. The pond's water height was maintained by a fixed 50' horizontal culvert which ended with in a two foot waterfall into Kinman Creek. RP 11/6/11 p.

Following the carefully engineered construction of the pond, the original wetlands soils were replaced and redistributed. The shores of the pond were then re-planted by Colin Young with native grasses specifically selected as conducive to the overall objective. RP 1/6/11 p.209 Over time a shrubbery canopy heavy with 4-6 foot Salmonberry gradually returned to the pond's edge and the interior nesting island. RP 1/10/11 p.542:4-12

For the next 30 years the Youngs enjoyed the benefits of their wildlife pond including all kinds of amphibians, muskrat, duck, Canada goose, kingfisher, bear, and bald eagle. RP 1/10/11 p.545:4-21, p. 546-47 The Youngs were also honored with several nesting pairs of Great Blue Heron that maintained a rookery just north of the pond. RP 1/10/11 p.543:1-5

In 1989 Ambauens purchased the southern half of the original Young farm, which included several acres of the historic wetlands southwest of Kinman Creek. The wetlands and the half the wildlife pond were situated on the back third of Ambauens' property.. By 1991 Ambauens had built a large three story home close

to their south property line. During the next 10 years David Ambauen gradually drained, slashed, burned, and mowed down their wetlands south of the pond, giving that area their property a “golf course” appearance. RP 1/10/11 p.540:18:20, p.541:21-542:1

In January, 2000, Colin Young purchased the last 14 acres of the Young family farm from his mother Loma Young. The Young’s Big Valley property was continuously posted “no trespassing” from 1970 through time of trial. After Colin Young’s purchase of the property in 2000 he never gave Ambauens permission to enter the property. Young posted additional no trespassing signs on the dividing line, and he had personally ordered David Ambauen off the subject property prior to the Ambauens’ 2003 filling of Young’s wetlands.

On several occasions between 2000 and 2003 Mr. Young caught David Ambauen with his green John Deer backhoe on Young’s property, and driving down in Young’s creek bed. On each of these occasions Mr. Young promptly ran David Ambauen off, ordering him to stay off the property. On the last occasion Young photographed David Ambauen hurriedly driving his backhoe off Young’s property, having just seen Young arrive, and having just been run off by Young a few days earlier.

Beginning in the late 1990’s and continuing through 2002, the Ambauens made a number of unsuccessful attempts to purchase the Young’s property by advancing their interest through a third party. Following Ambauens failed attempts to purchase the Young’s property, Ambauens filed suit March 12, 2004 for injunction

and damages relating to Young's storage of vehicles on his property - storage that was ongoing well before Ambauens' purchased their land 15 years earlier.

Unbeknownst to Young, a few months before filing his suit in this action David Ambauen entered Young's wetland adjacent to the pond, cut down Young's vegetation along the shore around north end of the pond, then filled in this area with sand and clay using his backhoe to level the area. Ambauen then spread straw and hay concealing his work. Young did not discover this 25 x 200 foot section of his wetlands destroyed until late the spring of 2004 - when grass was already growing tall in the area..

Ambauens had substantially "parked out" most of their wetlands south of the pond by the late 1990's. Starting in about 1999, the Ambauens gradually began cutting down the native Salmonberry and other wetlands shrubs and plants adjacent to Ambauens' half of the pond. Ambauens then planted grass in these wetlands and regularly mowed their half of the pond, giving it a "golf course" appearance. By 2001 the Ambauens had constructed a substantial 30' elevated foot bridge to the pond's nesting island which in turn allowed the predators access to the birds and nests on the island, of which Young owned half.

By 2002 Young was aware that Ambauens had cut down their canopy of native Salmonberry and wetlands vegetation on thier own property surrounding the pond and to the base of the hill south of the property line. Summer of 2003 Young noticed survey flags marking Young's property line from Kinman creek, crossing the pond, island, and adjacent wetlands up the hill to the corner marker. Using this survey Young then discovered that all but the last few feet of Ambauens' elevated

foot bridge to had been constructed on Young's property. David and Jana Ambauen had personally run this survey.

In January 2004 plaintiffs Ambauen filed a complaint against Colin Young and his mother Lorna Young, seeking damages and injunction relating to historic storage of automobiles on Colin Young's property. Lorna Young was served first, answering individually and separately, denying subject property ownership and responsibility. Colin Young was not served until months later.

In their lawsuit, the Ambauens named Lorna Young as co-defendant to Colin Young, ignoring unambiguous county auditor and tax records showing Colin Young as the owner of record from early 2000 through trial.

Ambauens' attorney, William Broughton, filed a bad faith declaration claiming his service on "all parties" setting a deposition for Lorna Young. However, neither Colin Young nor Lorna Young received this service and Lorna Young missed this deposition. This led to Ambauens' follow on motions to compel, for costs praecipe, and writ of execution for sheriff's sale of the real estate contract for the subject property that Ambauens had been unable to buy. All this occurring as Mr. Broughton continued to falsely claim service on "all parties" in his bad faith declarations of service to the court

As a result the Ambauens' attorney appeared at the above motion hearings unopposed, and the court awarded Ambauens judgment of costs for missed deposition and writ of execution against "party" defendant Lorna Young.<sup>1</sup>

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<sup>1</sup> Under civil discovery rules, Ambauens' attorney would have known that he could not have proceeded to execution and sheriff's sale of Lorna Young's real estate contract had Lorna Young been properly named as a "witness" rather than a "defendant party."

However, the sheriff's fulfilled his obligation to independently notify the land owner of record of the upcoming sheriff sale. Colin Young was thus provided notice of the sale, and promptly investigated this issue. Young discovered Ambauens false declarations of service, and took action to stay the sheriff's sale.

In the late spring of 2004 Colin Young discovered that a 25 x 200 foot area of his wetlands adjacent to this wildlife pond had been recently cut down and filled in using heavy equipment. Young followed the tractor tire tracks to Ambauens property but found no one at home.

Several months later Colin Young finally confronted David Ambauen about burying his wetlands, but David Ambauen admitted nothing. Young answered Ambauens complaint and counterclaimed for damages relating to Ambauens' timber trespass, filling and destroying Young's wetlands, laying waste to his land, theft of crop. The court later removed Lorna Young as an improperly named defendant.

Plaintiffs Ambauens' case against Colin Young was brought to summary judgment March 2006. Under statutory standing afforded adjoining property owners, in their suit Ambauens had sought "order of abatement" (using Kitsap's just enacted nuisance ordinance), as well as injunction and monetary damages. Ambauens never attempted to demonstrate their claim of monetary damages at any point in their case, and most of the sensational allegations were shown to be bald.

In summary judgment the early court provided none of the relief Ambauens requested. However, the court did order Young to limit his vehicles to the "limit

allowed” - by a then recent provision of the Kitsap County Code (KCC) of 10 “permanently stored” vehicles. Ambauens rested their case.

A year later Ambauens moved for, and were granted, attorney’s fees over Young’s objections. Plaintiff’s pleadings and cost bill failed to separate out numerous unproductive charges, including all billing related to Lorna Young, who was named co-defendant without grounds and in bad faith.

After Ambauens finally answered Young’s counterclaim on threat of default. Young’s counterclaim went to mandatory arbitration in 2008. An issue of arbitration jurisdiction carried over to this appeal. Young requested a jury *trial de novo*, which was then twice rescheduled between 2008 and 2011.

Long delays between rescheduled this trial were due to endless claims of schedule conflicts between Ambauens attorneys. Ambauens had stacked their side with two new attorneys beginning with arbitration. Years of delays getting to jury trial of Young’s counterclaims have resulted in a substantial diminishment in perceivable wetlands damages. However actual damages have not diminished since fall of 2003.

**Error - Ambauens case against Young**

A. The trial court erred when it awarded Ambauens attorney’s fees following Summary Judgment ending their case as trial court was without jurisdiction under CR54 (d)(2) to make the award.

- 1) The court was without jurisdiction to award Ambauens attorney’s fees under CR54 (d)(2) when Ambauens missed the 10 day limitation for filing their motion for attorney fees by five months.

B. The trial court erred in determining the amount of attorneys fees and costs awarded the Ambauens in their complaint against Young .

- 1) The Ambauens were not awarded damages or injunction, were not the prevailing party, and as such they were not entitled to attorney’s fees.

2) Plaintiffs' cost bill did not separate or deduct hours and costs relating to plaintiffs' non-productive theories/motions and prosecution of improperly named defendant Lorna Young later dismissed by the trial court in summary judgment.

### **Assignments of Error - Counterclaim**

Plaintiffs were allowed a de facto re-trial of their unsuccessful claims which in turn prejudiced the jury's decision on defendant's counterclaim?

Ambauens' showed their intention to bias the jury with irrelevant photographs and documents in their ER904 submissions detailing Young's storage of vehicles on portion of his 14 acres significantly away from any damaged area subject to counterclaim.

C. Arbitrator erred when he proceeded with arbitration after being notified the tribunal lacked jurisdiction because the damage estimate produced for arbitration exceeded KCLMAR 1.2 \$50,000 limitation when "timber trespass" remedy trebling was applied - rendering arbitration award moot.

D. The trial court erred in denying Young's limine motion to exclude automobile related evidence. and testimony.

E. The trial court erred in granting Ambauens' motion to exclude Young's "late disclosed" supplemental wetlands expert essential to rebut Ambauens' new issue and expert claim of the damaged wetlands "recovery" six years after damages.

F. The trial court erred when it barred Young's cross examination on the basis of Boule's opinions on permitting and other requirements that were inconsistent with directives in Department of Ecology/Army Corps of Engineers Wetlands Manual.

G. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 11 WPI 20.05, 20.02, 30.01, 20.01 (combined)  
WPI 120.01 "Trespasser - Definition" CP \_\_\_\_\_ (Appendix \_\_)

H. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 15 WPI 20.05, 20.02, 30.01, 20.01 (combined)  
"Burden of Proof" and Measure of Damages" CP \_\_\_\_\_ (Appendix \_\_)

I. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 16 WPI 20.01 and 20.05 (combined) "Summary of Issues"  
CP \_\_\_\_\_ (Appendix \_\_)

J. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 18 "Waste by Trespasser"  
CP \_\_\_\_\_ (Appendix \_\_)

K. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 19 "Timber Trespass" RCW 64.12.030  
CP \_\_\_\_\_ (Appendix \_\_)

L. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 20 "Waste to the Land of Another" RCW 4.62.030(1)  
CP \_\_\_\_\_ (Appendix \_\_)

M. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 23 WPI 50.01 "Agent and Principal" - Definition"  
WPI 50.03 "Act of Agency is Act of Principal" (combined)  
CP \_\_\_\_\_ (Appendix \_\_)

N. The trial court erred in refusing to submit to the jury Young's Proposed Instruction # 24 "Continuing Trespass"  
CP \_\_\_\_\_ (Appendix \_\_)

N. The trial court erred in submitting to the jury its final Instruction # \_\_\_\_\_ "Trespass" CP \_\_\_\_\_ (Appendix \_\_)

Issues

#### **Issues - Ambauens' complaint against Young**

Was the trial court without jurisdiction to award Ambauens' attorney's fees when Ambauen did not comply with CR54(b) strict 10 day limitation for filing motion for attorney fees on the summary judgment conclusion of their case ?

Did the trial court abuse its discretion when it awarded Ambauems attorney's fees and costs in Ambauens' complaint against Young ?

#### **Issues - Young's Counterclaim against Ambauens**

Was the arbitrator without jurisdiction to proceed having been notified at the opening of arbitration that Young's remedy of "timber trespass" damages trebling in addition to the just completed \$48,500 wetlands damage estimate would exceed the KCLMAR 1.2 jurisdiction limit of \$50,000 rendering moot attorney's fees award on failure to improve position?.

Was Young denied his constitutional right to a fair trial by the trial court's order striking the essential rebuttal testimony anticipated from Mr. Callaghan on the new issue of wetlands "recovery" as raised by Ambauens expert in his report five months prior to trial ?

Was Young denied his constitutional right to a fair trial by the trial court's evidentiary rulings which admitted irrelevant, prejudicial, and confusing evidence

leading to jury bias and confusion, and a verdict unsupported by the evidence in the trial record ?

Was Young denied his constitutional right to a fair trial in that the court's final jury instructions failed to address all claims at issue, supplanted Young's theory of the case, instructed the jury to invalid elements of proof for the issues, and imposed a new "ultimate question" with a confusing and inappropriate threshold of damage for award of any damages ?

Should the Ambauens be precluded from an award of attorney fees on remand in consideration of their fraud on the court, their photocopy forgery of Young's signature, their knowingly making false statements in sworn declarations, and their intentionally misleading the court as to standing ?

Did the trial court abuse its discretion in its award of attorney's fees and costs to Ambauens in Young's Counterclaim. (are expert fees authorized?)

Did the trial court manifestly abuse its discretion in final instructions to the jury by failing to instruct the jury on all of Young's claims; by submitting instructions that confused the issues and convoluted the claims; by failing to represent Young's theory of the case; by improperly taking material questions of fact from the jury; and by unfairly consolidating all claims to one ultimate question premised on an increased threshold of damage.

### **Statement of the Case**

In late spring of 2004 Young discovered the wetlands vegetation around his half wildlife pond had been recently cut down and then buried with 6-24" of sand and clay. Young also discovered at this time that his trees around the pond and on the island had all been limbed - as they had earlier on Ambauens' property. RP 1/10/11 p.408:15-18 Cut limbs from these alders were piled high on Young's end of the nesting island. RP 1/5/11 p.27:1-8 On examination these limbs and found them to still be green and having cut rather than broken ends. Additionally, the nesting island was found to be nearly completely stripped of the native Salmonberry and most other vegetation..

Until the Ambauens put their property up for sale in 2005, the only way to access the wildlife pond and wetlands southwest of Kinman creek by vehicle or heavy equipment was to cross the Kinman creek using Ambauens' land bridge over the creek. This land bridge was positioned well back onto Ambauens' property from dividing line. RP 1/10/11 p.385:21-28 Ex 10

The area of Young's wetland filled in and leveled by David Ambauen was adjacent to the ponds' edge. Young immediately investigated and photographed the damage around the pond with assistance of Mr. Perry. Young personally surveyed, measured, dug test holes, and photographed the damage to his wetlands. The test holes revealed the depth and extent of fill. RP 1/5/11 p.119-120 Young found that a 200 x 25 foot area around the north perimeter of his pond had been mowed then filled. Ex 18 By measuring the tractor tire tracks and blade marks Ambauens had hidden under the straw, Young was soon able to link Ambauens' John Deer backhoe to the devastation of his wetlands. RP 1/5/11 p.121

Young found that David Ambauen had first cut down his wetlands vegetation and shrubbery, and then used his heavy equipment to fill this area with sand and clay to depths ranging from 6 to 24 inches. RP 1/5/11 p.120 At this time Young and Mr. Perry also found native wetlands plants still green at the bottom of their test holes, below the sand and clay fill. RP 1/5/11 p.120:15-19 Young also discovered that the near-shore springs and wetlands ecosystem no longer existed adjacent to his half of the pond.

David Ambauen owned and operated a pest control business in the period while he was clearing and draining his historic wetlands southwest of Kinman

creek. RP 1/10/11 p.405 Ambauens had directed their pest control employees to use commercial backpack sprayers to kill off “weeds” and “stickers” on his Big Valley property. Ambauens also had his employees spray herbicides around the G4 wildlife pond. RP 1/10/11 p.402:16-22 In this period Young noticed a substantial decrease in the amphibian population in and about the pond. This was followed by the disappearance of the Great Blue Herons, which had frequented the Young’s wildlife pond and nearby wetlands for decades.

In answer to Young’s counter claim Ambauens denied all counter claims, presented no mention of “spite” or defense of “spite”. In answering to Young’s pre-arbitration Requests for Admission David Ambauen denied filling or mowing Youngs wetlands.

Young’s counterclaim finally went to jury trial on January 5, 2011. Hearing motions in limine January 4, 2011, the trial court first stuck testimony by Young’s supplement expert brought in to rebut the newly raised issue of “wetlands recovery” - and issue which Ambauens only raised in mid August 2010 in their expert’s report some four months prior to trial. Second, the trial court admitted numerous irrelevant and highly prejudicial photographs of Young’s vehicles, including exhibit #10 without performing the required “on the record” balancing of prejudice against probability of proving or disproving any fact in this case.

After a three day trial, the Honorable Judge Haberly then submitted jury instructions which cast aside Young’s separated claims theory of the case, and his election of statutory remedies which were a dead-on fit to the damages evidenced. After a lengthy period of objections and argument on instructions, Judge Haberly

refused all Young's proposed instructions, and exclusively presented all Ambauen's proposed instructions with only slight modification.

The six man jury was then charged with deciding just one ultimate issue, simple "trespass" Final instructions to the jury omit theft of crop and fencing issues. Final instructions did not inform the jury as to the nature of continuing trespass applying to the damages for bridge removal and all forms of waste to Young's land. Final jury instructions did not inform the jury that actual "trespass" did not have to be demonstrated to award damages of restoration costs for the proper replacement of the ornamental Salmonberry shrubbery.

"Substantial damage" became the ultimate issue under the court's final jury instructions, because it was the threshold that had to be met under the court's final instruction of "Trespass." However, "substantial damage" was never testified to prior to close of evidence, and it was never raised in closing or opening arguments. Nor was it argued or briefed as a component of either party's theory of the case. Yet the jury faced the "ultimate question" of determining "substantial damage" without guidance or definition. Before a verdict or any damages could be awarded Young this "ultimate question" had to be answered. "Substantia damages: was not part of Young's any of counterclaim issues, his theory of the case, his remedies nor did it guide his presentation of evidence..

David Ambauen admitted to brush hog mowing and filing in Young's wetlands around the north end of wildlife pond RP 1/10/11 p.403-404:3, p.418-419 There is no debate on this issue.

The jury decided against Young. By implication “substantial damage” was not done by David Ambauen’s destruction of Young’s wetlands around his wildlife pond. The jury’s verdict is not supported by substantial evidence. Young appeals the jury decision on this and various other grounds.<sup>2</sup>

## **I. Argument**

### **A. Standard of Review**

The appellate court engages in a two-step process when reviewing an attorney’s fees award. First the court determines whether the party is entitled to fees and costs, and if so the court then decides whether the award of fees was reasonable. The superior court’s decision to award attorney fees is a legal question and is reviewed *de novo* while the reasonableness of the attorney’s fees award is reviewed under the abuse of discretion standard. see : *Tradewell Group, Inc. v Mavis*, 71 Wn.App 120, 151 P.2d 1053 (1993). The superior court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

### **A. The trial court was without jurisdictional authority to award Ambauens attorney’s fees and costs outside CR54 (d)(2)’s 10 day filing limitation.**

The trial court was without jurisdictional to award Ambauens attorney’s fees due to Ambauens untimely filing of motion for attorney’s fees. This is a manifest

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<sup>2</sup> There was no jury instruction provided to isolate “substantial damage” either as an aggregate threshold for the collection of all counterclaim issues, or a threshold applying individually to each counterclaim trespass issue, thus allowing any one issue to go forward to an award of damages.

error by the trial court which violated Young's constitutional right to a fair trial.

Jurisdiction is a question of law. Standard of review is *de novo*.

Here The early trial court was without jurisdiction to award Ambauens attorney's fees under CR54 (d)(2) because Ambauens missed the 10 day limitation for filing their motion for attorney fees by five months.

On August 26, 2006, the Ambauens completed their case against Young with entry of summary judgment, stating they had completed their case with summary judgment.

Until December 31, 2006, the filing of a motion for attorney's fees under CR54 was without express limitation, but arguably subject to reasonable limitation. However, on January 1, 2007 new civil rule CR 54 (d)(2) went into effect strictly limiting the filing of motions for attorney fees to within 10 days of the entry of judgment.

**CR 54 (d)(2) Attorney's Fees and Expenses.** Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order if the court, the motion must be filed not later than 10 days after entry of judgment. [Civil Rule CR 54 (d) (2)] (emphasis added)

Ambauens had ample time to file their motion for attorney's fees following summary judgment. However Ambauens waited nearly a year after summary judgment, and five months after CR 54(d)(2) took effect before filing their motion for attorneys' fees in June 2007.

CR 54(b)(2) went into effect on January 1, 2007. Beforehand the Ambauens had five months opportunity to file their motion and cost bill. Ambauens' time to file their claim ran from the effective date of the statute Accordingly had another

10 days to file after the new rule took effect on January 1, 2007. Clearly the Ambauens were not prejudiced by lack of opportunity to timely file their motion for attorney's fees, Ambauens were simply negligent.

The CR54 rule change was a curative measure, designed to prevent delayed filings of motion for attorney's fees and address the issue of attorney fees being awarded in Superior Court while a case was under appeal

Ordinary rules of statutory construction apply to court rules. The policy behind adoption of a court rule will not be considered unless the rule is ambiguous. *State v Schmidt* 30 Wn.App 887, 639 P.2d 754 (1982) Washington courts have ruled on circumstances similar to this case where a more restrictive procedural court rule has taken effect during pendency of the case. Although a newly adopted court rule generally operates prospectively, when the rule is remedial in nature it can operate retrospectively. A rule is remedial when it relates to practice procedure, or remedies and does not affect a substantive or vested right. *Yellam v Woerner et al* 77 Wn.2d 604 (1982) The issue here is procedural or remedial rather than one affecting a substantive right.<sup>3</sup>

Here CR 54(d)(2) relates to the practice and procedure of filing cost bill and motion for attorney fees, and does not affect a substantive or vested right. Therefore, CR 54(b)(2) is remedial in nature, and as shown below, the plaintiffs' time to file

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<sup>3</sup> For guidance on this issue, under facts and circumstances similar to here, the California Court of Appeals decided the issue of timeliness of motion for attorney fees following a California Court Rule change during the pendency of an action.(see: Appendix A) Like here, the new California court rule provided a more restrictive limitation, shortening the period to file a motion for attorneys fees. The California Court of Appeals ruled that the limitation on the pending action began to run on the effective date of the new rule, and filing of motion for attorney fees based on the earlier rule was consequently untimely making the award of fees improper

their motion for fees ran from the effective date of the rule. In *Yellam*, the reviewing court found new court rule CR 41(b)(1) applied to those actions pending when the rule went into effect, and that the previous and more liberal rule did not apply. *Yellam id.*

Generally speaking, newly enacted statutes or newly adopted rules operate prospectively. *State v Ladiges*, 63 Wn.2d 230, 386 P.2d 416 (1963); However, when a statute or rule not explicitly made retroactive is remedial in nature, it can operate retrospectively. A statute or rule is remedial when it relates to practice, procedure or remedies and does not affect a substantive or vested right. *Yellam id.* Here, CR 54(b)(2) is not expressly prospective or retrospective, but it is clearly remedial.

New rule CR 54(b)(2) made Ambauens' motion for attorney's fees untimely. Upon enactment of CR 54(b)(2) January 1, 2007, the Ambauens not did attempt to meet the 10 day requirement for filing their motion for attorney's fees, nor did they request an extension. The language of CR 54(b)(2) is mandatory, and the court is without discretion to waive the 10 day requirement without a written order establishing "cause shown" No such order was requested, made, or is part to the record.

Young's oversight of the trial court's error in this regard, and his failure to object at the time of award are not fatal to raising this issue on appeal. Any award of attorney's fees, outside the court rules, or in violation of court rule, is a jurisdictional error that may be raised for the first time on appeal. *see*: RAP2.5(3)

In itself, the Ambauens year-long delay in filing their motion for attorney's fees was unreasonable, and arguably sufficient grounds for denial of their untimely motion.<sup>4</sup> Nevertheless, the mandatory language of CR 54(b)(2) controls. In light of the fact that no order was given by the court extending time for filing either the attorney's fee or cost bill Ambauens were not entitled to attorney fees on their untimely motion for fees. Young's fundamental right to judgment under current and applicable court rules was violated by the trial court awarding attorney's fees contrary to CR 54(d)(2). Ambauens were not entitled to attorney's fees due to their untimely filing of motion for attorney's fees. Accordingly the trial court was without jurisdiction to make the award.

**Because Ambauens were not the prevailing party they were not entitled to attorneys fees.**

In Ambauens' complaint plaintiffs' claimed "loss of enjoyment of their property" and monetary damages due to Young's storage of "unsightly" vehicles which contained "hazardous materials". In their demand for relief Ambauens sought injunction, monetary damages, and "order of abatement" removing all Young's vehicles from the subject property.

However, in ruling on the Ambauens' claims, the trial court made no finding of "junk vehicles", "unsightly vehicles", or "hazardous materials" on Young's property. Nor did the trial court find that Ambauens suffered any loss of value, monetary damages, environmental damages, or "loss of enjoyment of property" as

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<sup>4</sup> On zzz \_\_\_\_\_ plaintiffs sold their Big Valley property and lost standing to bring any further action against Young as an adjoining property owner. (see CP \_\_\_\_\_) The basis of their complaint was that they were an adjoining property owner under Kitsap County Code. .

Ambauens claimed or implied in their complaint. In point of fact, at no time did the Ambauens demonstrate any actual monetary damages or any hazardous materials effecting them or the local environment. Clearly Ambauens' bald claims served only to sensationalize their complaint and underscore the unprofessional and RPC violating guidance they received when their initial counsel, William Broughton..

In ruling on Ambauens' claims in its written summary judgment of August 28, 2008 the court dismissed Lorna Young as a defendant, and to the exclusive benefit of the Ambauens; the trial court ordered Colin Young remove vehicles stored on his property that were "in excess of those allowed" (in this case 10 "permanently" stored vehicles were allowed under KCC, and ignoring Young's grandfathered land use) As a product of Ambauens' complaint there was no injunction ordered, there was no condition attached to Young's title, and there were no monetary damages awarded.

**2. The court ruled that Ambauens lost standing in their early case when they sold their property in August 2006.**

In 2010 Mr. Broughton repeatedly attempted to mislead the lower court to contempt ruling against Young, supporting his motions with assertions of a non-existent injunction, and knowingly false declarations including David Ambauen's false declaration that he had returned to ownership of his Big Valley property subsequently shown to have been submitted in bad faith. RP 1/4/11 p.2:2-21

The court eventually dismissed the Ambauens contempt motion specifically ruling that the early court had not issued an injunction against Young or his use of

his property, and that the Ambauens had lost standing as a matter of law in this case when they sold their Big Valley property in August of 2006<sup>5</sup>

**Ambauens did not prevail**

Relating to prosecution of the Ambauens claims, Young clearly prevailed on the Ambauens' issues of monetary damages, loss of enjoyment, "order of abatement" (to removal all Young's vehicles), as well as the issue injunction. CP p.6 On the other hand, the Ambauens only partially prevailed on only one issue.

Ambauens only award came when the trial court issued its summary judgment order August 26, 2006, in which and for the exclusive benefit of the Ambauens Young was required to remove some of his vehicles from his property. This summary judgment order required Young to remove those vehicles "in excess of those allowed" - leaving 10 "permanently" stored vehicles on the subject property. This was not an "*order of abatement*," but rather a token award and does not constitute Ambauens prevailing on the majority of their claims, as required for an award of attorney's fees.

Based on the foregoing, Young prevailed on the majority of issues here and the trial court abused its discretion as it was not reasonable to award Ambauens' attorney fees on the basis of partially prevailing on one issue.

**2) Plaintiffs' cost bill did not separate or deduct hours and costs relating to plaintiffs' unproductive theories/motions or the prosecution of improperly named defendant Lorna Young who was later dismissed in summary judgment.**

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<sup>5</sup> Mr. Broughton filed a motion for contempt, presenting the Ambauen's as still the damaged property owners, when Ambauens in fact had not owned their enabling parcel in five years, yet clearly intending to mislead the court by failing to reveal they were without standing for the contempt motion.

Plaintiffs' motion for fees and costs is supported by Declaration of William Broughton in Support of Motion for Attorney's Fees and Costs which includes a "slip listing" printout of "*Billing to the Plaintiffs for prosecution of this matter*" Young submitted formally objections to the plaintiffs motion for costs and attorney's fees, listing reasons in his Response to Plaintiff's Motion for Attorney's Fees.

From January 2000 through January 2011 Colin Young was the single legal owner of record of the subject property. Yet Ambauens deliberately, and without sound basis, named Lorna Young as co-defendant in this action.

In naming Lorna Young as a defendant in an action brought under the Kitsap County Code (KCC), the plaintiffs were at best acting under an misplaced theory of ownership which directly conflicted with Code provisions that clearly defines the property "owner"<sup>6</sup> as it applies alleged violations of the KCC. Lorna Young was not the "owner" under KCC or any other legitimate provision or interpretation. Nonetheless, Ambauens maliciously named Lorna Young as a separate defendant. Lorna Young was served separately, appeared separately, then later was defended separately by attorney Randy Loun.

It is clear in retrospect that Lorna Young was wrongfully included in this lawsuit by Ambauens' attorney on at best, an erroneous theory. The court eventually agreed and Lorna Young was dismissed as an improperly named defendant by order of the court August 26, 2006.

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<sup>6</sup> KCC 17.110.545 "Owner" means the owner of record of real property or person purchasing a piece of property under contract. For the purposes of this title, in the terms of violations and binding agreements between the county and the owner, "owner" shall mean the leaseholder, tenant, or other person in possession or control of the premises or property at the time of agreement, violations of agreement, or the provision of this title.

However, the cost bill submitted by Ambauens attorney failed to separate hours associated with the prosecution of Lorna Young, as well as his failed motions and other unproductive theories. Clearly Ambauens' attorney, William Broughton, knew exactly what he was doing when he submitted his cost bill. He had every intention of causing Colin Young to pay all of Ambauens attorney hours in their unsuccessful pursuit of Lorna Young: from their allegedly scheduled deposition to his failed attempt at a sheriff's sale slated to provide Ambauens ownership of Young's Big Valley property

Mr. Broughton's billing for time associated with Lorna Young should have been separated and deducted, but it was not. In preparation of Ambauens' motion hearing for fees, Young submitted written objections and analysis of Ambauens' cost bill and motion for fees. Therein, and in oral arguments at the hearing Young detailed his objections to Mr. Broughton's assessment of costs and hours not successful or unjustified.

Ultimately, fees and costs attributed to defendants Colin Young and Lorna Young should be have been separated and resubmitted for the court's consideration, but this did not occur. Rather In a breach of the appearance of fairness, Mr. Broughton's all-time slip listing of case hours billed to Ambauens stood unmodified and unchecked..

Here, the trial court committed a manifest abuse of discretion when it failed to cause production of a detailed cost bill for separating out each defendant and unproductive theories. In light of Young's written objections,. no reasonable and unbiased person would have acted similarly.

**B. The early trial court arbitrarily determined Ambauens attorneys fees and costs award without substantive findings to support its decision.**

Ambauens' motion for attorney's fees stated they were seeking attorney fees and costs incurred. However, as shown above, the majority of Ambauens action against Young was based sensational allegations and the Ambauens were unsuccessful in nearly all aspects of their claim and requests for damages and relief. This lack of success was not acknowledged by the court in its award.

It was a manifest abuse of the court's discretion when it arbitrarily reduced Ambauen requested amount without well reasoned and written findings. It is well established in Washington that findings are necessary to provide a revisable record of the trial court's rational on any decision. Without findings Ambauens award of attorney's fees cannot be upheld

In the event Ambauens are found entitled to attorney's fees in the case of Ambauens claim against Young, it is urged that the court remand with instruction for reassessment of attorney fees separating defendants and breaking out non-productive motions and theories.

**C. Failure of Young to improve his position from arbitration is not grounds for an award of attorney's fees as jurisdictional limit of arbitration was exceeded by Young's damages estimate when compounded by treble damages under Young's "Timber Trespass" remedy.**

Mr. Rodman's wetlands damages estimate was received just prior to arbitration. Young had not anticipated that the wetlands damage estimate would be this high. With only a days until arbitration, Young was beyond the time to file a response disagreeing with the Statement of Arbitrability under KCLMAR 2.1(b).

As a result Young's only remaining option was to object to jurisdiction of the arbitrator at the hearing..

Young arranged a site assessment and wetlands damages estimate by retired Environment Engineer Robert Rodman who had extensive practical experience in environment mitigation projects. Mr. Rodman investigated and performed a site assessment of Young's damaged and filled wetlands around the north end of Young's wildlife pond in may 2008 just prior to arbitration..

In his damages estimate Mr. Rodman detailed his findings and the amount of fill that had been deposited over the wetlands and costs to remove and replace that soil, including permitting, and to restore the wetlands vegetation, including the dominant Salmonberry shrubbery that had been cut down. Rodman based his estimate on excavation costs on numerous core samples he drilled throughout the filled wetlands area to determine the depth of fill and soil types below.

Mr. Rodman's report was limited to estimating the restorative damages of the cutting down of Young's wetlands plants and ornamental shrubbery, as well as the cost of replacing the up to 24" of sand and clay with proper wetlands soils..

Mr. Rodman testified to his 2008 estimated restoration costs of \$48,600 for excavation of the fill; wetlands soil replacement; replacement of wetlands plants and restoring ornamental shrubbery (primarily Salmonberry); ongoing site maintenance; and permitting required for Young's wetlands restoration project. As Ambauens had previously denied both filling and damaging Young wetlands <sup>7</sup>,

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<sup>7</sup> In answer to Young's counterclaim, the Ambauens denied all claims and allegations of damage including damage to Young's wetlands. In response to Young's Request for Admissions prior to arbitration, David Ambauen again denied filling of Young's wetlands, denied cutting down Young's wetlands vegetation, and denied dumping vegetation waste on Young's land.

Ambauens had performed no site assessment for arbitration, and in fact had no wetlands expert opinion until August of 2010 - After two further trial dates had already past.

It is well established in Washington that jurisdictional issues may be raised at any time, and no arbitration specific exception was be found to indicate otherwise. Under Kitsap County Court Local Rule the jurisdiction limit on mandatory arbitration is \$50,000. *KCLMAR 1.2* Young provided Ambauens attorney a copy of Mr. Rodman's wetlands damages estimate, and submitted the same for arbitration.

At the start of the arbitration hearing Young presented his \$48,600 wetlands damages estimate to the arbitrator, objecting to the hearing on the basis that treble damages under "Timber Trespass" statute would push his \$48,500 estimate well past the jurisdictional limits of mandatory arbitration, still leaving his other claims of damage and waste outstanding.<sup>8</sup> Young also stated that Washington's Timber Trespass statute, treble damages applied to his wetlands shrubbery on the basis that it was "ornamental" The arbitrator chose to proceeded with arbitration over Young's objection identifying the jurisdictional conflict.

Although no record of the arbitration below was made, the reviewing court need look no farther than Mr. Rodman's estimate of \$48,600. Mr. Rodman's estimate was clearly developed and dated before arbitration. Moreover, Young need not prove that he raised the appropriate statutory remedy to be entitled to that

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<sup>8</sup> Mr. Rodman's estimate did not address any of the non-wetlands elements of Young's counterclaim. At arbitration Young testified from his personal farm experience to the measure of damages for stolen fencing, theft of crop, and waste deposited on Young's land.

remedy. Circumstances in this matter and Rodman's estimate dictate that Young is entitled under the "Timber Trespass" to restoration damages statute for loss of his ornamental Salmonberry shrubbery which included the removal of fill from the wetlands and replacement with proper wetlands soil.

The Arbitrator erred when he proceeded with arbitration after being notified by Young that he lacked jurisdiction. Rodman's damage estimate produced for arbitration was \$48,600 which exceeded KCLMAR 1.2 \$50,000 limitation when "timber trespass" remedy trebling was applied to his loss of the Salmonberry canopy that stood over the filled wetlands.

As the lack of jurisdiction for arbitration award rendered the arbitration award moot. This mooted award can not stand a basis of the Superior court award of attorney's fees on the failure of Young to improve his position. Accordingly the Superior Court was without jurisdiction to award attorney fees based on Young's failing to improve his position by trial *de novo*.

Young raised the lack of jurisdiction for arbitration during Ambauens' motion hearing for attorney fees, but Judge Harberly refused to hear the issue.

**D. The trial court's unbalanced and Prejudicial Evidentiary Rulings Against Young served to underwrite Ambauens' "spite" theory of the case and resulted in jury bias**

Ambauen's ER904 submissions clearly indicated their clear intent to demonize Young by re-alleging prior bad acts with irrelevant photographs and raising the nuisance ordinance before the jury. Such a course of action was effectively rehash

of their 2005 nuisance action which Young sought to avoid in his motion in preclude irrelevant and prejudicial vehicle related evidence...

Defending against Young's pretrial limine motion, Ambauens claimed "spite" as Young's motive for his counterclaims. Unsupported by any foundational evidence, Ambauens' "spite" theory of the case was presented as justification for admission evidence and testimony relating to Young's automobile collection.

From the outset, Ambauens theory of the case of "spite" was nothing more than gorilla dust. Ambauens proposed that Young counterclaimed out of "spite" for Ambauens previous complaint against him. RP 1/4/10 p.5:6-16

However, such a proposal flies in the face of all logic when one considers David Ambauen's pretrial admission of mowing down and then filling in Youngs wetlands. Clearly Ambauens concocted theory of "spite" out of desperation over their lack of a defensible position against David Ambauen's earlier admissions of filling and mowing the wetlands.

Here Ambauens clearly sought to distract and confuse the jury by re-alleging bad acts by Young's in his storage of vehicles. *see Ex 10* Ambauens only escape from their pickle was to culture an emotional verdict from jury sufficiently tainted and inflamed jury. Then the jury might ignore David Ambauen's arrogant and environmentally nefarious acts, and focus instead on Ambauens' allegations and photographs of Young's prior bad acts, performing a comparison of lessor evils by way photographs admitted.

### **Motions in Limine**

Trial in this matter commenced January 5, 2011. The court heard motions in limine January 4, 2011. The trial court granted Ambauens' motion striking the testimony of Mr. Callaghan, Young's rebuttal expert witness. Young formally objected. RP 1/4/11 p.22. The court also denied Young's limine motion to preclude irrelevant and prejudicial photographs and testimony relating storage of vehicles on a separated portion of Young's property. RP 1/4/11, p 2-23. Young formally objected. RP 1/4/11, p 31. Standard of review is abuse of discretion.

### **1) Young's Motion in Limine**

Ambauens' "spite" theory of the case was first presented in trial court in opposition to Young's pretrial limine motion, RP 1/4/10 p.2. Young sought to exclude all vehicle related evidence as irrelevant and highly prejudicial.<sup>9</sup> RP 1/4/11 p.2- p.5:4

In his pretrial arguments on this issue, Young made the court aware of the far reaching implications of admitting Ambauens' irrelevant and prejudicial vehicle storage related evidence. RP 1/4/11 p.2- p.5:4. The court was clearly warned of the dangers of admitting even one photograph showing those vehicles that were the subject of the Ambauens' earlier complaint. RP 1/4/11 p.7:21- p.10:8

Putting this issue into simple context, the Ambauens' theory of "spite" was without legs until Ambauens' irrelevant evidence of vehicle storage was admitted. At the same time Ambauens' vehicle storage evidence was not pertinent unless the Ambauens' theory was legitimate. Quite obviously this was a circular argument.

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<sup>9</sup> Prior to the hearing of any motion in limine Young informed the court and the counterclaim defendant that he was abandoning his claim of outrage RP 1/4/11 p 2:13 - 3::8 .

Clearly troubled at first with the concept of “spite” as an argument for admission of prejudicial evidence, eventually the trial judge ignored the fallacy of the

Ambauens’ circular argument and erroneously admitted the irrelevant evidence

In a manifest abuse of discretion the trial court ruled against Young’s limine motion, exposing the jury to irrelevant and highly prejudicial photographs. Jury was also presented with “limited” testimony about the bringing of a “nuisance” action against him. RP 1//4/11 p.29-p,31 Inflamed and tainted by this suggestion of Young’s prior bad acts, the jury eventually produced a verdict unsupported by any well founded evidence material to the any of the counterclaim issues.

Not only did the court admit into evidence the automobile storage related photographs from Ambauens’ earlier tried action against Young, but the court also admitted new exhibit #10 - Ambauens’ 24 x 36 inch satellite image of Young’s collection of vehicles. Exhibit #10 was admitted over Young’s specific objections as to its relevance, highly prejudicial nature, unknown date, and unknown maker. RP 1/5/11 p.76-77 Nonetheless, Exhibit #10 was prominently displayed in front of the jury each time the Ambauens’ attorney had the floor. It is doubtful a more prejudicial setting could have been provided for the trial..

Because each of the photographs admitted showing vehicles was of the nature and type Young sought to exclude with his limine motion, and all photographs in the record were admitted, specific objection for any evidence relating to vehicle storage or prior bad acts was not required . The rule in Washington is: “unless the trial court indicates further objections are required when making its ruling, its decision is final and the party losing the motion in limine has a standing objection.”

*State v. Ramirez* 46 Wn.App 223, 229, 730 P.2d 98 (1986) To preserve issues of relevance or prejudice of such exhibits or testimony for review, the objection is implied by its presence of such evidence in the record. Once again, it quite clear that photographs in the record showing vehicles are irrelevant to the counterclaim claims, inflammatory, and prejudicial and it was a manifest abuse of discretion to admit them.

In failing to acknowledge the fallacy of Ambauens circular argument for admission of their vehicle related evidence, the trial court also failed in its duty to ensure Young's right to a fair and unbiased trial of his counterclaim. On that basis alone Young is entitled to a new trial.

**1) In ruling on Young limine motion to preclude evidence, the trial court failed to provide "on the record" balancing of the probative value vs. prejudice.**

There was no written findings or order on the issue Young's motion in limine to the preclude vehicle related evidence. The trial court's decision was oral and on the record. However, the court erred when it denied Young's limine motion without an "*on the record*" balancing of the probative value of the evidence sought to be excluded against its prejudicial nature. RP 1/4/11 p.29-31 "When proffered evidence carries particularly high risk of unfair prejudice, trial court may have to conduct on-the record ER 403 balancing test of prejudicial effect of evidence against its probative value; when such balancing is under taken, factors considered by trial court in exercising its discretion must be stated on the record." *Carson v. Fine* 67 Wa.App 457 (1992) "In exercising its discretion under ER 403 to determine whether the danger of unfair prejudice substantially outweighs the

probative value of evidence, a court will consider the importance of the fact that the evidence is intended to prove” .*State v. Kendrick* 47 Wa.App 620 (1987)

When considering a motion in limine “on the record” balancing is required, and here Judge Haberly’s ruling was absent reasoning to support her admission her admission of irrelevant and inflammatory evidence of each an all photographs now in the record relating to storage of vehicles on Young’s property,. The court’s errant ruling led directly to Ambauens tainting the jury with pictures and testimony suggesting prior bad acts by Young in the open storage of his vehicles, a suggestion which by itself could have resulted in the jury’s verdict against Young.

Moreover, it is telling that the jury’s verdict is unsupported by substantial evidence in the record. Accordingly, the court’s erroneous admission of evidence relating to vehicle storage in ruling against Young’s motion in limine was a manifest abuse of discretion that denied Young the right to a fair and impartial trial.

## **2) The Jury was inflamed and tainted.**

It was obvious from the outset that Ambauens claim of Young’s “spite” was merely a trial tactic. By distracting the jury with photographs of Young’s car collection, implying some great wrong on society, Ambauens’ trial tactic successfully shifted the focus of the jury away from David Ambauen’s admission of his trespasses and environmentally nefarious acts and then painted Young in a unfavorable light with photographs of his vehicles

By its verdict against Young, it appears the jury completely ignored Ambauens' admission of trespasses, including his brush hog mowing Young's wetlands, and his filling in Young's wetlands using his heavy equipment, both acts being of a magnitude that it would shock any reasonable person.

"The probative value of evidence of worker's status as an undocumented immigrant was outweighed by the danger of unfair prejudice, in personal injury action against scaffolding subcontractor, and thus remand for a new trial was warranted". *Salsa v. Hi-Tech Erectors* 168 Wa.2d 664 (2010) The jury's verdict against Young was clearly an emotional decision, and contrary to the substantial evidence in the record establishing waste and damages by Ambauens admitted entry to Young's land without permission or right..

There can be no doubt that the Ambauens purposely raised and evidenced the inflammatory automobile storage issue at every opportunity. Ambauens had banked on displaying exhibit #10, which was relevant only to Young's storage of vehicles. Clearly, exhibit #10 was the most likely exhibit to evoke a non-rational response in the jury against Young. However, had the automobile related evidence been properly excluded, the jury would not have been confused or swayed by Ambauens earlier claims, and the jury's verdict would have been based solely on material evidence in the record.

**2) The trial judge failed to limit the jury's consideration of inflammatory photographs and testimony which falsely suggested uncharged prior bad acts by Young.**

Evidence causes "unfair prejudice," and thus may be excluded, when it is more likely to arouse an emotionally response than a rational decision by the jury.

*City of Auburn v. Hedlund* 165 Wa.2d 645 (2009) It is unconscionable that the trial court would permit the jury to be exposed to six year old and irrelevant vehicle storage evidence. When Judge Haberly did just this, she facilitated a “de facto” re-litigation of Ambauens claims against Young.

Juries are naturally inclined to treat other bad acts as evidence of criminal propensity. *State v. Bacotagarcia*, 59 Wn.App 815, 822, 801 P.2d 993 (1990) Courts have long urged the use of limiting instructions when such evidence is admitted to ensure that accused persons are convicted only upon proof beyond a reasonable doubt of the crime charged and not due to the perceived bad character. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697(1982).

Recently, Washington courts have begun to enhance this protection, requiring a limiting instruction regardless of whether it is requested. *State v. Foxhoven*, 161 Wn.2d 168, 175 , 163 P.3d 786 (2007); *State v. Russell*, 154 Wn. App. 775, 777, 225 P.3d 478 (2010); *State v. Williams*, 156 Wn.App 482, 234 P.3d 1174 (2010).

Recognizing the similarity of purpose and effect between Ambauens’ re-raising the issue of Young’s vehicle storage and impropriety of raising previous bad acts in criminal cases, this court should consider that *Russell* and *Foxhoven* rest on the shoulders of *State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300(1950) where long ago the Washington courts recognized the courts’ independent duty to protect against jurors’ natural tendency to convict based on character. *Id.*, at 379 In that case the court found that evidence of uncharged crimes, “may well be better calculated to inflame the passions of the jurors than to persuade their judgment” and “should be surrounded with definite safeguards”. *Id.* The court then described

those safeguards: “The court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should also be the court’s duty to give the cautionary instructions that such evidence is to be considered for no other purposes.” *Id* The court reversed Goeble’s conviction concluding “he was entitled to a fair trial, and that he did not have when evidence of a highly inflammatory character, proving an independent had unrelated crime, was admitted on a purely collateral matter” *Id*.

*Foxhoven, Russell, and Goeble* show the jury is likely to be influenced by evidence of other bad acts to an extent that renders the trial unfair unless consideration of that evidence is limited by careful instruction. In this matter testimony and photographs of Young’s vehicles, although irrelevant and inflammatory, were admitted without proper balancing by the court or limiting instruction. This was a manifest error by the trial court which denied Young his constitutional right to a fair trial.

It is urged that this court follow the clear language in *Foxhoven* and *Russell* which hold that without limiting instruction, the admission of bad act evidence (Young’s storage of vehicles) was manifest error which violated Young’s right to a fair trial. In accord with *Russell* and *Foxhoven* the reviewing court should therefore remand this case for a new trial with instruction fitting of the issues..

**H. Ambauens’ Motion in Limine to preclude Young’s late disclosed rebuttal witness to answer Ambauens new “paper tiger” issue of wetlands recovery.**

The trial court erred in granting Ambauens’ motion to exclude Young’s “late disclosed” supplemental wetlands expert essential to rebut Ambauens’ late August

2010 expert claim of the damaged wetland's "recovery", which raised a new issue six years after damages occurred. Standard of Review is abuse of discretion.

In summer of 2010 Ambuaens' wetlands expert was identified as Mr. Marc Boule. Mr. Western, attorney for the plaintiffs, arranged a site visit which took place in June 2010. RP 1/4/11 p.16:19 Mr. Marc Boule's report was dated August 12, 2010. Young received the Boule report by mail on or about August 19, 2010. RP 1/4/11

Shortly after receipt of the Boule report, Mr. Young contacted his 2008 expert, Mr. Rodman, to go over the Boule report. Due to Boule's report disclosing opinions that in 2010 the damaged wetlands were on the way to "recovery" based on vegetation assessment, and Boule's estimate of only \$5000 in damages, a more specialized analysis was required to address Ambuaens' late raised issue of "recovery" RP 1/4/11 p 15:4 - p.20:4

Ambuaens' expert is much more qualified than Mr. Rodman in the area of assessing wetlands "recovery" based on vegetation growth, But Mr. Rodman was much more experienced in practical restoration costs, as reflected in Boule's clearly deficient cost assessments and later described methodology minimizing excavation costs. Due to the likelihood of being limited to one expert for trial it was necessary for Young locate a qualified expert that could consider, address, and rebut Mr. Boule's assessment of the damaged wetlands' "recovery" over the past 2-3 years since Mr. Rodman's assessment. As "recovery" and "restoration" are linked at the hip that expert would also need practical experience in costs of restoring wetlands to match Rodman specialty, if Young was limited by the court to one expert..

Here Young was clearly forced into a last minute replacement of Mr. Rodman, or supplementing Rodman with a rebuttal expert, by the Ambauens' late raised new issue and theory of wetlands "recovery" four months prior to trial RP 1/4/11 p15:14-23

After a lengthy and involved search for an expert of the level of Mr. Boule that had practical experience in restoration costs, in early November of 2010 Mr. Young located a capable national firm - GeoEngineers - and provided them with Mr. Boule's report for review and assessment. RP 1/4/11 p.16-17 GeoEngineers assigned the project to Mr. Joe Callaghan. Ambauens' attorney was notified immediately of this rebuttal witness November 19, 2010, with Mr. Callaghan's resume provided to Mr. Western the following week. Emails between Young and Mr. Western in this period demonstrate are in the record and show the flow of information and notice to Ambauens. In early December Young notified Mr. Western by email that Mr. Callaghan was available for deposition on short notice.

On December 6, 2010, Mr. Callaghan performed a site visit and prepared his expert's report for the subject property containing analysis, opinions, and detailed restoration costs in just four days. This same task took Mr. Boule two months. Mr. Callaghan's report was served on both of Ambauens' attorneys on December 10, 2010 - four weeks prior to trial. RP 1/4/11 p.13

Despite having two attorneys and six weeks until trial, Ambauens made no effort to depose Mr. Callaghan, which was no surprise as they never attempted to depose Mr. Rodman in two years. In fact Ambauens never in five years showed any interest in deposing any witness beyond Colin Young and Lorna Young in this

matter. Moreover, Ambauens did the submit interrogatories to anyone but Colin Young. Clearly Ambauens have nothing to substantiate Judge Haberly's assessment that they were prejudiced. Even if there had been a new theory, which was not identified or pleaded, the court was obligated evenhandedly to avoid excluding rebuttal evidence, and could have limited Callaghan's testimony to theories of Rodman and Boule. This the court did not do, and the failure was a manifest abuse of discretion that denied Young his right to a fair trial.

In ignoring Mr. Callaghan, the transmittal of his qualification and expected testimony, his expert report served December 10, 2010, and offers to arrange deposition on short notice, the Ambauens filed their Motion to Exclude Counterclaimant's Late Disclosed Witness on December 17, 2010. Therein Ambauens sought exclude the testimony of Young's supplemental and rebuttal expert, Wetlands Biologist Joe Callaghan of GeoEngineers who had been identified six weeks prior to trial, but at no point did the Ambauens attorneys specifically show they were substantially prejudiced. RP 1/10/11 p.363-367 In fact, they could not because they made no reasonable effort to discover Mr. Callaghan. Young can not make Ambauens attorneys depose his expert when the had a month to do so, and as such, under the circumstances here of a newly raised issue Young can not be sanctioned with witness exclusion for Ambauens complete lack of effort after Young's disclosure of Mr. Callaghan.

Ambauens instead argued that Mr. Callagan was not timely identified under the rules of discovery rules to supplement interrogatories and claims Ambauens were thus subject to "sabotage" and "trial by ambush" by Young. These claims were

purely sensational and didn't satisfy the requirement of demonstrating prejudice to exclude a critical rebuttal witness - brought on by their own much delayed investigation of the site.

In fact, with Ambauens having Rodman's assessment and estimate prior to arbitration in 2008, if anyone was "ambushed" here, it was Young. Ambauens waited two years, until the summer of 2010, to respond to the Rodman assessment and estimate.

Clearly this a strategic trial tactic by Ambauens: to hang back and do nothing for six weeks then claim they were victims of trial by ambush is well outside the spirit and intent of the rules of discovery. Considering all factors in this issue, it should be Boule's raising of a new issue late in the game that the court should have stricken. A solution that any reasonable person would have deduced.

**G. Boule's site investigation was insufficient to support his opinions or the jury verdict, and his scientific testimony was largely based in presumption and/or speculation.**

Mr. Boule first investigated Young's damaged wetlands in June 2010. Principal to Boule's opinions was his digging of four "test pits" or "holes" around the pond and on the island in June 2010. RP 1/10/11 p.479:17-20

Boule testified that one of his four test pits was "on the island itself" (known by his clients not to have been filled), while another was "in the immediate vicinity of the bridge." RP 1/10/11 p.480:1-3 By Boule's description, his second test pit was situated at, or very near, the southern limits of the wetlands filled by Ambauen. The foot bridge Boule referenced in his testimony is mostly on Young's property,

situated on the creek side of the pond. (note: Young testified that based on Ambauens survey markers the property line crosses the bridge at an angle)

As for the third and fourth test pits Boule testified (pointing to exhibit 23) “and then up in these areas, up here, outside the pond, looking at the difference in the soil, and the area of disturbance, being approximately in there, and one outside of the area of disturbance.” RP 1/10/11 p.480:5-8

Using exhibit 23 at trial Boule pointed to the west side of the pond for his “area of disturbance” third test pit, and then to a location across an old logging road (not represented on exhibit 23) north of the pond and north of filled area for his control or outside the area of disturbance” fourth test pit. RP 1/10/11 p.480:7-21. Boule then confirmed each of these four test pit locations. RP 1/10/11 p.481:3-19

However, only two of Boule’s test pits provided “depth of fill” data. These two test pits were selectively located across the pond from each other and at opposite ends of the known filled area close to the property line. By comparison Rodman’s and Young’s testimony showed the wetlands fill deepest near the drain culvert but shallow and tapering off near the property line, based on more than 10 core holes they dug through the fill..

Situated across the pond from each other, neither of Boule’s two test pits down the sides of the pond could reasonably be used predict the depth of fill at the north end of the pond between them, and it was presumptuous and unacceptable scientific methodology for Boule to assume otherwise .

No evidence, scientific or otherwise, supported Boule’s expert conclusion that only one 20 x 20 foot area of wetlands had been filled, RP 1/10/11 p.460:23- 461:2

nor does Boule explain how this one 20 x20 foot area came to be situated about Boule's western most test pit. Boule then goes on to claim "from digging test holes in the area, it would appear that it was no more than three to six inches thick throughout" RP 1/10/11 p.460:2-3

Here Ambauen's scientific methodology is absurd. From his two test holes on opposite sides of the pond Boule concludes that the area "throughout" (the filled wetlands) has the same level of fill. RP 1/10/11 p.460:2-3 This conflicts with his claim of only one 20 x 20 foot area that was filled. Ironically, David Ambauen testified at trial to depositing the deepest fill at the north end of the pond, near the drain, which was some 80 feet from the 20 x 20 foot area on the west side of the pond that Boule claimed was the lone area of buried or "disturbed" wetlands.

Additionally, Boule has no knowledge, evidence, or tangible basis for claiming any reed canary grass grew at the north end of the pond prior to Ambauens' 2003 cutting of the Salmonberry and filling of the wetlands, RP 1/10/11 p.458:19-459:19, p 483, p.511:21-512:24 Nonetheless, Boule engages in stark speculation that invasive reed canary grass was helpfully buried by Ambauens' in 2003. RP 1/10/11 p.479:17-20 Later Boule again describes Ambauens filling the wetland as beneficial in "eradicating some of the reed canary grass locally." Here, without any basis, Boule presents scientific testimony that reed canary grass existed at the north end of the pond before Ambauens buried it in 2003, and misleads the jury accordingly. RP 1/10/11 p.460:4-22 , p.511:21-512:24

In the trial record there is no evidence or expert testimony free of speculation that leads to a conclusions that reed canary grass ever grew on Young's half of the

pond's wetlands prior to Ambauens 2003 cutting back the established Salmonberry canopy to some 25 feet from the water's edge where it remains today, unable to return due to the soil and reed canary grass.

Testimony and evidence shows Ambauens' depositing of fill over these near shore wetlands came shortly after he mowed down the vegetation, and thus provided a ripe and open environment for the invasion and proliferation of reed canary grass. These facts were testified to by Young at trial, and all elements of Rodman's 2008 estimate of restoration costs are required for the proper restoration of just the Salmonberry wetlands canopy back to the shores of the pond. Rodman's estimate, in its singular total amount of \$48,600 did not need to be impossibly broken down to the minutia of the number of Salmonberry plants destroyed - or the number planted for restoration - this to permit jury calculation of damages as Judge Haberly proposes in her refusal of Young's proposed jury instructions .RP 1/11/11 p.8 On this issue the courts have held that " 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". *Sherell v. Selfors*, 73 Wn.App 596, 602 , 871 P.2d 168 (1994) The Sherrel court held the measure of damages in a case involving injury to, or destruction of, residential/ornamental trees or shrubs, such as the present case, was the restoration or replacement costs for the vegetation *Id* at 603. See also *Tatum v. R&R Cable, Inc* 30 Wn.App 580, 636 P.2d, 508 (1981) and *Birchler v. Castello*, 133 Wn.2d 106, 942 P.2d 968 (1997) where the court found "damages under RCW 64.12.030 are not confined exclusively to injury to or destruction of vegetation."

Here “restoration costs” for the Salmonberry clearly involves the removal of the reed canary grass and fill, then introduction of supplemental replacement soils and maintenance . As shown by the foregoing Young was prejudiced by the court’s refusal to put his proposed instructions to the jury.

With regard to the restoration of the native Salmonberry canopy, restoration damages could have come through either of Young’s alternative statutory based remedies under his theory of separate issues and separate claims. However both Young’s proposed jury instructions of “Timber Trespass and “Waste to land” proposed instructions were refused by the court without reasoning on the record. On the issue and claim of restoration of the native Salmonberry, Rodman’s estimate was sufficient to stand as a whole without further jury dissection or calculation. Rodman’s estimate and accurately demonstrated for the jury Young’s total costs for Salmonberry restoration about the wildlife pond.

**G. Despite the court’s unfair instructions, there was sufficient evidence and measure of damages for an award in the amount of Rodman’s estimate as restoration damages.**

Quite simply, the quantum of well reasoned evidence from all trial witnesses including at times Mr. Boule, clearly shows that for proper restoration of the ornamental Salmonberry shrubbery to the shores of the pond to occur: 1) approximately \$20,000 in mandatory permitting must be in place; 2) the invading reed canary grass, its roots, and the soil about its roots must be excavated from the area Ambauen’s stripped of the Salmonberry canopy, filled, and reed canary grass moved in ; 3) Improper soils removed and replaced with wetlands soils; 4) young Salmonberry must then be replanted sufficient to cover the area of restoration (not a

one to one replacement for each mature Salmonberry cut down) , and 5) three years of maintenance to prevent volunteer reed canary grass and other non wetlands plants from getting a foothold and provide for attrition of young Salmonberry. Only then will the canopy of Salmonberry is sufficiently established to naturally shade the undergrowth of undesirable species such as reed canary grass.

In consideration of the Boule's ill-founded conclusions as to the need for permitting, his waffling on the need for restorative action, suggestions of burning and further poisoning of the wetlands with herbicides as methodology of reed canary grass eradication, his hearsay opinions on permitting, and his pseudo science based opinions as the extent of Ambuens fill, (see:RP 1/10/11 p.456-527 generally) Rodman's testimony and 2008 estimate stands much more credible. RP p.286-307 By all rights the jury should have awarded Young at least the amount Rodman specified. under the final jury instructions..

However, the jury's verdict of no damages on all claims is not supported by the record,. suggesting the verdict tainted by bias or prejudice brought on by the inflammatory and irrelevant photographs of Young's vehicles and prejudicial jury instructions.

**The trial court failed in its "gatekeeping" duties with regard to precluding Mr. Boules unorthodox scientific methodology.**

In the summer of 2010 Ambauens hired and disclosed their first and only expert witness, Mr. Boule. Mr. Boule first revealed his opinions in his mid August 2010 report where he raises a brand new theory of ongoing "wetlands recovery" occurring. Mr. Boule then uses the passing of two years as an opportunity to raise a new issue to supersede Rodmans estimate and discount the total amount of

wetlands damages the Ambauen might owe to \$5000, in his report, and to zero at trial. Ironically Boule infers, both in his report and at trial, that the Ambauens should benefit from mother nature's alleged repairs. Validity of assessment aside, Boule's "recovery" theory was clearly opportunistic, and unfairly presents the new issue "recovery" only because Ambauens deliberately waited more than two years after Rodmans report, and six years after Young's discovery, to asses their damage to Young's wetlands.

The basis of Boule's opinions on the size of the wetlands area filled and the depth of the fill were clearly ill-founded. Boule's opinion is based on just two hand dug test holes near opposite ends of the 200 x 25 foot area of filled wetlands described and indicated by Mr. Young during Boule's June 2010 site visit. Moreover, most of the damaged area was still clearly marked by the abrupt border of remaining five foot Salmonberry canopy.

However, this "two distant holes" methodology Mr. Boule used to determine the sized of the area of wetland filled, and, the depth of fill is absurd even to the layman as it fails to represent the vast area of buried wetlands between his samples. This "two distant holes" methodology and Boule's errant reasoning was a gross deficiency that went unchecked by the trial court in its "gatekeeper" duties..

Acting as the "gatekeeper" of expert testimony "The trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" The evidence must pertain to "scientific knowledge" defined as falsifiable scientific theory capable of empirical testing. It is the trial court's task to decide "whether the reasoning or methodology underlying the testimony is scientifically

valid ... and whether that reasoning or methodology properly can be applied to the facts in issue” *see: Daubert, 113 S. Ct 2795-97*

Although Judge Haberly had both the Boule and Callaghan reports before her, . RP 1/4/11 p.21:6-10, the trial judge clearly failed in her duties as the “gatekeeper” to recognize and project the jury from Boule’s scientific and opinion testimony that was based on invalid “reasoning or methodology.” Here, most egregiously Boule clearly used insufficient sampling to reach his conclusions as to the extent of Ambauens’ filling in of Young’s wetlands, the costs of excavation and restoration, and that no permitting was required for excavation of the fill or restoration work in the wetlands.

By his report and by his testimony, Boule’s opinions were based on his digging just two test core holes in the filled wetlands that surrounding the north end of the pond.. Boule’s digging of two holes over 100 feet apart and near the edge of the filled wetlands then testifying to the absence of filled wetlands between is not accepted “scientific testimony or evidence” based on valid “reasoning or methodology” which rises to the level of being “reliable” such that this “evidence” may then be “properly applied to the facts at issue” in the form of expert opinion or conclusions before the jury. The court clearly should not have permitted the jury to consider such ill-founded opinions and conclusions under its “gatekeeper” duties..

Throwing salt to the wound, not only did Judge Haberly fail as “gatekeeper” to keep the foregoing ill-founded scientific evidence from the jury, but she twice

interceded when Young attempted to demonstrate Boule's "methodology" was contrary to accepted scientific method.

In attempting to cross examining of Boule as to the basis and methodology of his expert opinions, Young tried to examine Boule as to his opinion of "no permitting required" grossly differing from the permitting and interdisciplinary study requirements mandated in the Department of Ecology Wetlands Manual.

However, each time Young raised the Wetland Manuals, or its requirements, he was cut off by Judge Haberly unfairly ordering Young to terminate the line of questioning. This constituted a manifest abuse of the court's discretion and violated Young's right to a fair trial. Nonetheless, had Mr. Callaghan been allowed to testify this indiscretion by the court could have been overcome, and in this regard Young was prejudiced.

Under the circumstance of Ambauens late raising this new issue of wetlands "recovery", justice requires opportunity for a qualified and substantive rebuttal.

Ambauens convinced the court to exclude Mr. Young's supplemental, rebuttal, or replacement expert Mr. Callaghan, who was to testify as the new issue of "recovery". The exclusion was unwarranted, however, and the court failed to consider whether lesser sanctions would suffice; whether Mr. Young had reasonable excuse for his delay in identifying the rebuttal expert, or whether the delay substantially prejudiced Ambauens' ability to prepare for trial. Unquestionably, the unwarranted loss of Mr. Callaghan's expert testimony "substantially and severely prejudiced" Young, and had a grave effect on

determining the outcome of this case under the unfitting ultimate issue of “substantial damage”

**The court’s exclusion order for Mr. Callaghan was inadequate.**

When the trial court 'chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. [Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)] (emphasis added; internal citation and quotation marks omitted). Under Burnet, a trial court abuses its discretion by imposing the severe sanction of excluding expert witness testimony absent: (1) a willful or deliberate refusal to obey a discovery order; (2) substantial prejudice to the opponent's ability to prepare for trial; and (3) a determination that no lesser remedies are available. *Id.* at 494-96; *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677,687, 132 P.3d 115 (2006); see also *Bard v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 349-50, 522 P.2d 1159 (1974) (listing additional witness-specific factors).

To ensure against such an abuse, before a trial court can exclude an expert witness as a discovery sanction it must explicitly consider, on the record, lesser remedies and determine that none are available or sufficient. Judge Haberly’s January 5, 2009 order does not mention lesser remedies or include a finding or determination on issue. CP 351-54. Nor is there anything in the record indicating Judge Haberly gave any thought to whether a lesser sanction would have sufficed.

The court must also explicitly find, on the record, that the witness's proponent's failure to timely disclose the witness amounted to "intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." Burnet, 131 Wn.2d at 494 (citation omitted). Judge Haberly's exclusion order at issue contained no such finding. CP 351-54. Nor would there have been any basis for such a finding, as Mr. Young's belated identification of Mr. Callagan as his second expert resulted from the late raised claim by Ambauens' expert that those wetlands he identified as filled by Ambauens had "recovered" (a new issue) Ambauens do not deny that they made no attempt to depose Young's experts, which further evidences Judge Haberly's failure to consider Young's position under the circumstances and lesser sanctions. .

Ambauens' belated suggestion of discovery violation and claims of "prejudice" and "trial by ambush" were in no fashion substantiated. Not even Judge Laurie can substantiate her adoption of Ambauens' claims of "prejudice", "new theory" when Young challenges these unsupported assertions . RP 1/4/11 p. 13,14,20-22. In the same fashion the court fails to consider Young's immediate offer to cooperate in scheduling Mr. Callagan for deposition on short notice. Nor was it and unreasonable proposition that that it took Mr. Young two and half months to locate a qualified wetlands expert able to testify to the extents of Mr. Rodmans report, re-investigate the site, and rebut Mr. Boule's claims that the damaged wetlands had "recovered" and no permitting is required for restorative work. Moreover such a sought after expert would also have to be willing to conduct such and investigate and provide a report on short notice.

Mr. Callagan was expected to testify as to the issues of “recovery” including the necessity and costs of various permits required to remove the fill from the wetlands as well as the costs and procedure for removal of the invasive species of reed canary prior to restoring the native Salmonberry shrubbery and other wetlands plants. RP 1/4/11 p.15-20 generally

Washington State trial courts exercise broad discretion when deciding evidentiary matters, but those decisions are subject to an abuse of discretion standard. *Cox v. Spangler*, 141 Wn.2d 431,439, 5 P.3d 1265 (2000). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12,26,482 P.2d 775 (1971) Here, under the court’s unreasonable assessment of the underlying circumstances, its ruling is based on “untenable grounds.”

**J. The Trial Court Wrongly Excluded Young’s Wetlands Rebuttal Witnesses.**

The basis for the court's exclusion of the witness testimony was the untimely disclosure of Young’s rebuttal witness, even though this occurred some six weeks prior to trial. Aside from the delayed disclosure of Mr. Callaghan being clearly excusable under the circumstances, the fundamental issue is Ambauens raising the new issue of “recovery” after waiting three years to commission their expert’s report. Although there is no written ruling on the courts decision, but the basis for the court's order appears to be a sanction for discovery violation.

**a. There Was No Discovery Motion Before the Court**

As a matter of law, however, the court was not authorized to sanction the defendant for discovery violations. Civil Rule 37(b)(2) authorizes a court to

sanction a party for failure to comply with a previous court order made pursuant to CR37(a) or CR26(f). In this matter there had been no previous CR37(a) or CR26(f) order. Furthermore, the Ambauens motion was brought in the context of a motion in limine and not a CR37(b)(2) motion.

**h. The Plaintiffs Had Never Conducted a Discovery Conference.**

In addition, it is undisputed that the plaintiffs' counsel never sought to confer with defense counsel pursuant to Civil Rule 26(i). A trial court lacks authority to entertain a CR37 motion when the moving party fails to first hold a conference pursuant to CR26(i). *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn.App. 861, 866, 28 P.3d 813 (2001), *Case v. Dundom*, 115 Wn. App. 199, 203, 58 P.3d 919 (2002).

Under the procedural facts of this case the trial court lacked authority to exclude the witnesses for an alleged discovery violation. Exclusion of testimony, moreover, is considered one of the more severe sanctions for violations of a discovery order. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). When the trial court excludes evidence as a sanction, the record must show that the court considered whether a lesser sanction would have sufficed and whether the disobedient party's refusal to obey the discovery order was willful or deliberate and substantially prejudiced the moving party's ability to prepare for trial. *Id.* "The Court should exclude testimony if there is a showing of intentional or tactical nondisclosure." *Lampard v. Roth*, 38 Wn.App. 198,202,684, P.2d 1353 (1984) Here there was no intentional or tactical nondiclosure and every effort was

made to identify Mr. Callagan, disclose his opinions, and make him available for deposition at the earliest possible date.

**c. There Was No Violation of Case Scheduling Order.**

This case came to the Superior Court under the Trial De Novo path. On repeated reset of this trial there was no amended Order Setting Case Scheduling that established a relevant cutoff date for witness disclosure. The alternative justification for the exclusion of Young's rebuttal witness seemed to be that the trial court felt it was enforcing the 120 day discovery cutoff found in Kitsap County Local Civil Rule 40. However, within KCLCR 40 there is no rule or cut-off applying specifically to the disclosure of witnesses or witness lists, even though all civil cases are governed by the *Case Event Schedule* as set out in KCLCR 40.

**d. There Was No Equitable Basis for Excluding the Witnesses.**

Because the trial court had no justifiable basis to exclude Young's supplemental expert witness either as a discovery sanction or as an enforcement of the case scheduling order, the only possible remaining basis would have been under the inherent equitable power of the court to ensure that justice is done and a fair trial held. The specific facts of this case, however, indicate that exclusion of the witnesses was an injustice and the defendant's right to a fair trial was violated.

Under these circumstances Mr. Young had no choice but to locate and name a replacement or supplemental wetlands expert due to rebut Mr. Boule's unforeseeable conclusion that the wetlands were self "recovering" and that permitting was not required for either the Ambauens excavations or restoration of Young's wetlands. "It is an abuse of discretion for a court to impose the severe

sanction of exclusion for such a technical and unintended discovery violation.” In re Estate of Fahlander, 81 Wn. App. 206, 209-11, 913 P.2d 426 (1996) (abuse of discretion to bar substitute expert when counsels' and original expert's incompatible schedules prevented original expert's deposition and nothing indicated plaintiff's eleventh-hour identification of substitute expert was a trial tactic or an intentional violation of any discovery rule or scheduling order).

It is abundantly clear from the emails between Mr. Western and Mr. Young that the Ambauens were fully aware Young would be using the testimony of Mr. Callagen at trial to rebut the assesment and testimony of Mr. Boule Ambauens wetlands expert.. Young was not provided Boule's report until August 2010. In his report Mr. Boule opines Young's filled wetlands adjacent to the pond had subsequently “recovered,” and that there was no need for any permitting, soils excavation, restoration or replanting to repair the previous damages done to Young's wetlands by David Ambauen in 2004.

It is indisputable that Ambauens were aware by Mr. Callaghan's report that he would present the much the same evidence as Mr. Rodman but as an up-to-date supplement, and that Mr. Callaghan would also provide rebuttal evidence to the to counter the Boule contentions as to the damaged wetlands “recovery” and the costs of restoration..

In all fairness, the court is obligated to acknowledge that the Ambauens waited six years after damaging Young's wetlands and nearly three years after Rodman's report to submit Mr. Boule's report with just five months before trial. By raising the new issue of “recovery” the Ambauens clearly prejudiced Young.

In point of fact the trial date in this matter had twice previously come and gone while the Ambauens had no wetlands expert. Ambauens had no analysis of the wetlands damage, and had not deposed any of Young's witnesses, nor even expressed any interest in deposing Mr. Rodman. Substantial prejudice was not demonstrated in the Ambauens' limine motion, nor was it supported by the Ambauens disinterest in deposing Young's experts despite nearly a month of opportunity with Mr. Callaghan, and three years of opportunity for Mr. Rodman.

There was no proper discovery motion before the court. There was no violation of the case scheduling order. The plaintiffs were aware of the expected rebuttal testimony from GeoEngineers wetlands expert Joe Callaghan, and they had more than a reasonable opportunity to prepare for it. Despite disclosure of Young's rebuttal expert witness six weeks prior to trial Ambauens made no effort whatsoever to depose Mr Callagan. Instead the attorneys for the Ambauens hung back until December 17, 2010 then moved at the last minute to strike Mr. Callagan's testimony. The only genuine reason for Ambauens not scheduling a deposition of Mr. Callagan, was to create an argument for seeking his exclusion.

In sum Ambauens' late investigation, late expert's report, failure to depose any of Young's witness, and late motion to exclude, collectively present as a trial tactic designed to gain an unfair advantage in the arena of expert opinion.

The conclusion here is inescapable. Judge Haberly had no tenable basis for granting Ambauens's motion to strike Mr. Callaghan's testimony and as a result, failed to enter a legally sufficient order. That being the case, the erroneous exclusion of Mr. Callaghan warrants a new trial. The exclusion of the defendant's

rebuttal witness under these circumstances by the trial court was a manifest abuse of discretion and that denied Young his constitutional right to a fair trial

**G. The trial court erred in its final jury instructions by failing to instruct the jury on all of Young's claims; by submitting instructions that confused the issues and convoluted the claims; by failing to represent Young's theory of the case; by improperly taking material questions of fact from the jury; and by unfairly consolidating all claims to one ultimate question premised on an increased threshold of damage.**

Immediately after the close of evidence Judge Haberly handed the her jury instructions and instructed the parties that closing arguments would be first thing in next the morning. As only a few minutes remained before the end of the court's day, clearly the court's instructions and its verdict form were completed several hours before the close of evidence. Mr. Young quickly thumbed through the court's jury instructions and realized that at niether of his two statutory remedies nor supporting instructions were present. RP 1/10/11 548-556 generally Young's election of two statutory remedies found in PJI# 19,20 were the by far the best fit of all possible remedies and insturction for the claims he brought to trial in his counterclaim as mapped out by his proposed jury instructions PJI # 11,15,16,23,24

In fact Young's Timber Trespass and Waste to the Land of Another statute based instructions were the pillars of Youngs case. Under Young's theory of the case, these two remedies, along with the construct of a trespass preexisting and continuing into the statute of limitation period, mapped the course of the counterclaim jury trial and testimony. Youngs thoery of the case was illustrated in his trial breif, and his carefully prepared set of proposed jury instructions. Clearly

Young built his case around the expectation of the court's fairness in presenting instructions that represented his theory of the case. RP 1/11/11 p.2-18 generally

Rather than the court meeting its obligation of presenting Young's theory of the case through its jury instructions, the court handed down improper instructions - inconsistent with the course of the trial - which failed to address several of his claims. In the jury was charged with deciding just one issue, simple "trespass"<sup>10</sup>. Young then objected to the entire package of instructions slated to go to the jury the next morning, and and the lack of time to review the instructions and raise his issues with the jury instructions just presented by the court.

An erroneous and prejudicial jury instruction is a proper ground for granting a new trial. See, e.g., *Kennett v. Yates*, 41 Wn.2d 558,564-66, 250 P.2d 962 (1952). Washington Courts frequently grant and uphold new trials on the basis of improper or confusing instructions. *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204,667 P.2d 78 (1983); *Kennett*, 41 Wn.2d at 564-65; *Mega v. Whitworth*, 138 Wn. App. at 672; see also 15 Karl B. Tegland, Wa. Practice: Civil Procedure ° 38.18 at 50 (2d ed. 2009).

Simple "trespass" clearly does not accommodate Young's counterclaims of theft of crop, theft of fencing, or Young's entitlement to statutory exemplary damages for waste of his land and timber trespass. Moreover, within this simple "trespass" instruction the trial court abused its discretion as it improperly raised the standard of proof for all of Young's claims to "substantial damage" and confused the issues.

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<sup>10</sup> Eventually the court's confusing instructions led to a question from the jury during deliberation as to the measure of damages

The next morning Mr. Young interrupted the morning court proceedings with substantive objections and argument as the insufficiency and unfairness of the court's jury instructions. Young argued that the jury instructions set out failed to address all his claims, replaced his selection of remedies, and ignored his theory of the case.

By failing to include Young "timber trespass", "continuing trespass", and "waste to land" instructions, the trial court insufficiently instructed the jury on the counterclaim issues and committed manifest error in failing to put forth Young's theory of the case. Young objected to the absence of his proposed jury instructions without any effect.

It is noteworthy that the trial court failed to present any jury instruction raising or bringing to point Ambauens' counterclaim theory of the case that Young's counterclaim was founded purely in "spite"<sup>11</sup>. Not only did Ambauens' pretrial defense and theory of "spite" remain unsupported through trial, but it was enormously outweighed by David Ambauen's admissions to the wetlands damage with his backhoe and Young's direct evidence of Ambauens' damaging acts and trespasses.

**All instructional errors raised or addressed on appeal are a manifest error and abuse of the court's discretion that denied Young his constitutional right to a fair trial**

Standard of Review for this issue is *de novo*. As each jury instruction error claimed herein was a manifest error with constitutional fair trial implications,

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<sup>11</sup> At no point did the Ambauens proffer any explanation of how Young's alleged "spite" caused Ambauens to mow down Young's ornamental wetlands shrubbery (the Salmonberry canopy) then use a backhoe to extensively fill and smooth over Young's wetlands with up to two feet of sand and clay; or limb Young's trees; dump yard and vegetation waste on Young's land; or steal his fence - all this as they "parked out" Young's half of the pond's wetlands in preparation for sale.

each instructional error claimed herein is reviewable for the first time on appeal under the exception of RAP 2.5(a)(3), regardless if the instruction was properly objected to, globally objected to, or not objected to in the course of the trial. On the basis of a manifest error affecting a constitutional right to fair trial, the appellant now formally objects to the court's omission of Young's following proposed instructions PJI# 11, 15, 16, 18, 19, 20, 23, and 24 as well as the court's final "trespass" instruction and verdict forms on the grounds that the court's final instructions and verdict forms did not fairly or accurately represent the various and separate issues of Young's counterclaim; his election of remedies; his theory of the case; his two separate claims of theft of crop and fencing; and his various issues subject to "continuing trespass." Young therefore was prejudiced by the court's manifest error in this regard and was not afforded his constitutional right to a fair trial.

RAP 2.5(a) provides in pertinent part:

... However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of the trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error effecting a constitutional right. [RAP 2.5] (emphasis added)

RAP 2.5 (a) applies to civil appeals as well as criminal, See *Richmond v. Thompson*, 130 Wn.2d 368, 385, P.2d 1343 (1996) Instructions not objected to at trial become law of the case and will not be addressed on appeal unless issue implicates manifest error affecting constitutional right. RAP 2.5(a); *Falk v. Keene Corp*, Wn.2d 645, 659, 782 P.2d. 974 (1989) " appellate court has inherent authority to consider issues which the parties have not raised if doing

so is necessary to the proper decision” RAP 1.1(e) (each rule applies to both civil and criminal actions, unless a different application is intended). Clearly RAP 2.5 comes with a constitutional exception for manifest error.

**The court’s single issue “trespass” based set of jury instructions created one “ultimate question” and did not fairly reflect the multiple issues of Young’s counterclaim**

As a whole, the trial court’s jury instruction completely failed to present Young’s theory of the case, but most importantly it failed to instruct the jury on two of Young’s theft claims. “It is within the discretion of the trial court to determine how many instructions should be given regarding each litigant’s theory of the case. We will not disturb the exercise of that discretion unless it clearly appears that undue emphasis has been placed on one theory to the detriment of the other.” Ulve v. Raymond, [Smith v. McLaren. 907 (1961)] However failure of the court to instruct the jury on all of the claims evidenced at trial requires remand for a new trial. Here the trial court used all of Ambauens instructions, and failed to instruct the jury on Young’s claims of theft of crop and theft of fencing and the essential issue of continuing trespass that applied to a number of Young’s claims including damages for bridge removal and depositing of waste on his land. As shown below each of these insufficiently instructed claims was sufficiently evidenced to put the questions to the jury. Had the jury properly been given Young’s proposed jury instructions of PJI# 11, 15, 16, 20, and 23 and a corresponding special verdict form, Young may well have been awarded damages for either or both of these claims.

Here it was not an issue of “best fit” of proposed instructions - it was a complete absence of proper instruction dealing with claims theft and/or waste, two elements

called out in Young's remedy of RCW 4.24.630(1) and basis of PJI#20 "Waste to the Land of Another"

**Young's proposed "Continuing Trespass" was an essential jury instruction**

The trial court erroneously and unfairly failed to include Young's PJI#24 "*continuing trespass*" as an essential instruction to the jury. Ommiting "*continuing trespass*" instruction - as the trial court did - is an error of law and subject to *de novo* reveiw. Although Young did not specifically object to the absence of his proposed "*Continuing Trespass*" instruction, PJI# 24 is essential to proper resolution of several of his counterclaims and to his collective body of proposed jury instructions which in all fairness should have gone forward to the jury..

Here due absence of PJI# 24 the jury had no choise but to apply the strict three year statte of limitations to all Youngs claims, thus putting the contruction of the bridge, and the depositing of 20 yards of vegetation waste on Youngs land outside the possiblity of award to Young because Young could not testify to when they first occured. Moreover, Young's theory of the case could only be before the jury in the form of his complete package of proposed instructions, where a "good fit" for the case and its various claims. Meanwhile the Ambauens proposed instructions neither fit their case or mention their "spite" theory of the case. The principal oversight by the court being unique

claims such as here inherently required separation for proper resolution of each issue individually..

Here, Young's theory of the case is clearly illustrated in Counterclaimant's Trial Brief and Counterclaimant's Proposed Jury Instructions. Under Young's theory of the case the Ambauens willfully entered Young's property bringing waste to his land consistent with descriptions found in RCW 4.24.630(1) Liability for damage to land and property, and in PJI#20 "Waste to the Land of Another" following:

A Washington State statute provides:

Liability for damage to land and property -- Damages -- Costs -- Attorneys' Fees

"Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.

For purposes of this section, a person acts 'wrongfully' if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs."

*[RCW 4.24.630(1) & PJI#20 "Wast to the Land of Another"]*.(emphasis added)

Young's theory of the case also includes the remedy of "timber trespass" under RCW 64.12.030 where a showing of intentional trespass is not required element. As a remedy the timber trespass statute applies the Ambauens' cutting of tree limbs and ornamental wetlands shrubbery (predominately Salmonberry) from Young's wetlands adjacent to the wildlife pond.

Young's theory of the case was embodied in his package of Proposed Jury Instructions. However, the trial court omitted all but one of Young's proposed instructions. As a result the court failed to provide the jury with Young's theory of the case. Moreover, the trial court failed to instruct the jury on the issue and nature of "*continuing trespass*," - critical to a proper determination of several counterclaim issues and claims.

As detailed in Young's trial brief, the issue of "*continuing trespass*" is principal to several of Young's claims. Understanding the concept of "*continuing trespass*" is essential to determining the proper limitation for some Young's claims, and for identifying the relevant evidence supporting those claims. Young's proposed "*continuing trespass*" instruction PJI #24 is an essential element to a complete package of proper jury instructions in this case. Young was bound to object to the the trial court's complete package of instructions. The court clearly committed a manifest error as it failed to instruct the jury without and instruction as to application and meaning of "*continuing trespass*" and thus the court denied Young his constitutional right to a fair trial.

In his trial brief Young extensively details and argues his theory of the case as well as his remedies. In his trial brief Young calls out his remedies, argues his election and entitlement of separate claims under one of two statutory remedies, and designated where and why "*continuing trespass*" applies.

Young's package of proposed jury instructions soundly reflected his theory of the case as it was presented in his trial brief, and as he presented his case at trial. Young's proposed instructions were interdependent and lengthy due to his number of claims and their foundation on separate facts precluding an aggregate claim. Within Young's package of proposed jury instructions each claim was separately presented to the jury and defined down to an issue with a listing elements that must be proven. Each claim was also then aligned with one of two statutory remedies for a measure of damages.

The trial court prejudicially drafted its final verdict forms prior to the close of evidence. Due to the number of claims, the somewhat unpredictable course and outcome of testimony, as well as the possible application of both Young's statutory based remedies to a few individual claims, the verdict forms should not have been formalized prior the close of the evidence as the court did.

The court's prematurely drafted verdict forms in no fashion represented Young's theory of the case. The court's simple one issue verdict forms could not accomodate Young's separate claims or properly associate Young's statutory based remedies. Unless the court acted on Young's objections to the court's entire set of jury instruction, and then included Young's package of essential instructions separating claims and designating statutory remedies (which it did not), the issue of modifying the courts' premature verdict forms was moot.

Here the court committed a manifest error with constitutional implication when on Young's lengthy objections it omitted Young's set of proposed instructions necessary to put forth Young theory of the case. This made it impossible to award Young any damages under the two statutory remedies that were the pillars of Young's case. These two remedies were put forth by Young in his proposed instructions, and as argued in his trial brief under his theory of the case. On this issue Washington's case law is clear. Where a statutory remedy fits the facts of the case as it clearly does here, the plaintiff is entitled to relief under that remedy, even though the remedy may not have been requested by the plaintiff.<sup>12</sup>

Based on the foregoing, it was reasonable to anticipate that significant discussion and reasonable time would be allocated at the close of evidence to developing proper and fair verdict forms after the close of evidence. However, this was not to be the case as Judge Haberly had set both her jury instructions and verdict forms *prior to the close of evidence*. Following Young's lengthy objections the next morning, she remained steadfast in putting forth her prematurely developed instructions and verdict forms that included all Ambauen's proposed jury instructions..

Had Judge Haberly not precluded application of Young's statutory remedies through her jury instruction, the outcome of this case would have been enormously different. As shown herein and by the facts and evidence in

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<sup>12</sup> Young's package of proposed jury instruction also contained additional instructions in the event of additional disclosures, or retractions by David or Jana Ambauen during the course of the trial.

the trial record, on a finding by the jury of as little as one dollar in damages, Young clearly was entitled to the application of his selected statutory remedies RCW 4.24.620(1) found in PJI# 20 “Waste to the Land of Another” and RCW 64.12.030 found in PJI# 19 “Timber Trespass and Ornamental Damages.” This however was not possible with the courts final jury instructions where “substantial damage” had to be proven first.<sup>13</sup>

An jury award of damages for just one stolen bale of hay or one stolen fence post - as is possible under the “waste” statute - would have improved Young’s position from arbitration, and eliminated the statutory path from mandatory arbitration to an award of attorneys’ fees.

However, it is prudent to at this point to restate that the court’s improper simple “trespass” instruction unfairly and improperly raised the threshold of proof from just “damage” to an assessment of “substantial damage” Clearly no reasonable jury would find a five dollar bale of hay or fence post to be “substantial damage” but under the “waste to land” statute that same jury would have no choice but to find the “damage” threshold had been met and make the award. In point of fact it yet remains an instructional issue that “substantial damage” is a subjective determination undermining any argument supporting the propriety of the final instructions.

By the diversity of Young’s claimed damages it is obvious that each of Young’s claims are supported by a different set of facts, which in turn demands

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<sup>13</sup> While each of Young’s statutory remedies required treble damages, an award under RCW 64.12.030 also requires mandatory award of attorneys fees and costs to Young

the jury determine each issue or claim separately. However, by way of its final jury instructions the trial court effectively takes these many unique questions of fact from the jury. Resolving these questions of fact is clearly essential to proper determination of each separate claim, yet the Judge Haberly errantly rolls them all into one simple and completely inappropriate “trespass” jury instruction. In doing so the trial court fails in its appearance of fairness, and fails to demonstrate sound reasoning. Again, the court’s refusal to change its initial jury instructions was a manifest error by the court which denied Young his right to a fair trial.

The statute of limitations for Young’s counterclaims runs from time of service to three years prior to service on Ambauens and under PJI# 15, and 16 all statute of limitation considerations were separately provided for each issue. Therein those counterclaims subject to *continuing trespass* were shown at trial to be within the statute of limitations. Here, the bridging over the pond to the island, habitual depositing of vegetation debris, theft of hay crop and ongoing destruction of wetlands were each established at trial as trespasses of an ongoing or “*continuing*” nature within the 2001 - 2004 time frame. As the balance of Young’s counterclaims were not dependent on a *continuing trespass* instruction it was essential that the jury be instructed on the difference. Clearly the trial court failed to meet its obligations in this regard when it did not submit PJI #24.

Those counterclaims turning on the issue of a "continuing" trespass included Ambauens' depositing of yard waste and debris on Young's property; Ambauens' bridge to the island erected on Young's land; and Ambauens' continuing encroachment into Young's wetlands. Ambauens most aggressive clearing, brushing, and mowing of Young's wetlands came after Ambauens personally surveyed and marked the property line across the pond and wetlands in 2003. RP 1/5/11 p.145-151, p.181:16-182:3, Clearly by Jana Ambauen's admission at trial of she and David Ambauen personally running a property line survey across the wetlands and pond, the Ambauens knew exactly where their property ended and Young's began before mowing down and filling Young's wetlands. By early 2003 survey the Ambauens would also have known that that their bridge to the island was on Young's land.. In fact Jana Ambauen's testimony at trial indicates the Ambauens likely had known the location of the dividing property line since the defendants' initial survey in 1990. RP 1/5/11 p.145-151 Young testified as to when he discovered the Ambauens bridge, and when he discovered the bridge was on his land. Young also testified to his estimate for the cost of the bridge removal. The forgoing are just a sampling of the material questions of fact effectively taken from the jury by the trial court errant jury instructions.

Each Young's counterclaims required a separate determination of the issue of the claim by the jury, as well as the amount of damages, again a decision for the jury. Each claim with continuing trespass implications presented a separate

set of facts but shared a common question as to whether Ambauens knew or should have known the position of the dividing property line and if the trespass continued in the period covered by the statute of limitations.

Likewise, where Ambauens failed to admit to waste and/or damage - as different material facts apply to each of Young's claims - the jury's duty should have been to make a separate decisions based on the evidence presented for each claim, then been permitted to be balance their decision on the evidence against the credibility of Ambauens denial for each specific claim. It is neither reasonable nor workable for the court to have placed all counterclaim issues under one instruction as the court did and seperated the jury from its duties..

In the case of Young's claim of theft of fencing, the jury should have been permitted to balance the following facts and questions of fact against Ambauens' denial of the Young's counterclaim for theft of fencing: Young's testimony of loss of his fencing from its remote location, the likelihood of anyone but Ambauens having motive to remove the fence, who would have found or had knowledge of the fence, who had access across Ambauens property to remove it, Young's testimony that the fence was on the property line; Young's testimony that Ambauens' bridge to the island was erected on Youngs property, the fact that this property line fence clearly would prevented Ambauen from accessing his bridge and the pond's island; David Ambauen's admission that he mowed the area where the fence was removed; and David Ambauen's admission of having this same type of fencing in his garage after it

Young's fence went missing. Young further testified to the replacement cost of the stolen fencing.

In the case of Ambauens' theft of Young's hay crop, the jury would have weighed the following factors under proper jury instructions including PJI# 11,15,19,20 and 23: Young's testimony as the value of hay crop being cut from his land in the same period as the waste on his land was discovered; David Ambauen's testimony as to his knowledge of Young's strip where the theft of hay crop occurred, that Young never cut hay there RP 1/10/11 p.530; Jana Ambauens testimony as the who cut their hay and when RP 1/5/11 p.159,169,170; the question of whether the Ambauens knew or should have known where their property line was RP 1/5/11 p.160; the fact that Exhibit 10 shows the hay in Young's strip behind their front garage cut at the same time as Ambuens was cut; the fact that Ambauens profited from the sale of their hay; Young's testimony as the the number of bales that would be in the area of stolen crop and the price per bale of the hay; the likelihood of any one else coincidentally having come in and harvested such a small number of bales of hay; and the credibility of David Ambauen in his denial of responsibility for cutting the hay off Young's land behind his garage RP 1/10/11 p.530 - in light of his admitted trespass of brush hog mowing and filling of Young's wetands with his heavy equipment. (omission of Young's "agency" instruction PJI# 23 was critical and prejudicial here)

In the case of Ambauens' dumping of yard and vegetation waste on Young's land, Young produced photographs and testified to some 20 cubic yards of decomposing vegetation dumped on his property, as well as the large pile of tree limbs on with cut ends on his half of the island.. Mr. Perry testified to a large 'truck" sized pile of yard waste on Young's property; and a photograph of a pile of cut limbs, and the property line running across the bridge and then island.RP 1/5/11 p.124:16-127. David Ambauen testified to being responsible for the piling of limbs on Young's north end of the island as shown in photograph. Young testified to his knowledge of the dividing property line and the dumped waste's location relative to the property line. Young testified to when he discovered the waste on his land, and that it remained at the time of trial. Young also testified to the estimated the cost for removal of the waste.on his land

All of the foregoing claims were sufficiently evidenced at trial, and each claim is determined by a different set of facts. Additionally, each of the forgoing claims required a different jury assessment under the "Waste to Land" remedy for proper damages or restoration award. However like all of Young's claims, the forgoing claims were cut off at the knees and handicapped by the court's failure to put forth Young's proposed package of interdependant jury instructions.

Had the court's jury instructions properly segregated Young's claims, with each claim's elements of proof, the questions of fact and credibility issues

would have been before the jury for separate *jury* decisions, and separate *jury* damage determination. This having been done in at least the spirit of Young's proposed instructions, Young would not have been prejudiced and the outcome of this trial would have been remarkably different.

Clearly questions and determinations were improperly taken from the jury in this matter.. This was a manifest abuse of discretion and manifest error by the court that denied Young his constitutional right to a fair trial. Of Young's proposed instructions omitted, the court agreed in haste to note for objection PJI # 18,19, 21<sup>14</sup> (rp 1/11/11 p. 17), but even these would have made the difference in producing a judgment for Young on a number of his issues and claims..

As detailed and supported in Young's Trial Brief, "Timber Trespass" claims are governed by a unique burden of proof where actual "trespass" need not be established. Furthermore, different material questions of fact and separate assessment of restoration damages under the Timber Trespass statute should not have been taken from the jury by the trial court's improper jury instructions. When the court took these factual questions and decisions from the jury it constituted a manifest error and abuse of discretion by the court which denied Young's right to a fair trial.

It is without contention that Young counterclaimed for restoration of damages as they existed in 2004 and not for damages perceived in 2010.

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<sup>14</sup> Young actually objected to, and specifically argued the omission of his PJI #20 "Wast to the Land of Another" based on RCW 4.24.630(1) - one of his two alternate remedies. see: RP 1/11/11 p..10,11

Material to this issue the Ambauens should not have benefited as they did from extending out trial delays, twice facilitated by Ambauens stacking their side with multiple attorneys, who collectively claimed they were unable accommodate the extending the standby trial status, and who were not able meet near term trial rescheduling that was put forth by Kitsap's Superior Court Scheduler. Meanwhile Young was able to meet any trial date. Accordingly the counterclaim jury trial was pushed from late 2008 to March 2011 providing for additional vegetation growth to conceal the damaged wetlands before Ambauens commissioned Mr. Boule to do their last minute site assessment.

As indicated by his December 10, 2010 report, Mr. Callaghan's late 2010 site assessment, and his opinion that proper restoring the wetlands around Young's pond was mandatory would most certainly have effected the outcome of the counterclaim trial, even under the court's errant jury instructions. By his report Mr. Callaghan was expected to provide the jury with a modern (2010) basis for determining the extents to which wetlands restoration was yet required, thus discrediting Mr. Boule's expert testimony as unfounded and inconsistent with the Department of Ecology Wetlands Manual. .

Here the record shows that Boule's expert testimony was conclusory, unsupported and based on skewed and limited sampling. Such expert testimony was not the kind of testimony that would assist the trier of fact.

ER702.

**Conclusion**

Based on the foregoing Ambauens are not entitled to attorneys fees; Judge Haberly improperly exercised her discretion in granting Ambauens motion to exclude late disclosed witness. Testimony of Joe Callaghan was vital to Young's counterclaim, and a new trial should be granted based on the erroneous exclusion of Mr. Young's expert. In addition, instructional error deprived Mr. Young of a fair trial. For these reasons, as well as all of the additional reasons stated above, Mr. Young respectfully asks the Court to remand this matter for a new trial.

### **Attorney's Fees and costs on Appeal**

Firstly, the declaration of fees and costs bill from Ambauen's second counsel, Beth Jensen, clearly shows the duplicity with co-counsel Mr. Western. Her slip listing descriptions show a nearly complete lack of necessity of her services and billing from arbitration through appeal by trial de novo. Ms. Jensen's net pretrial production preparing for this trial was just one motion. The trial court erred when it accepted Ms. Jensen's billing. It was err to award Ms Jensen's hours and costs unsupported by sound and substantial reasoning. Additionally expert witness fees were awarded absent supporting authority for such award. Judge Haberly's written judgment comment on the hourly rate clearly does not justify the number of hours Ms Jensen billed. RP 2/11/11 p.6-10

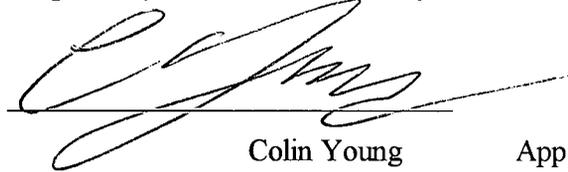
Young now requests attorney's fees and costs on appeal under RAP 14.1, 14.2, 14.3, and 18.1 A party may recover attorney fees and costs on appeal when granted by applicable law *see: Pruitt v. Douglas Co.* 116 Was.App 547 (2003) As extensively discussed above, Young selected two remedies for litigation of his counterclaim. Young selected RCW 4.24.630(1) as best aligned with his claims of waste and theft. RCW 4.24.630(1) provides for "attorney's fees and other litigation-related costs." This satisfies the statutory requirement for fees and costs on appeal.

Therefore an award of attorney fees and costs at the appellate level are authorized under RCW 4.24.630(1) in the event Young prevails on appeal of his counterclaim. Moreover, "As an independent ground we may award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior,

bringing excessive motions, or discovery abuses.” *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965); *Eide v. Eide*, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969). Here the Ambauen’s initiated their lawsuit with the bad faith naming of Lorna Young as defendant without legitimate grounds and with the ulterior motive of acquiring Young’s land. Additionally, as shown above, David Ambauen and his attorney repeatedly brought motions for contempt under false pretenses, and misled the lower court with deceptive pleadings and knowingly false declarations of proofs of service and false declaration of ownership of real property to regain standing to bring their motions for contempt and costs.

Each instance of Ambauens’ knowingly submitting bad faith declarations to mislead the lower court qualify as intransigence. In *re Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999) “A party’s intransigence in the trial court can also support an award of attorney fees on appeal.” Based on the forgoing this court should award Mr. Young attorney’s fees and costs on appeal

Respectfully submitted this 9th day of December 2011



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Appendix

(Very Instructions)

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

DAVID AMBAUEN and JANA AMBAUEN,  
husband and wife,  
Plaintiffs,

vs.

COLIN YOUNG, a single man,  
Counterclaimant & Defendant

No. 04 2 00642 4

COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 11

**WPI 120.01 Trespasser—Definition**

A trespasser is a person who enters or remains upon the premises of another without permission or invitation, express or implied.

**COMMENT**

The definition set forth in this instruction is derived from *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966); and the cases cited therein.

Permission may be express or implied. In the case of a residence, an owner or occupier is deemed to have consented to a stranger's approach to the front entry of the residence absent an express communication otherwise. *Singleton v. Jackson*, 85 Wn.App. 835, 935 P.2d 644 (1997). Thus, generally, a party approaching a residence via a front entry will be considered a licensee, not a trespasser.

A pedestrian using a public highway or bridge that is not open to pedestrian traffic is a trespasser, not an invitee. See *Fernandez v. State, ex rel. Dept. of Highways*, 49 Wn.App. 28, 741 P.2d 1010 (1987).

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

DAVID AMBAUEN and JANA AMBAUEN,  
husband and wife,  
Plaintiff,

vs.

COLIN YOUNG, a single man,  
Counterclaimant & Defendant

No. 04 2 00642 4

COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 15

**WPI 20.05. 20.02, 30.01.01. 30.13 (combined)**  
**(Burden of Proof and Measure of Damages)**

Mr. Young has the burden of proving each of the following propositions by a preponderance of the evidence:

- 1) That the counterclaim defendant acted, or failed to act, in one or more of the ways claimed by the Mr. Young, and that in so acting, or failing to act, the counterclaim defendant was negligent.
- 2) That Mr. Young's property was damaged;
- 3) That the negligence of the counterclaim defendant was a proximate cause of the damage to Mr. Young's property.

If you find from your consideration of all the evidence, that each of these propositions has been proved on any of Mr. Young's issues, your verdict should be for Mr. Young on that issue. On the other hand, if any of these propositions has not been proved on any one issue, then your verdict should be for the counterclaim defendant. on that issue

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 Mr. Young for such damages as you find were proximately caused by the wrongful conduct of the counterclaim defendant.

As to the issue of theft of fencing:

If you find:

- 1) Between 8/11/01 and 8/11/04 counterclaim defendant entered onto Mr. Young's land or caused another person to enter onto Mr. Young's land, and this entry resulted in the removal Mr. Young's fencing from Mr. Young's land.
- 2) Counterclaim defendant's removal of Mr. Young's fencing was intentional and unreasonable, and counterclaim defendant knew or should have known that he was without authority to remove Mr. Young's fencing.

Then your verdict on this issue must be for Mr. Young, and Mr. Young's is entitled to recover economic damages of the reasonable cost of replacement of fencing, and these damages shall be

trebled, and Mr. Young shall be awarded reasonable attorneys' fees, investigative costs, and other litigation related costs.

As to the issue of building a foot bridge on Mr. Young's land which allowed access to the nesting island within the wildlife pond

If you find:

- 1) Counterclaim defendant built, or caused to have built, the foot bridge to the island within the pond and this foot bridge constituted a continuing trespass on Mr. Young's property beyond 8/11/01;
- 2) Counterclaim defendant knew or should have known that he was without authority to build any part of this foot bridge on Mr. Young's property;
- 2) Counterclaim defendant's building of a foot bridge to the island and continuing use of the bridge's was intentional and unreasonable and resulted in injury to improvements on Mr. Young's real estate or damage to Mr. Young's unique wildlife habitat;

Then your verdict on this issue must be for Mr. Young, and Mr. Young is entitled to recover economic damages for the removal of the bridge, and these damages shall be trebled, and Mr. Young shall be awarded reasonable attorneys' fees, investigative costs, and other litigation related costs.

As to the issue of theft of crop:

If you find:

- 1) Between 8/11/01 and 8/11/04 counterclaim defendant entered onto Mr. Young's land or caused another to enter onto Mr. Young's land, and this entry resulted in the removal of Mr. Young's hay crop from Mr. Young's land;
- 2) Counterclaim defendant's removal of Mr. Young's crop was intentional and unreasonable, and counterclaim defendant knew or should have known that he was without authority to remove Mr. Young's hay crop.

Then your verdict on this issue must be for Mr. Young, and Mr. Young is entitled to recover economic damages of the value of crop removed, and these damages shall be trebled, and Mr. Young shall be awarded reasonable attorneys' fees, investigative costs, and other litigation related costs.

As to the issue of dumping waste on Mr. Young's land:

If you find:

- 1) Between 8/11/01 and 8/11/04 counterclaim defendant entered onto Mr. Young's land or caused another to enter onto Mr. Young's land, and this entry resulted in the dumping of waste on Mr. Young's land or causing waste to Mr. Young's land; and
- 2) Counterclaim defendant's dumping of waste on Mr. Young's land was intentional and unreasonable, and counterclaim defendant knew or should have known that he was without authority to dump waste on Mr. Young's land.

Then your verdict on this issue must be for Mr. Young, and Mr. Young is entitled to recover economic damages of a reasonable sum of money for removal of waste and restoration of land, and these damages shall be trebled, and Mr. Young shall be awarded reasonable attorneys' fees, investigative costs, and other litigation related costs.

As to the issue of filing Mr. Young's wetlands:

If you find:

- 1) Between 8/11/01 and 8/11/04 counterclaim defendant entered onto Mr. Young's land or caused another to enter onto Mr. Young's land, and this entry resulted in the spreading of fill over Mr. Young's wetlands or other destruction of wetlands plants, shrubbery, or environment.
- 2) Counterclaim defendant's spreading of fill over Mr. Young's wetlands or other destruction of wetlands plants, shrubbery, or environment was intentional and unreasonable, and counterclaim defendant knew or should have known that he was without authority to for these acts.

Then your verdict must be for Mr. Young, and Mr. Young is entitled to recover economic damages of a reasonable sum of money for the repair and restoration of the wetlands filled and for the replacement of wetlands plants and shrubbery, and these costs shall be trebled, and Mr. Young shall be awarded reasonable attorneys' fees, investigative costs, and other litigation related costs.

As to the issue of excavating Kinman Creek on Mr. Young's land:

If you find:

- 1) Between 8/11/01 and 8/11/04 counterclaim defendant entered onto Mr. Young's land, and this entry resulted in the excavation of Kinman Creek on Mr. Young's property;
- 2) Counterclaim defendant's excavation of Kinman Creek on Mr. Young's was intentional and unreasonable, and counterclaim defendant knew or should have known that he was without authority to excavate Kinman Creek on Mr. Young's land.

Then your verdict on this issue must be for Mr. Young, and Mr. Young is entitled to recover economic damages of the reasonable cost of restoring the damaged portion of Kinman Creek and these costs shall be trebled, and Mr. Young shall be awarded reasonable attorneys' fees, investigative costs, and other litigation related costs.

As to the issue of excavating Mr. Young's half of the wildlife pond and the loss of pond habitat:

If you find:

- 1) Between 8/11/01 and 8/11/04 counterclaim defendant entered onto Mr. Young's land, and this entry resulted in the excavation of Mr. Young's half of the wildlife pond; and
- 2) Counterclaim defendant's excavation of Mr. Young's wildlife pond was intentional and unreasonable, and counterclaim defendant knew or should have known that he was without authority to excavate Mr. Young's wildlife pond and this excavation caused injury to this real estate improvement on the land.

Then your verdict on this issue must be for Mr. Young, and Mr. Young is entitled to recover economic damages of the reasonable cost of restoring his wildlife pond and pond habitat to its original configuration and condition, and these costs shall be trebled, and Mr. Young is entitled to recover a a reasonable amount of money for the loss of use of the pond habitat from the time of its damage to the time of its restoration, and Mr. Young shall be awarded reasonable attorneys' fees, investigative costs, and other litigation related costs.

As to the issue of mowing, cutting, limbing, or otherwise damaging or destroying Mr. Young's shrubbery, and trees:

If you find :

- 1) The counterclaim defendant was without lawful authority to mow, cut, limb or otherwise damage shrubbery or trees on Mr. Young's land.
- 2) Counterclaim defendant was responsible for the injury or loss of Mr. Young's shrubbery or trees between 8/11/01 and 8/11/04.

Then your verdict on this issue must be for Mr. Young, and Mr. Young is entitled to recover reasonable economic damages for intrinsic value or restoration costs for loss of tree limbs, and shrubbery, and these damages will be trebled. In addition, if you award non-economic damages to Mr. Young for injury to trees and shrubs you may award Mr. Young damages for annoyance, humiliation, or distress.

The burden of proving damages rests upon Mr. Young. 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.

If you find for Mr. Young on any of his claimed issues, you should also consider the following noneconomic damage elements:

- 1) The annoyance, humiliation, and distress Mr. Young experienced by counterclaim defendant's wrongful conduct.
- 2) Damages for loss of use or of viability of the wildlife pond and surrounding wetlands habitat from the time it was damaged through the time it is fully restored to its original condition

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

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

DAVID AMBAUEN and JANA AMBAUEN,  
husband and wife,  
Plaintiffs,

vs.

COLIN YOUNG, a single man,  
Counterclaimant & Defendant

No. 04 2 00642 4

COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 16

**WPI 20.01 and 20.05 (combined)**  
**(Summary of Issues)**

Mr. Young claims the counterclaim defendant was negligent in one or more of the following respects:

- 1) Counterclaim defendant erected a foot bridge on Mr. Young's property, crossing the wildlife pond to the island nesting sanctuary, and through 8/11/04 this bridge constituted a continuing trespass by the counterclaim defendant which allowed predators access to the island nesting sanctuary, and counterclaim defendant access to damage Mr. Young's island land.
- 2) Between 8/11/01 and 8/11/04 counterclaim defendant harvested the hay crop from a portion of Mr. Young's land.
- 3) Between 8/11/01 and 8/11/04 counterclaim defendant repeatedly dumped large quantities of yard waste on Mr. Young's land in a continuing trespass of Mr. Young's land.
- 4) Between 8/11/01 and 8/11/04 counterclaim defendant removed fencing from Mr. Young's land adjacent to the counterclaim defendant's property line between Kinman Creek and the shared pond.
- 5) On numerous occasions between 8/11/01 and 8/11/04 counterclaim defendant trespassed with his heavy equipment onto Mr. Young's land, and in doing so the counterclaim defendant damaged and laid waste to Mr. Young's property. Mr. Young repeatedly ordered the counterclaim defendant to stay off Mr. Young's land, but the counterclaim defendant ignored these orders, annoying Mr. Young and causing personal humiliation.
- 6) Between 8/11/01 and 8/11/04 the counterclaim defendant or his agents mowed, cut, or otherwise destroyed wetlands plants, shrubbery, and limbed trees on Mr. Young's land adjacent to the wildlife pond, and on Mr. Young's portion of the island located within the pond.
- 7) Between 8/11/01 and 8/11/04 counterclaim defendant used his equipment to excavated Kinman Creek some 50 feet onto Mr. Young's land, damaging Mr. Young's Kinman Creek riparian environment.
- 8) Between 8/11/01 and 8/11/04 counterclaim defendant used his heavy equipment to excavated Mr. Young's half of their shared wildlife pond, and in doing so counterclaim defendant, filled Young's wetlands, significantly damaged Mr. Young's pond and the surrounding wetlands and pond habitat. Then attempted to conceal his actions by spreading straw and hay on top of the fill.

Mr. Young claims that one or more of these acts was a proximate cause of injuries and damages to Mr. Young. In his answer the counterclaim defendant denies these claims.

The foregoing is merely a summary of Mr. Young's claims, you are not to consider the summary of as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

#### Comment

This instruction, which sets forth the issues or claims that are properly supported by evidence, is preferable to the detailed statement of the facts or evidence claimed or pleaded by each party that was often used under the old practice. See *Wiehl, Instructing a Jury in Washington*, 36 *Wash.L.Rev.* 378, 380 (1961). By the use of WPI 1.01, *Advance Oral Instruction—Beginning of Proceedings*, the jury will have heard the general factual outline of the case, and accordingly needs no special instruction thereon in the written instructions on the law. The opinion in *Greene v. Rothschild*, 60 *Wn.2d* 508, 512, 374 *P.2d* 566, 569 (1962), overruled on other grounds, 68 *Wn.2d* 1, 402 *P.2d* 356 (1965), specifically holds that the requirement for written instructions applies only to the substantive law of the case and not to the usual and necessary oral admonitions and instructions to the jury throughout the trial.

Each party is entitled to have the trial court instruct on its theory of the case if there is substantial evidence to support it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 *Wn.2d* 127, 135, 606 *P.2d* 1214 (1980). It is not enough to state in general terms that one party claims that the other was negligent. *Dabroe v. Rhodes Co.*, 64 *Wn.2d* 431, 392 *P.2d* 317 (1964); *Woods v. Goodson*, 55 *Wn.2d* 687, 349 *P.2d* 731 (1960). Merely stating there is a claim of negligence does not satisfy the obligation of instructing the jury on the specific theory of the case. See *Meredith v. Hanson*, 40 *Wn.App.* 170, 697 *P.2d* 602 (1985); *Gammon v. Clark Equipment*, 38 *Wn.App.* 274, 686 *P.2d* 1102 (1984), judgment affirmed 104 *Wn.2d* 613, 707 *P.2d* 685 (1985); *Pearce v. Motel 6, Inc.*, 28 *Wn.App.* 474, 624 *P.2d* 215 (1981) (holding that defendant was entitled to a requested issues instruction which was substantially the same as WPI 20.01).

"Claims," as used in this instruction, is not limited to the issues raised by the pleadings. By the time the case is submitted to the jury the issues may have been framed by a pretrial order, by trial amendment, and by evidence introduced at the trial. *CR 15; Meisenholder, The Effect of Proposed Rules 7 through 25 on Present Washington Procedures: Part II*, 32 *Wash. L.Rev.* 336, 352 (1957). Also some issues such as aggravation of a pre-existing condition in an injury action may be in the case properly although not pleaded in the complaint. *Johnson v. Howard*, 45 *Wn.2d* 433, 449, 275 *P.2d* 736, 745 (1954); *Frick v. Washington Water Power Co.*, 76 *Wash.* 12, 135 *P.* 470 (1913). The phrase "a proximate cause" is the proper terminology for this instruction; "the proximate cause" is incorrect. *Milne v. City of Seattle*, 20 *Wn.2d* 30, 33, 145 *P.2d* 888, 890 (1944); *Hansen v. Sandvik*, 128 *Wash.* 60, 64–5, 222 *P.* 205, 207 (1924); *Bullock v. Yakima Valley Transp. Co.*, 108 *Wash.* 413, 435, 184 *P.* 641, 648 (1919).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
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Counterclaimant & Defendant

No. 04 2 00642 4

COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 18

**(Waste by Trespasser)**

Any waste or object placed on the land of another without authorization of the land owner constitutes a trespass, and remains a continuing trespass for as long as the trespass object or waste remains on the land. On the event of transfer of ownership of a land where any continuing trespass is occurring, the right to legal action on continuing trespass is transferred to the new land possessor.

**COMMENT**

The damaged owner, who has innocently suffered a loss because of the wrongful acts of an intentional trespasser, should neither be put to the travail of protecting against further damage, nor the onus of restoring the land to the extent possible to lessen his damages. A purpose of the treble damage statute is to provide "a rough measure of compensation for future damages not generally ascertainable." *Harold v. Toomey*, 92 Wash. 297, 298, 158 P. 986 (1916), cited with approval in *Mullally v. Parks*, 29 Wn.2d 899, 909, 190 P.2d 107 (1948).

The damaged owner, who has innocently suffered a loss because of the wrongful acts of an intentional trespasser, should neither be put to the travail of protecting against further damage, nor the onus of restoring the land to the extent possible to lessen his damages. A purpose of the treble damage statute is to provide "a rough measure of compensation for future damages not generally ascertainable." *Harold v. Toomey*, 92 Wash. 297, 298, 158 P. 986 (1916), cited with approval in *Mullally v. Parks*, 29 Wn.2d 899, 909, 190 P.2d 107 (1948).

A trespasser is liable for all damages proximately caused by his trespass.

*[Baker v. Ramirez, 190 Cal. App 3d 1123, 235 Cal. Rptr. 857 (5th Dist. 1987); Brand v. Mathis & Associates, 15 S.W.3d 403 (Mo. Ct. App. S. D. 2000)].*

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COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 19

**(Timber Trespass and Ornamental Damages)**

A Washington State statute provides:

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

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

As to the damage to ornamental trees and shrubbery: the proper measure of damages for the wrongful destruction of ornamental trees and shrubbery which did not decrease the value of the land is the intrinsic value of the trees and shrubbery removed.

COMMENT

RCW 64.12.030

In 89 Wn.2d 190, 570 P.2d 1035 SEATTLE-FIRST NAT'L BANK v. BROMMERS the court decided: "The rules in Washington for awarding treble damages under RCW 64.12.030 and .040 are well established, as are the reasons for the rules. A person who willfully or recklessly cuts down and removes trees from the land of another is liable to the latter for treble damages.

Willfulness or recklessness may be shown by circumstantial evidence. SEE SMITH v. SHIFLETT, 66 Wn.2d 462, 403 P.2d 364 (1965); BLAKE v. GRANT, 65 Wn.2d 410, 397 P.2d 843 (1964); FREDERICKSEN v. SNOHOMISH COUNTY, 190 Wash. 323, 67 P.2d 886, 111 A.L.R. 75 (1937); VENTOZA v. ANDERSON, 14 Wn. App. 882, 545 P.2d 1219 (1976); LONGVIEW FIBRE CO. v. ROBERTS, 2 Wn. App. 480, 470 P.2d 222 (1970)."

RCW 64.12.030

The statute is applicable to ornamental trees and shrubs as well as timber. BUTLER v. ANDERSON, 71 Wn.2d 60, 75-76, 426 P.2d 467 (1967); TRONSRUD v. PUGET SOUND TRACTION, LIGHT & POWER CO., 91 Wash. 660, 158 P. 348 (1916). Mitigation of treble damages is possible under RCW 64.12.040 where "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 . . ." However, the burden of proving mitigation is upon the one who caused the injury. VENTOZA v. ANDERSON, 14 Wn. App. 882, 894, 545 P.2d 1219 (1976), and cases cited. Nor is it necessary to prove intent on the part of the trespasser. FREDERICKSEN v. SNOHOMISH COUNTY, 190 Wash. 323, 326, 67 P.2d 886, 111 A.L.R. 75 (1937). Here, there was evidence that permission was not obtained and no effort was made to ascertain the location of the easement. The purpose of the treble damage statute is to (1) punish a willful offender; (2) provide, by trebling the actual present damages, a rough measure for future damages; and (3) discourage persons from carelessly and intentionally removing another's shrubs or trees. GUAY v. WASHINGTON NATURAL GAS CO., 62 Wn.2d 473, 383 P.2d 296 (1963) [ TATUM v. R & R CABLE, INC .30 Wn. App. 580 ]

APPENDIX

Counterclaimant's Proposed Jury Instructions

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
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No. 04 2 00642 4

COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 20

**(Waste to the Land of Another)**

A Washington State statute provides:

Liability for damage to land and property -- Damages -- Costs -- Attorneys' Fees

“Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.

For purposes of this section, a person acts 'wrongfully' if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.”

COMMENT

RCW 4.24.630(1)

Once a trespasser forms intent to enter the land, the trespass becomes willful; thus, under such circumstances, a plaintiff may recover treble damages under a statute allowing treble damages for willful trespass.

*[see: Matanuska Elec. Ass'n, Inc. v. Weessler, 723 P.2d 600 (Alaska 1986)]*

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No. 04 2 00642 4

COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 23

**WPI 50.01 Agent and Principal—Definition**  
**WPI 50.03 Act of Agent is Act of Principal (combined)**

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. One may be an agent even though he or she receives no payment for services.

Any act or omission of an agent within the scope of apparent authority is the act or omission of the principal.

NOTE ON USE

Use bracketed material as applicable. For the scope of this instruction, see WPI 50.00, Introduction.

Use this instruction only when there is an issue as to the existence of agency. Use WPI 50.03, Act of Agent is Act of Principal, with this instruction. If the issue is whether the agent was acting within the scope of authority, use WPI 50.02, Agent—Scope of Authority Defined. If the issue is whether a person is an agent or independent contractor, use WPI 50.11 (Independent Contractor—Definition) and 50.11.01 (Distinguishing Between Agents and Independent Contractors) along with this instruction.

COMMENT

Characteristics of agency relationship. The essential elements of an agency relationship are control over the manner in which the work is performed and consent. *Yong Tao v. Heng Bin Li*, 140 Wn.App. 825, 831, 166 P.3d 1263 (2007); *O'Brien v. Hafer*, 122 Wn.App. 279, 283, 93 P.3d 930 (2004). The definitions of agent and employee have been approved in many Washington cases. See, e.g., *CKP, Inc. v. GRS Const. Co.*, 63 Wn.App. 601, 821 P.2d 63 (1991) (definition of agent); *Chapman v. Black*, 49 Wn.App. 94, 741 P.2d 998 (1987) (definition of employee); *Hollingbery v. Dunn*, 68 Wn.2d 75, 411 P.2d 431 (1966) (definition of employee).

In the absence of actual exercise of control, a principal-agent relationship exists if the principal has the right of control over the manner and means by which the work is accomplished. *Chapman v.*

Black, 49 Wn.App. at 99 (the right of control is the “crucial factor”); O'Brien v. Hafer, 122 Wn.App. at 283 (same holding). For a more detailed discussion of the significance of the right to control in distinguishing between agents and independent contractors, see Massey v. Tube Art Display, Inc., 15 Wn.App. 782, 551 P.2d 1387 (1976); McLean v. St. Regis Paper Co., 6 Wn.App. 727, 496 P.2d 571 (1972); Comment to WPI 50.11, Independent Contractor.

Both the principal and the agent must consent to the relationship. Stansfield v. Douglas County, 107 Wn.App. 1, 117, 27 P.3d 205 (2001); O'Brien v. Hafer, 122 Wn.App. at 283.

An agency may be express or implied. See King v. Riveland, 125 Wn.2d 500, 886 P.2d 160 (1994); Barker v. Skagit Speedway, Inc., 119 Wn.App. 807, 82 P.3d 244 (2003); Stansfield v. Douglas County, 107 Wn.App. at 17–18.

An agent need not be paid for services in order to qualify as an agent. Coombs v. R. D. Bodle Co., 33 Wn.2d 280, 205 P.2d 888 (1949); Baxter v. Morningside, Inc., 10 Wn.App. 893, 521 P.2d 946 (1974).

Factual issues. Whether an agency relationship exists depends on a variety of factual issues. See Yong Tao v. Heng Bin Li, 140 Wn.App. at 831 (“The existence of agency always depends on the facts and circumstances of each case”); Stansfield v. Douglas County, 107 Wn.App. at 18; see also WPI 150.11.01, Distinguishing Between Agents and Independent Contractors (listing ten factors to consider in distinguishing agents from independent contractors). If there are conflicts in the evidence whether the relationship between the parties was a principal-agent relationship or an independent contractor relationship, or if the evidence is reasonably susceptible of more than one inference, the question is one of fact for the jury. If the evidence is undisputed, the question is one of law and left to the court for its determination. See Chapman v. Black, supra (holding that trial court erred in granting a motion for judgment N.O.V. on the issue of agency and control because the evidence was in conflict); O'Brien v. Hafer, 122 Wn.App. at 284.

Loaned employees. In Jones v. Halvorson-Berg, 69 Wn.App. 117, 847 P.2d 945 (1993), the court discussed in detail the elements necessary to establish whether an employee is “loaned” from one employer to another. An employee may become the loaned servant of another by submitting to the direction and control of the other with respect to a particular transaction or piece of work.

However, such a relationship is not established unless it appears that the employee has expressly, or by implication, consented to the transfer of his or her services to the new employer, and unless the lender surrenders and the borrower assumes the power of supervision and control.

#### WPI 50.03 Act of Agent is Act of Principal

Any act or omission of an agent within the scope of apparent authority is the act or omission of the principal.

#### NOTE ON USE

For the scope of this instruction, see WPI 50.00, Introduction.

Depending on the questions in issue, use this instruction with one or more of the following instructions: WPI 50.01 (Agent and Principal—Definition), WPI 50.02 (Agent—Scope of Authority Defined), or WPI 50.02.01 (Agent—Scope of Apparent Authority Defined).

Use the bracketed language as appropriate.

#### COMMENT

A master may generally be held liable for the tortious acts of the servant if such acts are performed within the scope of employment, although the master may not know or approve of them. *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 383 P.2d 504 (1963).

The principal is held vicariously liable if the agent's acts were committed within the scope of either actual or apparent authority. Actual and apparent authority are distinct concepts:

An agent's authority to bind his principal may be of two types: actual or apparent. Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. Both actual and apparent authority depends upon objective manifestations made by the principal. With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person.

*King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994) (citations omitted).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
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vs.

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Counterclaimant & Defendant

No. 04 2 00642 4

COUNTERCLAIMANT'S  
PROPOSED JURY  
INSTRUCTION # 24

**(Continuing Trespass)**

A "continuing trespass" exists where there is an intrusive condition on a persons land causing actual harm to that persons property and one can take curative action to stop continuing damages  
A "continuing trespass" is actionable regardless of the first trespass occurring outside the three year statute of limitations, so long as the trespass continued within the three year statute of limitations.

**Comment**

A cause of action for a continuing trespass exists where there is an intrusive condition on a person's land causing actual harm to that person's property and the condition is abatable, meaning that one can take curative action to stop continuing damages. See *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985); *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 125-26, 977 P.2d 1265 (1999). Because a trespasser is under a continuing duty to remove the intrusive condition, sequential causes of action continue until the trespasser removes it. *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006); *Fradkin*, 96 Wn. App. at 124-25.

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

COLIN YOUNG,  
Appellant,  
vs.  
DAVID AMBAUEN and  
JANA AMBAUEN,  
husband and wife,  
Respondents,

No. 41921-1-II

DECLARATION OF SERVICE  
BY MAILING

I, Colin F. Young, certify and declare under penalty of perjury of the laws of the State of Washington the following:

1. I am over 18 years old, and I am a resident of Kitsap County, Washington.
2. I am the appellant the above titled action
3. That on the 9th day of December, 2011, I deposited in the United States Postal Service Mail, first class postage paid, to Plaintiffs' attorneys, Mr. David Jacobi, at his office address of 901 Fifth Ave suite 1700. Seattle WA 98164-2050, and Mr. William Broughton at his office address of 9057 Washington Ave. NW. Silverdale WA 98383

1) Appellant's Opening Brief

 Signed this 9th day of December, 2011 at Silverdale WA.

Colin F. Young 360-697-4966  
1785 Spirit Ridge  
Silverdale, WA 98383