

No. 92324-8

Washington State Court of Appeals

Division One



Docket No. 71726-0-I

LESLIE PENDERGRAST,

Plaintiff-Appellant,

v.

**ROBERT MATICHUK and JANE DOE MATICHUK,
husband and wife, et al.,**

Defendants-Respondents.

RESPONDENTS/CROSS-APPELLANTS' OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling as a matter of law that plaintiff Pendergrast obtained ownership of a disputed area of land located within the deeded parcel of defendants Matichuk, when there was no evidence in the record that the fence on the property was established as the boundary by the common grantor of the two adjoining lots.

2. The trial court erred in refusing to grant a new trial on plaintiff's non-economic damages claims, when the amounts awarded for non-economic damages were disproportionate to the economic damages upon which they were based.

Issues Pertaining to Assignments of Error

1. Did the trial court err in applying the boundary by common grantor doctrine in this case, when there is no evidence of any agreement between the grantor and the original grantees that the property line should be moved to align with a fence on the property?

2. Did the trial court err in applying the boundary by common grantor doctrine when the deed for the property containing the disputed area provided specific measurements for the area being conveyed, provided no reference to the fence at issue, and when the use of the fence as a boundary would have reduced the specific dimensions conveyed by the deed?

3. Should the proponent of a boundary established by common grantor be held to a clear and convincing evidence burden of proof?

4. Should the court of appeals reverse the decision of the trial court awarding Pendergrast the disputed area of land, are defendants the prevailing parties to this action for purposes of the lis pendens statute?

5. Was the jury's verdict on non-economic damages based on passion and prejudice when the

verdict awarding non-economic damages for trespass was fourteen times larger than the underlying award for economic damages?

6. Was the jury's verdict on non-economic damages based on passion and prejudice when the verdict awarding non-economic damages for timber trespass was twelve times larger than the underlying award for economic damages?

7. Did the trial court correctly decline to treble plaintiff's non-economic damages under the timber trespass statute?

A. Statement of the Case.

1. Facts.

Plaintiff Pendergrast filed this action on February 26, 2010, against defendant Robert Matichuk and his wife, claiming title to a strip of land fully within the tract of land that Matichuk purchased in 2006. [CP 9; Appendix] Two months later, plaintiff recorded on defendants' property a lis pendens, providing record notice of plaintiff's claim to the small strip of land. [CP 22]

Prior to acquisition by the parties to this suit, the Pendergrast and Matichuk parcels were each owned as separate parcels by Tali and Cyrus Conine. A home was located on the Pendergrast parcel; the Matichuk parcel was vacant.

The Matichuks acquired their parcel from the Conines on April 25, 2006. [CP 323-26] The legal description in the deed specifically provided that Conine conveyed to Matichuk the "south 75 feet of Lot 30, Block 5 of Perley's Replat" in the City of Blaine. [CP 331] Matichuks intended to develop a condominium project on the vacant lot. Prior to purchase, Bob Matichuk noted the dimensions of the lot as contained in its legal description, and paced those dimensions on the lot to confirm the lot's dimensions. [CP 53] Finding the parcel, as described in the legal description,

suitable for their needs, the Matichuks went forward with the purchase. The conveyance documents in no way mentioned the wooden fence separating the Matichuk property from what would become the Pendergrast property. [CP 323-326]

On September 18, 2006, Pendergrast acquired her adjoining parcel from the Conines. [CP 319-322] The deed through which Pendergrast took title provided a legal description which made no reference to the fence along the boundary with Matichuk. [CP 319] Pendergrast had no discussion with Conine, the seller, during her purchase transaction. [CP 329-330]

At the time each party purchased its respective parcel, a fence existed between the two parcels, located entirely within the Matichuk property. [See Appendix] Near the fence, and within the disputed area, was a large tree with an old treehouse. Pendergrast used the fenced area as a yard space from her purchase in 2006 until 2009. [RP 41, ln. 21]

After acquiring their property, the Matichuks began their efforts to develop their condominium project. On September 11, 2008, the City of Blaine approved Matichuks' plans for a four-plex on the property. [Trial Exhibit 5] The Matichuks subsequently revised their site plan to create two duplex buildings. That revised site plan was approved by the City of Blaine on August 24, 2009. [Trial Exhibit 4]

On January 29, 2009, Bob Matichuk wrote to Pendergrast, informing her of his intention to remove the fence and install a new fence on the boundary line based upon the legal description. [Trial Exhibit 10] Several weeks later, on April 24, 2009, Pendergrast, through an attorney, wrote to seller Conine, informing the seller of the Matichuks' plans, and claiming misrepresentation in her sales transaction. [CP 329-330] The letter in no way referred to any "boundary" established at the fence line by Conine as common grantor.

On April 21, 2009, also wrote to Matichuk, asking him not to move the fence. [Trial Exhibit 9] Pendergrast took no other action to protect the rights she claimed to have. She did not seek any sort of injunction to stop relocation of the fence.

Thereafter, prior to the commencement of construction, Matichuk removed the old fence and replaced it with a new one along the property line as established by the legal description for the Matichuk lot. Matichuk also removed the old tree that was within his property based on the legal description. [See Trial Exhibit 20, p. 1]

On November 10, 2009, the City of Blaine issued a building permit for the southerly duplex building. [Trial Exhibit 2] Construction of the building foundation began a few days thereafter. Months later, on February 26, 2010, Pendergrast, through new counsel, filed this action. [CP 9] At no time in this litigation did Pendergrast seek any kind of injunction to stop construction of the condominium project. Final inspection of the southerly building occurred on March 30, 2011.

2. Procedural History.

Plaintiff Pendergrast filed this action on February 26, 2010. [CP 9] Two months later, plaintiff recorded against defendants' property a lis pendens, providing record notice of plaintiff's claim to the small strip of land. [CP 22]

On December 21, 2012, the Whatcom County Superior Court, Judge Steven J. Mura, considered cross-motions for summary judgment. The court dismissed plaintiff's claim to the disputed property under her boundary by agreement theory, and granted plaintiff summary judgment on her claim of boundary by common grantor. Written orders were entered by the court on January 4, 2013. [CP 81 (dismissing boundary by agreement claim; CP 84 (granting plaintiff summary judgment on boundary by common grantor)]

On July 5, 2013, plaintiff amended her complaint to add claims for trespass, timber trespass, unlawful detainer and ejectment. [CP 108] Plaintiff also added as a party Blaine Properties, LLC, an entity owned by the Matichuks to which the Matichuk property had been transferred. [Trial Exhibit 12]

Beginning on January 29, 2014, the court presided over a jury trial related to plaintiff's claims of trespass, timber trespass, unlawful detainer and ejectment against the Matichuks, Blaine Properties, and others. The jury was asked to decide these issues from the premise that the court had already ruled in favor of Pendergrast on summary judgment on the boundary by common grantor doctrine, and therefore for purposes of plaintiff's claims, the jury was to treat the disputed property at issue as belonging to Pendergrast. At the conclusion of the trial, the jury awarded Pendergrast damages against Matichuks and Blaine Properties LLC on her trespass claims, including \$5200 for economic loss, and \$75,000 (or more than fourteen times the economic verdict) for non-economic damages. As to timber trespass, for the removal of the single, old tree, the jury awarded plaintiff \$3310 against defendants Matichuk for her economic damages, and \$40,000 (or more than twelve times the economic verdict) for non-economic damages. [CP 203]

Findings of Fact, Conclusions of Law and Judgment were entered in favor of Pendergrast and against Matichuk and Blaine Properties, on February 27, 2014. [CP 221, 238] On March 10, 2014, Matichuk filed a motion for a new trial on the non-economic damages claims. [CP 370] On March 28, 2014, the court denied the motion. [CP 266]

On March 28, 2014, Pendergrast appealed the court's refusal to treble the non-economic damages claims under the timber trespass statute. [CP 268] Matichuk timely cross-appealed on March 31, 2014. [CP 376]

C. Argument

This case pertains to the ownership of a disputed strip of land between two adjoining parcels in Blaine, Whatcom County, Washington. The trial court ruled that plaintiff Pendergrast owned the property by operation of law under the “boundary by common grantor” doctrine. The court then heard a trial on plaintiff’s damages associated with defendants’ prior “trespass” into that property, involving both use of the land and removal of a single tree.

As argued below, the court should reverse the decision of the trial court awarding the disputed property to Pendergrast. Should the court affirm the trial court’s summary judgment order, the court of appeals should still reverse the trial court’s refusal to grant a new trial on the award of plaintiff’s non-economic damages. The damages awarded were grossly disproportional to the economic harm Pendergrast suffered. Moreover, the record was replete with testimony of stressful situations separate from the actions of defendant which explained plaintiff’s alleged emotional state at the time. There was no causal connection between defendants’ trespass, the removal of the fence and tree, and plaintiff’s claimed injuries.

Finally, to the extent the court determines Pendergrast owns the disputed property, the court should decline plaintiff’s invitation to treble plaintiff’s emotional distress damages. No cases require trebling of those damages. To do so would greatly expand the reach of the timber trespass statute. Courts are required to interpret the timber trespass statute narrowly. This court should affirm the trial court’s more narrow interpretation of the timber trespass statute.

1. The Trial Court Erred in Concluding that Plaintiff Had a Legal Right to the Disputed Property Under the Doctrine of Boundary By Common Grantor.

A. Standards on Summary Judgment.

The Whatcom County Superior Court entered summary judgment in this case on plaintiff's theory of boundary by common grantor. [CP 84 (order); CP 225 (Finding of Fact 5 incorporating prior order); CP 231 (Conclusion of Law 3 incorporating prior order)] This court reviews an order of summary judgment *de novo*, engaging in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Those standards for entry of summary judgment are well settled. Summary judgment is appropriate only "when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); CR 56(c). "A material fact is one upon which the outcome of the litigation depends in whole or in part." Atherton Condominium Apartment Owners Ass'n v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The court must review the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. Sedwick v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 258 (1994) quoting Marincovich, 114 Wn.2d at 274. Said differently, the court must examine the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. Weatherbee v. Gustafson, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992). A court weighing a summary judgment motion must place the emphasis on facts, and regard a fact as "an event, an occurrence, or something that exists in reality." Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

These standards on summary judgment are critical to disposition of this case. As shown herein, there were no facts in the record from which the trial court could conclude, as a matter of law, that plaintiff Pendergrast was entitled to the disputed strip of land wholly within defendants Matichuk's deeded property. The trial court based its decision by inferring facts that simply were not there. The trial court was required to resolve any such inferences of fact in favor of the Matichuks, and not Pendergrast. The trial court's order should be vacated, and either the case remanded for a new trial, or for entry of an order of dismissal on all of Pendergrast's claims.

B. The Boundary By Common Grantor Doctrine Should Not Apply.

It is undisputed that the disputed area at issue in this case was within the property owned by Matichuks, as provided by the legal description contained in their deed, and as confirmed by survey. Generally, a bona fide purchaser of real property is entitled to rely on record title. Levien v. Fiala, 79 Wn. App. 294, 299-300, 902 P.2d 170 (1995). If the law were otherwise, it would impose an almost impossible burden upon a party in that each and every conveyance would have to be investigated beyond the auditor's records for possible error to avoid a claim of inquiry notice. This would destroy the strength of our recording system and any justifiable reliance on it. *Id.*

Despite the fact that defendants are record owners of the "disputed property," plaintiff claimed ownership of it based on two legal theories: (1) property line location established by "common grantor;" and (2) boundary by "parol agreement." Though distinct, the two theories are similar, such that the only way that plaintiff could prevail in this case would be to prove that the boundary between the Pendergrast and Matichuk properties was established through some sort of an agreement with the original grantor, or by some affirmative act of that original grantor. In the trial court, plaintiff's claim based on a "boundary by parol agreement" was dismissed as a matter of law,

because the court found no evidence of an agreement between the grantor of the parcels and either of the subsequent purchasers. [CP 81-83] Indeed, there is no evidence in the record that either party had even met the seller of the properties prior to their respective purchases.

Despite the fact that there is no evidence of any interaction between the seller and either of the two buyers during sale, and despite the fact that none of the sale paperwork for either transaction in any way references the fence at issue, the trial court granted Pendergrast ownership of the disputed property on summary judgment, applying the “boundary by common grantor” doctrine as a matter of law. This was error. Just as there was no evidence to support a boundary by agreement, so was there no evidence to support establishment of the boundary by the common grantor.

The common grantor doctrine has been explained as follows:

A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with reference to that boundary. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, the conveyance in reference to it. However, for a boundary line established by common grantor to become binding and conclusive on grantees it must plainly appear that the land was sold and purchased with reference to such line, and that there was a meeting of minds as to the identical tract of land to be transferred by the sale. (Emphasis supplied)

Levien v. Fiala, 79 Wn. App. 294, 301 n.3, 902 P.2d 170 (1995); Thompson v. Bain, 28 Wn.2d 590, 591-92, 183 P.2d 785 (1947); Strom v. Arcorace, 27 Wn.2d 478, 481, 178 P.2d 959 (1947).

Under this principle, a grantor who owns land on both sides of a line he or she has established as the common boundary is bound by that line. Fralick v. Clark County, 22 Wn. App. 156, 589 P.2d 273 (1978). The line is also binding on grantees if the land was sold and purchased

with reference to the line, and there was a meeting of the minds as to the identical tract of land to be transferred by the sale. Kronawetter v. Tomoshan, Inc., 14 Wn. App. 820, 545 P.2d 1230 (1976).

It is unclear to what standard of proof a proponent of a boundary by common grantor should be held. Related boundary dispute doctrines hold that a proponent of a boundary is held to a clear and convincing standard of proof. *See, e.g.,* Thomas v Harlan, 27 Wn.2d 512, 518, 178 P.2d 965 (1947) (fixing a boundary by estoppel requires clear and convincing evidence because title to real property is a most valuable right); Heriot v. Smith, 35 Wn. App. 496, 504, 668 P.2d 589 (1983) (boundary by mutual acquiescence must be shown by clear and convincing evidence); Keierleber v. Botting, 77 Wn.2d 711, 715, 466 P.2d 141 (1970) (evidence to reform deed based on mutual mistake must be clear and convincing). The purpose of the boundary by common grantor doctrine is similar to these other doctrines. In all instances, the plaintiff is seeking to create a property interest outside of the normal deed procedure, and must overcome the dictates of the statute of frauds in doing so. A proponent of such a boundary should be held to a clear and convincing standard of proof.

No matter what standard of proof applies in this case, plaintiff cannot meet it. There are no facts in this record which would establish that the fence line is the boundary between the parties' parcels under this standard. First, there is absolutely no evidence that the common grantor ever established a boundary line different from the deeded boundary. There is absolutely no reference to the fence line in the deed conveying Pendergrast's parcel to her [CP 319-322], and there is absolutely no reference to the fence line in the deed conveying the Matichuks' property to them [CP 323-326]. Moreover, the Matichuk deed provided a specific physical dimension of the property being conveyed. Similarly, there is no evidence that there was ever an agreement between Conine, and either Matichuk or Pendergrast, to move the boundary in any way. In fact, neither Matichuk nor

Pendergrast had ever met the Conines before the purchases of their respective parcels. [See CP 329-330 (Pendergrast response to discovery)].

Thus, there is nothing in the paperwork for either sales transaction which makes any reference to the alleged fence line as the boundary between the two parcels. There is no evidence of any formal or specific agreement about the boundary. Therefore, there was no “reference to the boundary” *at the time of sale* which would make the boundary by common grantor doctrine applicable. See Fiala, 79 Wn. App. at 301; Strom, 27 Wn. App. at 481.

Nor is there any evidence that when Matichuk and Pendergrast subsequently owned the parcels, they acted in a way to suggest that they agreed that the fence was the boundary. To the contrary, Matichuk informed Pendergrast of his intention to remove the fence and move it to the deeded property line. In response, Pendergrast wrote to Conine, and demanded financial compensation. [CP 339-40] *The letter did not claim the existence of an agreement to move the boundary; instead Pendergrast claimed to have been deceived by the seller.* Under these circumstances, there is absolutely nothing in the record to support plaintiff’s claim under the common grantor doctrine.

The trial court relied upon Winans v. Ross, 35 Wn. App. 238, 240, 666 P.2d 908 (1983), in applying the common grantor doctrine in this case. Winans determined that a boundary agreement entered into by property owners is binding on subsequent purchasers, even if that agreement was not a formal contract. The Winans court ruled that “a meeting of the minds between the common grantor and original grantee may be shown by the parties’ manifestations of ownership after the sale.” Winans, 35 Wn. App. at 241. In trial of the Winans case, the trial court found as fact that the properties were purchased with reference to the fence line. *Id.* at 240. Moreover, the court found

“substantial evidence” that an agreement existed between the grantor and the original grantee, based on the rebuilding of a fence in the exact location, and a tenant asking permission to use a pond on the other side of the fence line for irrigation. The court then enforced the boundary agreement on Ross, a subsequent purchaser.

The trial court here purported to apply *Ross*, ruling that, because the Matichuks took no action to remove the fence during the brief period of time (between April 25 and September 18, 2006, a period of less than five months) in which they owned their vacant, undeveloped parcel and Conine still owned the adjoining Pendergrast parcel, there was a “meeting of the minds” between Matichuk and Conine *as a matter of law* that the fence line formed the boundary between them.

The court erred in that conclusion in several respects. First, *at best* Matichuks’ failure to immediately remove the fence at purchase, with nothing more, creates only an *inference* of an agreement between Matichuk and Conine, and is not actual proof of one. The Matichuks are entitled to have all inferences of fact resolved in their favor. Weatherbee, 64 Wn. App. at 131. It was error for the trial court to grant summary judgment on an inference alone. There are no facts supporting the trial court’s ruling. At best, there are material issues of fact about the existence of an agreement that would need to be resolved in a trial.

Second, the “inference” the trial court relied upon is contrary to the factual evidence presented in the record. Nothing in the property deed conveying the property to the Matichuks mentions the fence line. The Matichuks never discussed the purchase transaction with their sellers, the Conines. There is nothing in the record to suggest that the Matichuks were informed that there was an agreement establishing a boundary at the fence line. Indeed, Matichuk testified that the purchase was made based on the property dimensions described in the deed, and he paced off those

dimensions before purchase. [CP 53] Moreover, during that five month period, the Matichuk parcel was vacant and undeveloped; there was no use of the property during that time which would suggest that the fence line was being respected. Thus, there were no facts upon which the court could find a “meeting of the minds” between Matichuk and Conine, The record is certainly insufficient to make that ruling as a matter of law.

Third, the inference is inconsistent with Pendergrast’s own statements after the fact. When Matichuk informed Pendergrast of his intention of remove the fence, Pendergrast wrote to the seller Conine, not to demand that any boundary line agreement be enforced, but instead to demand financial compensation for an alleged misrepresentation. [CP 339-40] Pendergrast was certainly not acting under a belief of an agreement concerning the fence when she wrote that letter. Even her letter to Matichuk claiming rights to the disputed property merely establishes a dispute between the parties. It in no way establishes the conclusive proof of an agreement necessary to win on summary judgment. Under these circumstances, there is absolutely nothing in the record to support an “inference” of an agreement between the common grantor and Matichuk sufficient to apply the common grantor doctrine as a matter of law.

Reduced to its essence, the trial court’s ruling concluded that the mere existence of the fence, coupled with use of the fence line as the boundary for a short period (when one of the lots was undeveloped and vacant), is enough to create a boundary by the common grantor. By definition, the boundary by common grantor doctrine requires more: evidence of an actual “meeting of the minds” to move the line from the deed location to another location. That agreement does not exist in this case. This court should reverse the order on summary judgment and either dismiss plaintiff’s claims outright or remand for a trial.

2. Defendants Are Entitled To Costs and Attorney's Fees on Remand.

This court should conclude that the trial court's ruling on boundary by common grantor be reversed, and that plaintiff's cause of action be dismissed, because plaintiff had no actionable interest in the Matichuks' property. Upon remand, defendants should be entitled to an award of costs and attorney's fees for plaintiff's clouding of Matichuks' title with a lis pendens. RCW 4.28.328(3). For purposes of the statute, a claimant lacks substantial justification for filing a lis pendens if there is no evidence that the claimant had a legal right to the property. Richau v. Rayner, 98 Wn. App. 190, 198, 988 P.2d 1052 (1999).

Pendergrast will likely contend that attorney's fees are not awardable in this case because she had control over the disputed area for three years, and a "belief" that the property belonged to her. Her use of the property based on her own subjective belief that she owned it does not rise to the level of a legal right to the property. Rayner, 98 Wn. App. at 198. As shown herein, at no time did plaintiff have a legal right to the disputed area. Accordingly, defendants are entitled to reasonable attorney's fees for defending against the lis pendens, which plaintiff used to cloud title during the pendency of this action.

3. The Trial Court Should Have Granted Defendants A New Trial On The Excessive Non-Economic Damages Awarded By the Jury.

After summary judgment establishing Pendergrast's ownership of the disputed property, the trial court held a trial related to Pendergrast's claims of trespass on the disputed area, and timber trespass for removal of the tree. At the conclusion of that trial, the jury awarded Pendergrast damages against Matichuks and Blaine Properties LLC on her trespass claims, including \$5200 for economic loss, and \$75,000 (or more than fourteen times the economic verdict) for non-economic damages. As to timber trespass, for the removal of the single, old tree, the jury awarded plaintiff

\$3310 against defendants Matichuk for her economic damages, and \$40,000 (or more than twelve times the economic verdict) for non-economic damages. [CP 203]

After the trial, defendants moved for a new trial pursuant to RCW 4.76.030; CR 59(a)(5) and CR 59(a)(9). Defendants argued that the non-economic damages awarded by the jury were so excessive as to indicate unmistakably that the verdict was the result of passion and prejudice, and that substantial justice had not been done. The court denied the motion.

The trial court erred in its refusal to either grant a new trial, or to reduce the non-economic damages awarded by the jury. This court reviews the denial of a motion for new trial under an abuse of discretion standard. Sommer v. DSHS, 104 Wn. App. 160, 170, 15 P.3d 664 (2001). An abuse of discretion is found if the verdict evoked a feeling of prejudice by the jury such that the Matichuks were deprived of a fair trial. *Id.*

A. Standards For Reduction of Damages.

In seeking a new trial or a reduction of damages, defendants were mindful of the role of the jury in deciding this case. The jury is given the constitutional role to determine questions of fact, and the amount of damages to be awarded is a question of fact. Bunch v. King County Dep't of Youth Services, 155 Wn.2d 165, 179-80, 103 P.3d 1247 (2005); James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). The court presumes that the jury's verdict is appropriate, and should not disturb the award unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice. Bingaman v. Grays Harbor Comm. Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985). The requirement of "substantial evidence" requires that the evidence convinces an "unprejudiced, thinking mind." Indus. Indem. Co. of NW, Inc. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520

(1990). The "shocks the conscience" test asks if the award is "flagrantly outrageous and extravagant." Bingaman, 103 Wn.2d at 836-37. Passion and prejudice must be "unmistakable" before they affect the jury's award. RCW 4.76.030; Bingaman, 103 Wn.2d at 836. In other words:

The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.

Bunch, 155 Wn.2d at 179; Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 395, 261 P.2d 692 (1953).

It is true that the proof of anguish and distress can be provided by the plaintiff's own testimony alone. *See* Nord v. Shoreline Savings Ass'n, 116 Wn.2d 477, 487, 805 P.2d 800 (1991) (plaintiffs testified about their anger and shock at the defendant's actions, which supported a claim for emotional distress when testimony was supported by other facts of the case). However, courts should "scrupulously analyze" an award of compensatory damages for emotional distress predicated exclusively on the plaintiff's own testimony. Bunch, 155 Wn.2d at 182-83. Nonetheless, the award must be in proportion to the injury suffered. Damages need not be proved with mathematical certainty, but must be supported by competent evidence. Rasor v. Retail Credit Co., 87 Wn.2d 516, 530-31, 554 P.2d 1041 (1976). Emotional damages must not be "flagrantly outrageous and extravagant." *See* Bingaman, 103 Wn.2d at 837.

B. Pendergrast's Proof Of Emotional Harm Was Insufficient to Support The Jury's Award.

Although the standard to set aside the jury's verdict is a difficult one, it was met in this case. Ms. Pendergrast's proof of non-economic damages as presented to the jury was limited. Essentially, Pendergrast argued that the actions of Matichuk in removing the fence and tree made her "sick." [RP 61, ln. 12] She testified that the "whole experience" of the dispute and subsequent litigation made it hard for her to "remain optimistic." [RP 70, ln. 11] Nothing in her testimony suggested that she ever consulted a healthcare professional. No one close to her testified about her claimed anxiety.

The record was also replete with evidence that, at the same time as her interactions with defendants, Ms. Pendergrast was undergoing stress from other a variety of other sources. Pendergrast testified extensively about the pressures she felt in caring and providing for her adult children. [RP 9; 53]. She testified that she had other properties in foreclosure. [RP 88, lns. 6-7]. She testified she "didn't know what pressure was" until she had to deal with an insurance company in regard to a plumbing malfunction in the property. [RP 32, ln. 6]

The bulk of plaintiff's evidence for her "non-economic" damages was focused on the alleged loss of her "dream" of creating a bed and breakfast on her property. [RP 19, ln. 11] She testified that she lost some \$100,000 relating to the alleged bed and breakfast project. [RP 28, ln. 1; RP 30, ln. 4]

Pendergrast attributed the "loss" of this "dream" to defendants, even though she admitted to many other factors which frustrated that dream. For example, she testified to a plumbing problem (which occurred before Matichuk's removal of the fence and tree) that set the project back considerably. [See, e.g., RP 27, ln. 9; RP 31, ln. 24] Even though she claims to have started on the project as soon as she acquired the property in 2006 (years before the tree and fence were removed),

she admitted that she had never filed a building permit for her desired swimming pool. [RP 76, ln. 14] She never applied for a building permit for the renovation of the garage. [RP 76, ln. 21] Indeed, based on her testimony it is unlikely that Pendergrast could ever have operated such a business. She testified that she had a concussion disorder from a prior automobile accident, she would have for life. [RP 59, ln. 20] That pre-existing concussion condition prevented her from interacting with others when it was prevalent. She testified that “the fact that I had to sell my other house and move in there to have people coming and going as a bed and breakfast, which is a 24-7 job, I couldn’t do it.” [RP 59, ln. 9-13]

Apparently due to the “loss” of this “dream,” the jury awarded Pendergrast over \$100,000 in “non-economic” damages, matching the “over \$100,000” Pendergrast attributed to her bed and breakfast losses. Those damages are many multiples over the damages the jury awarded Pendergrast for her economic loss.

Assuming for the sake of argument that these lost profits can be attributed as a non-economic loss, the amounts awarded were excessive. Our case is similar to Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 856 P.2d 746 (1993). The Hill plaintiff sued for sex discrimination. In support of her claim for non-economic damages, she testified she was constantly under heavy pressure to perform her work, and felt inadequate and frustrated because she felt insufficiently trained. She testified she consulted her doctor, who thought her problem was stress related. He referred her to another doctor, who prescribed medication to settle her nerves and calm her. Based on that testimony alone, the jury awarded Hill \$198 in stipulated medical expenses, \$40,000 in lost income (which was reduced by the trial court) and \$410,000 (ten times the economic damages) in non-economic damages. The trial court reduced the non-economic damages by more than two-

thirds, finding the jury verdict shocking to its conscience because there was insufficient credible evidence of emotional distress, mental anguish, pain and suffering, or humiliation severe enough to justify the award. The court of appeals agreed, finding that the award “clearly indicates passion or prejudice, or an attempt to award punitive damages.” Hill, 71 Wn. App. at 134.

The evidence of passion and prejudice in this case is apparent. First, the jury chose to award damages only against defendants Matichuk and their corporate entity, even though the limited liability company was in the same position as other defendants whom were found not responsible. The jury inquired whether it could add attorney’s fees onto its verdict, indicating further its passion to punish the defendants: the jury wanted to go further than it was instructed it could do. [Sub. 152] Finally, the jury actually awarded more in non-economic damages than the \$100,000 plaintiff sought. Taken together, with the amounts awarded being many multiples above the economic damages suffered, indicates that the jury award was improper. The court should either grant a new trial, or reduce the non-economic damages awarded.

4. The Trial Court Appropriately Declined to Treble Pendergrast’s Non-Economic Damages Under the Timber Trespass Statute.

Pendergrast has appealed the trial court’s ruling declining to award her treble the non-economic damages relating to her timber trespass claim. Pendergrast demanded awarding of an *additional* \$80,000 in damages, bringing the non-economic total to \$120,000.00, for the removal of a \$3100 tree containing an old, dilapidated treehouse. The trial court properly ruled that treble damages for her non-economic injuries did not reasonably relate to the economic harm suffered.

Plaintiff sought treble damages for the removal of her tree pursuant to RCW 64.12.030. This court must construe the penalty provisions of RCW 64.12.030 narrowly. Birchler v. Castello Land Company, Inc., 133 Wn.2d 106, 110, 942 P.2d 968 (1997). While Birchler ruled that non-economic

damages are recoverable in a timber trespass case, the court expressly did not consider whether those damages should be trebled. *Id.* at 110, n.3.

The Birchler court's analysis suggests that non-economic damages should not be trebled, noting that historically cases have confined treble damages to the injury to the vegetation itself. *Id.* at 111; Sherrell v. Selfors, 73 Wn. App. 596, 602, 871 P.2d 168, *rev. denied*, 125 Wn.2d 1002 (1994). The addition of emotional distress damages to the remedies available does not, in and of itself, require that those additional damages be trebled. To do so would interpret the statute expansively rather than narrowly, and extend damages in timber cases beyond what has been awarded for over a hundred years. The court should decline the opportunity to extend the law in the way Pendergrast demands, and affirm the reasoning of the trial court.

D. Conclusion

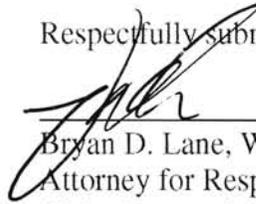
The trial court erred in several respects. First, the trial court erred in granting Pendergrast ownership of the disputed strip of land by operation of law under the "boundary by common grantor" doctrine. The court's ruling cannot be sustained by the record the trial court considered. At the very least, genuine issues of material fact require reversal of the trial court's order and remand for a new trial.

Should the court affirm the trial court's summary judgment order, the court of appeals should still reverse the trial court's refusal to grant a new trial on the award of plaintiff's non-economic damages. The damages awarded were grossly disproportional to the economic harm Pendergrast suffered. Moreover, the record was replete with testimony of stressful situations separate from the actions of defendant which explained plaintiff's alleged emotional state at the time. There was no causal connection between the removal of the fence and tree and plaintiff's claimed injuries.

Finally, the court should decline plaintiff's invitation to treble plaintiff's emotional distress damages. No cases require trebling of those damages. To do so would greatly expand the reach of the timber trespass statute. Courts are required to interpret the timber trespass statute narrowly. This court should affirm the trial court's more narrow interpretation of the timber trespass statute.

Dated this 29th day of August, 2014.

Respectfully submitted,



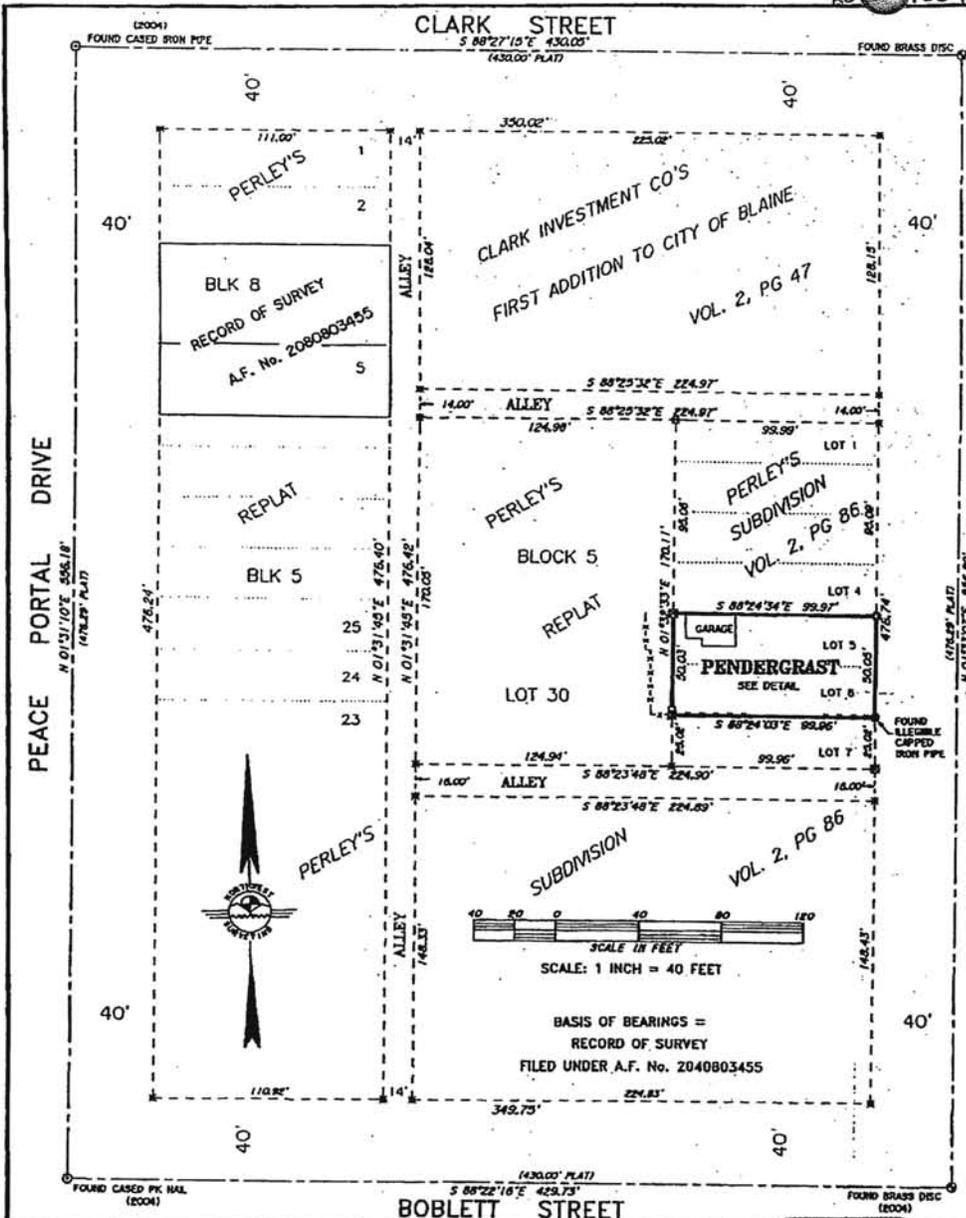
Bryan D. Lane, WSBA No. 18246

Attorney for Respondents/Cross-Appellants Matichuk and
Blaine Properties, LLC

APPENDIX

RECORD SURVEY OF PROPERTIES

(TRIAL EXHIBIT 22)



SURVEY IN SECTION 1, TOWNSHIP 40 NORTH, RANGE 1 WEST OF W.M.

LAND DESCRIPTION:

PARCEL A:
 LOTS 5 AND 6, BLOCK 5, PLAT OF PERLEY'S SUBDIVISION OF BLOCK 5, MILLER'S PARK ADDITION TO THE TOWN OF BLAINE, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 8 OF PLATS, PAGE 86, RECORD OF WHATCOM COUNTY, WASHINGTON.

PARCEL B:
 A NON-EXCLUSIVE, TEMPORARY EASEMENT TO USE THE GARAGE WALL IN ITS PRESENT LOCATION AND TO USE CONCRETED AREA FOR INGRESS AND EGRESS TO THE EXTENT THAT EACH ENCROACHED ONTO LOT 4.

BOTH SITUATE IN WHATCOM COUNTY, WASHINGTON

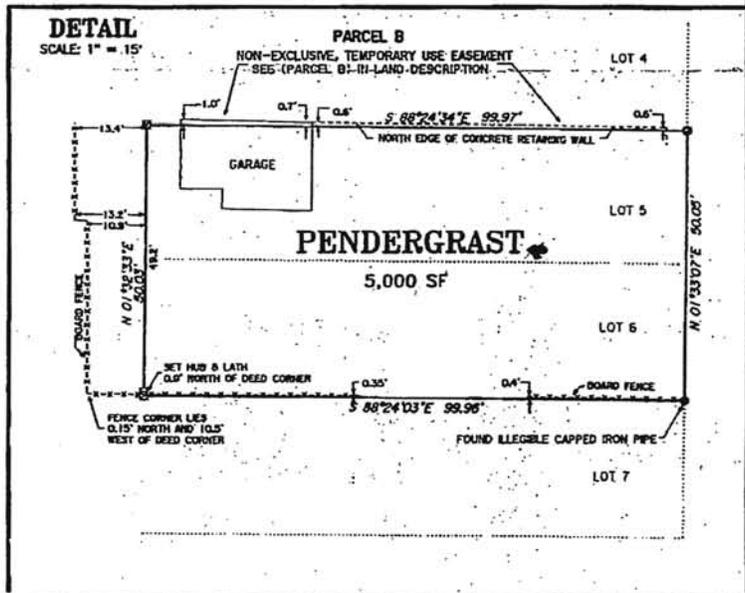
BOTH SUBJECT TO AND TOGETHER WITH ALL EASEMENTS, COVENANTS, RESTRICTIONS AND/OR AGREEMENTS OF RECORD.

SURVEYORS NOTES:

1. "O" DENOTES COTTON SH. SPIKE WITH LS WASHER MARKED "TWS 8 GPS LS 21423" SET BY THIS SURVEY IN FEBRUARY OF 2009.
2. "B" DENOTES 5/8 INCH REBAR WITH 1 INCH PLASTIC CAP MARKED "COMPASS POINT LS 24430" FOUND BY THIS SURVEY IN FEBRUARY OF 2009.
3. "X" DENOTES HUB AND LATH SET FOR POINT ON LINE BY THIS SURVEY IN FEBRUARY OF 2009.
4. "K" DENOTES CALCULATED POINT ONLY.
5. THIS SURVEY WAS PERFORMED BY STANDARD FIELD TRAVERSE USING A NIKON MPL-352 TOTAL STATION WITH A CARLSON EXPLORER 604+ DATA COLLECTOR/FIELD COMPUTER IN FEBRUARY OF 2009.
6. THIS SURVEY TIED INTO THE CONTROL POINTS SET DURING OUR PREVIOUS SURVEYS IN THE AREA AND RELED UPON THAT RECORD OF SURVEY FILED UNDER A.F. NO. 2080803455 FOR BASIS OF BEARINGS AND BLOCK DIMENSIONS.
7. THIS SURVEY WAS COMPLETED WITHOUT THE BENEFIT OF A CURRENT TITLE REPORT AND DOES NOT PURPORT TO SHOW ANY OR ALL EASEMENTS THAT A CURRENT TITLE REPORT MIGHT REVEAL.

OCCUPATIONAL INDICATORS AND EXISTING FENCE LINE NOTE:

THIS SURVEY HAS DEPICTED EXISTING FENCE LINES AND/OR IMPROVEMENTS IN ACCORDANCE WITH W.A.C. CH. 332.130. THESE OCCUPATIONAL INDICATORS MAY INDICATE A POTENTIAL FOR CLAIMS OF UNWRITTEN TITLE OWNERSHIP. THE LEGAL RESOLUTION OF OWNERSHIP BASED UPON UNWRITTEN TITLE CLAIMS HAS NOT BEEN RESOLVED BY THIS SURVEY.



AUDITOR'S CERTIFICATE
 FILED FOR RECORD THIS 8th DAY OF December 2009 AT 3:18 PM. IN BOOK 1 OF SURVEYS AT PAGE 1-A, AT THE REQUEST OF NORTHWEST SURVEYING & GPS.

Shirley J. Jolly
 COUNTY AUDITOR

SURVEYOR'S CERTIFICATE
 THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT. AT THE REQUEST OF LESLIE PENDERGRAST IN FEBRUARY OF 2009.

Leslie Pendergrast
 DATE: 12/08/09 CERTIFICATE No. 21423



PTN: GOV'T LOTS 1 & 2 (E 1/2, NE 1/4) SEC. 1, TOWNSHIP 40 NORTH, RANGE 1 WEST OF W.M., WHATCOM COUNTY, WASHINGTON

NORTHWEST SURVEYING & GPS, INC.
 Dennis M. DeMeyer, L.S. No. 21423
 407 5TH STREET, LYNDEN WASHINGTON, 98264
 PH. (360) 354-1950 FAX (360) 354-7544

RECORD OF SURVEY FOR LESLIE PENDERGRAST

DRAWN BY: JEROMY DATE: 12/08/09 JOB NO.: 09-20
 REVIEWED BY: DENNY DATE: 01/14/09 SHEET: 1 OF 1
 CRO: MILLER, CRO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 2, 2014, I caused a true and correct copy of the foregoing, to be served upon the following person by hand delivery to his office provided below:

Mark Lee
Brownlie Evans Wolf & Lee
230 East Champion Street
Bellingham, Washington 98225



Bryan D. Lane, WSBA No. 18246

