

No. 48222-3-II

Court of Appeals, Div. II,
of the State of Washington

Ernest Kirk George,

Appellant,

v.

John Danielsen,

Respondent.

Reply Brief of Appellant

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1. Introduction

Danielsen ordered his logger to cut 18 trees from George's property. He has sought to justify his actions by arguing that he subjectively believed his efforts in locating the property line were reasonable and proportional to the size of the project. Danielsen's subjective beliefs are insufficient to defeat summary judgment on the issue of mitigation under RCW 64.12.040. The only possible conclusion is that the trespass was not casual or involuntary and that Danielsen did not have probable cause to believe the trees were his own. The trial court should have decided this issue in favor of George as a matter of law. This Court should reverse and award treble damages.

Danielsen's criticism of George's proposed harmonization of the provisions of RCW 4.24.630 is misplaced. Under George's harmonization, the timber trespass statute and case law would still apply to measure timber damages even in cases where RCW 4.24.630 provides additional remedies. The timber trespass statute would also remain the sole remedy in cases like *Gunn*, where trees are "cut down, girdle[d], or otherwise injure[d]," but not "remove[d]" from the property and there is no evidence of "waste or injury to the land." George's harmonization gives meaning to all of the provisions of both statutes. This Court should, to the extent necessary, overrule or limit *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015), to account for the plain language of RCW 4.24.630 applying to "every person who goes onto the land of another and who removes timber."

2. Reply to Respondent's Statement of the Case

Danielsen notes that George's designation of Clerk's Papers did not include Defendant Morger Construction, Inc. and Dan Morger's Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment. Brief of Respondent at 9. George's counsel intended to designate the document but neither he nor the clerk's office could locate it in the superior court's docket. *Cf.* CP 376-77 (the document was not designated). It now appears the document was inadvertently appended to the Declaration of Kelley Sweeney when it was filed and thereby became part of the Clerk's Papers, at CP 172-190.

Danielsen notes that the record does not include a report of proceedings from the trial. Br. of Resp. at 13. This is because George is asking the Court to address the trial court's errors at summary judgment, not at trial.¹ Had the trial court decided correctly at summary judgment, the issues presented at trial would have been very different. A new trial may be necessary as a result of the trial court's errors at summary judgment.

Danielsen states that he "confirmed the other three of his four boundaries before instructing the logger to cut [George's trees]." Br. of Resp. at 13. However, Danielsen appears to be referring to evidence that was elicited at trial. *See* CP 337-38. This testimony was not presented to the court

¹ George also assigned error to the trial court's decision on his post-trial motion addressing the same issues. Br. of App. at 2. The purpose of the motion and this assignment of error was to preserve the issues for review. This Court should review the summary judgment decision *de novo* and remand for further proceedings.

at summary judgment. *See* CP 223-28 (note that pages 4 and 5 of the declaration are reversed in the clerk's papers (CP 226-27)).

Rather, Danielsens's testimony at summary judgment was that he did not know how to locate property boundaries from a survey map (CP 62 at 46:16-24); that he did not confirm that his assumed boundary ran in an east-west line (CP 63 at 52:6-53:9); that he relied exclusively on his measurement south from the northeast corner marker (CP 226, lines 24-27); and that he was not even sure he had found the correct property line (CP 55 at 18:1-4). For purposes of this appeal, this Court should consider only the evidence called to the attention of the trial court prior to the summary judgment decision. *See* RAP 9.12.

3. Argument

3.1 The only reasonable conclusion from the evidence was that Danielsens did not have probable cause to believe the trees were on his land.

The issue of mitigation under RCW 64.12.040 should never have gone to the jury. The evidence presented at summary judgment left only one reasonable conclusion: Danielsens's cutting of George's trees was not casual or involuntary and Danielsens did not have probable cause to believe the trees were on his own property. Danielsens utterly failed to make reasonable efforts to locate the boundary with certainty. This Court should reverse the trial court's summary judgment order on this issue and remand with instructions to triple the damages found by the jury.

As with any question of fact, the mitigation defense can be disposed of on summary judgment where reasonable minds can reach only one conclusion. *E.g., Hill v. Cox*, 110 Wn. App. 394, 406, 41 P.3d 495 (2002) (affirming summary judgment of treble damages in a timber trespass case), *rev. denied*, 147 Wn.2d 1024, 60 P.3d 92 (2002). Danielsen, as the nonmoving party on this issue and the party bearing the burden of proof, failed to present evidence sufficient to establish the mitigation defense. The material facts were undisputed. The only reasonable conclusion was that the trespass was not casual or involuntary and that Danielsen did not have probable cause to believe the trees were on his land.

George's Brief of Appellant reviewed the case law on the mitigation defense. Br. of App. at 8-10. The common thread running through the cases is that, in order to establish mitigation, a defendant must be able to show that he had knowledge of reliable facts creating probable cause to believe the land was his own. If a defendant failed to take reasonable steps to determine the property boundary with certainty—such as conducting a formal survey or consulting with the neighboring owner (*i.e.*, George)—the cutting is willful or reckless and subject to treble damages. An erroneous amateur survey of the kind conducted by Danielsen is not enough to establish mitigation.

Danielsen's response attempts to raise a material issue of fact in three respects: 1) he claims to have relied on a survey (Br. of Resp. at 17); 2) he claims to have believed his method of measuring from the Brush survey stake was reasonable and correct (Br. of Resp. at 6); and 3) he questions the accuracy of George's survey (Br. of Resp. at 7, 18, 24).

3.1.1 Danielsen did not rely on a survey to locate the property boundary.

Danielsen did not rely on a survey to locate his boundary with George. Danielsen did not have a survey that located that line. CP 54 (at 17:2-9). Danielsen did not locate surveyed corners of that line. CP 52-53 (at 9:23-10:1). Danielsen relied on a plat map that clearly warned against relying on its contents. CP 49, 57 (at 28:15-29:1). Although Danielsen and Brush used a surveyed corner as a starting point for their measurement, they did not use a surveyor's tools or methods to ensure accuracy. As a result, the point they measured proved to be some 40 feet beyond the actual boundary line. *See* CP 102 (trespass area extended approximately 40 feet south of the property line).

3.1.2 Danielsen's method of locating the boundary was objectively reckless and could not give him probable cause to believe the trees were on his land.

Danielsen's methods were not objectively reasonable. Danielsen admitted that he was not competent to locate boundaries on the ground from a survey map. CP 62 (at 46:16-24). Danielsen could not understand the legal description of his property. CP 57 (at 27:20-25). Danielsen did not use a compass to check the direction of the line he and Brush were running. CP 54 (at 15:3-7), 63 (at 52:6-53:9). Danielsen did not even see the distance on the tape because Brush was the one who carried the tape downhill. CP 59 (at 36:19-37:24). Danielsen's resulting 40-foot error in measurement is itself evidence that Danielsen's methods were reckless and did not give him probable cause to believe that the trees were his own.

Danielsen's subjective belief that his methods were reasonable and correct does not give him probable cause. As a matter of law, "A mere subjective belief in the right to cut trees is not sufficient for mitigation pursuant to RCW 64.12.040." *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 96, 173 P.3d 959 (2007). It is not a mitigating factor for the trespasser to be acting in good faith. *Sherrell v. Selfors*, 73 Wn. App. 596, 604, 871 P.2d 168 (1994).

There is no material issue of fact with respect to Danielsen's methods of locating the boundary. The only reasonable conclusion from the facts is that Danielsen's methods were reckless and did not give him probable cause to believe the trees were his own.

3.1.3 The accuracy of George's survey is immaterial to whether Danielsen had probable cause.

Danielsen's suggestion that George's survey is inaccurate also does not create a material issue of fact because it is not supported by any evidence. It is based entirely upon "local rumors of surveys in the area disagreeing with one another" and supposed discrepancies that Danielsen admits he does not understand. CP 226. Even if it were supported, it is immaterial because Danielsen admitted at summary judgment that "there is no survey to challenge the accuracy of the Brewer survey" (CP 211 at line 7) and that he was liable for cutting George's trees (CP 220 at lines 13-16; CP 228 at lines 1-2). Any inaccuracy in George's survey is immaterial to the issue of whether Danielsen had probable cause to believe the trees were his own.

Danielsen failed to raise an issue of material fact on the mitigation defense, on which Danielsen bore the burden of proof. The only reasonable conclusion from the evidence is that Danielsen did not have probable cause to believe the trees were his own. The trial court erred in failing to grant summary judgment in favor of George on this issue. This Court should reverse and order that damages be trebled under RCW 64.12.030.

3.2 Gunn v. Riely should be overruled or limited because the plain terms of RCW 4.24.630 apply to every person who removes timber from land of another.

George asks this Court to overrule or limit *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015). *Gunn* was decided under the “waste or injury to the land” prong of the statute, not the “removes timber” prong. As a result, the *Gunn* court did not consider the direct conflict between the waste statute’s exception and the general provision, “removes timber.” This conflict can be harmonized in a manner that gives meaning to all provisions and leaves the timber trespass statute and its case law intact. This Court should reverse the trial court’s summary judgment decision and remand for a determination of damages on George’s RCW 4.24.630 claim.

This issue was the subject of cross-motions for summary judgment. In considering dismissal of George’s claim, George is the nonmoving party and is entitled to have all facts and inferences viewed in his favor. On the flip side, Danielsen is the nonmoving party on George’s motion for partial summary judgment of liability on the RCW 4.24.630 claim. However, the

issue raised is a question of statutory interpretation, with a simple set of undisputed facts. This Court can resolve the issue as a matter of law.

George's Brief of Appellant reviewed the facts and reasoning set forth in the *Gunn* opinion and argued that the *Gunn* court did not address the conflict between the exclusion in RCW 4.24.630(2) and the general provision applicable to "every person who goes onto the land of another and who removes timber." Br. of App. at 15-18. George then proposed a way to harmonize the statute in a manner that would give meaning to every provision, preserve existing timber trespass law, prevent double recovery, and provide the additional remedies the legislature intended. Br. of App. at 19-21.

3.2.1 The *Gunn* court only addressed the "waste or injury to land" prong, not the "removes timber" prong.

Danielsen contends that the *Gunn* court did address the conflict in the waste statute, but he provides no argument to support this assertion. Br. of Resp. at 24. Perhaps Danielsen means that the court resolved the application of the exception to the second prong of the statute, "wrongfully causes waste or injury to the land." *See* Br. of Resp. at 22-23. However, there is nothing in the *Gunn* opinion that addresses the first, "removes timber" prong of the waste statute, which is the provision at issue in this case. Rather, the opinion focuses entirely on the "waste or injury to the land" prong. *See, e.g., Gunn*, 185 Wn. App. at 527 ("Beyond the value of the trees, there was no evidence or damages awarded related to **waste or damage to the land.**" (emphasis added)).

The waste statute has three, alternative prongs from which liability can arise. The language of the statute is disjunctive:

Every person who goes onto the land of another and who [(a)] **removes timber**, crops, minerals, or other similar valuable property from the land, **or** [(b)] wrongfully causes waste or injury to the land, **or** [(c)] wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party...

RCW 4.24.630 (divisions and emphasis added).

Review of the parties' briefs in *Gunn* confirms that *Gunn* was decided as a "waste or injury to the land" case, not a "removes timber" case. The trees were cut, but not removed from the land. *Gunn v. Rieley*, No. 45177-8-II, Reply Br. of App. at 4.² The trees also were not "timber" because they were not merchantable, being only young saplings. *Gunn*, Br. of Resp. at 14. The trial judge concluded that the only available avenue was the "waste or injury to the land" prong. *Gunn*, Reply Br. at 4. Given this posture, the appellate court had no reason to address the "removes timber" prong or resolve the conflict between that prong and the exception.

These facts provide a reasoned distinction upon which this Court should, appropriately, limit the application of *Gunn* to the "waste or injury to the land" prong, while separately addressing, in this case, the conflict between the statute's exception and the "removes timber" prong.

² This is also reflected in the opinion, which notes that the damages awarded were "for the value and cleanup of the cut trees." *Gunn*, 185 Wn. App. at 527. Cleanup would not be necessary if the trees had been removed.

3.2.2 Under the “removes timber” prong, evidence of other waste or injury to the land is irrelevant.

Danielsen’s response notes that George’s expert testified that the logging occurred with minimal disturbance to the land itself, hoping to bring this case under *Gumm*. Br. of Resp. at 18. However, as noted above, this is not a “waste or injury to the land” case. This is a “removes timber” case. Nothing in the “removes timber” prong of RCW 4.24.630 requires proof of any other waste or injury to the land.

To require the removal of timber to be accompanied by some other waste or injury to the land would ignore the disjunctive structure of the statute and render “removes timber” superfluous—removal of trees accompanied by damage to land is already compensable under the “waste or injury to the land” prong and *Gumm*. If the separate term “removes timber” is to have any meaning, it must be remediable by itself, without any other damage to land.

3.2.3 George’s proposed harmonization of RCW 4.24.630 preserves timber trespass law.

Danielsen argues that George’s proposed harmonization of the statutes would “effectively supercede the ‘timber trespass’ statute and render it useless.” Br. of Resp. at 19. As George noted in his opening brief, that is not the case. Br. of App. at 20. Under George’s proposed harmonization, timber trespass would still be the sole statutory remedy for injuries inflicted without crossing the property line; cutting of trees without removing the logs; girdling or otherwise injuring standing trees; and injuries to shrubs or

vegetation other than marketable timber; just to name a few examples (all assuming there is not also evidence of waste or injury to the land).

The waste statute and the timber trespass statute address different injuries, with only two points of overlap: 1) removal of timber from land of another, and 2) wrongful waste or injury to the land with accompanying injury to trees, timber, or shrubs. *Gunn* addressed the second overlap. This case gives the Court the opportunity to address the first.

3.2.4 George’s proposed harmonization of RCW 4.24.630 avoids absurd results by giving meaning to all of the provisions rather than rendering the first provision meaningless

Danielsen complains that interpreting the waste statute’s exception to allow some of the statute’s remedies to apply in a “removes timber” case would lead to an absurd result. Br. of Resp. at 19. But George’s proposed harmonization avoids the even more absurd result of eviscerating the legislature’s clearly stated intent that the remedies of RCW 4.24.630 should apply to “every person who goes onto the land of another and who removes timber.”

A statutory exception cannot be allowed to render the statute’s general provisions meaningless. *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013). Any doubt should be resolved in favor of the general provisions. *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974). “[A]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than

rendering any superfluous.” *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010).

George’s harmonization would make the waste statute a supplement to timber trespass in “removes timber” cases. The core remedy—triple damages for the value of the timber—would be determined under timber trespass law. The waste statute would then add the additional remedies of damages for restoration of the land, investigation costs, and reasonable attorney’s fees and costs. The exception in RCW 4.24.630 would have effect in that it would preserve—not supersede or duplicate—damages provided under RCW 64.12.030, but it would also allow the general provision “removes timber” to have effect, granting the additional remedies the legislature intended.

This Court should interpret and apply the statutes as set forth above and in George’s Brief of Appellant. Because the statutes can be harmonized in a manner that gives effect to all of the statutory language of RCW 4.24.630 and RCW 64.12.030, without rendering any portion meaningless, there are no grounds for dismissal of George’s claim under the waste statute. It is undisputed that Danielsen went onto George’s land and removed timber. Under the harmonized statute, Danielsen is liable under RCW 4.24.630. This Court should reverse the trial court’s summary judgment order and remand for a determination of damages under the waste statute.

4. Conclusion

The trial court erred in dismissing George's claims under the waste statute and in denying George's motion for summary judgment on the issues of waste and the mitigation defense. There is only one reasonable conclusion from the evidence: Danielsen did not have probable cause to believe the trees were on his own land. The issue should have been decided on summary judgment rather than going to the jury. This Court should reverse and remand for tripling of damages. This Court should also overrule or limit *Gunn*, harmonize the provisions of the waste statute as proposed by George, and remand this case for a determination of damages under the waste statute.

Respectfully submitted this 6st day of June, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 6, 2016, I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 6th day of June, 2016.

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