

No. 96214-6

No. 49819-7-II

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

Jerry Porter and Karen Zimmer,

Appellants,

v.

Pepper E. Kirkendoll and Clarice N.
Kirkendoll,

Respondents

Reply Brief of Appellants

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1. Introduction

Kirkendoll's response brief is a hodge-podge of disconnected criticisms without any coherent organization or unifying theory. Kirkendoll reframes the issues, juggles their order, then redefines and re-juggles them again in presenting his argument. As a result, Kirkendoll's brief is confusing and never appears to directly address Porter's arguments. This Reply will attempt to sort through Kirkendoll's tangled web and respond to Kirkendoll's arguments within the context of the arguments Porter originally presented.

2. Reply to Respondent's Statement of the Case

Kirkendoll's Statement of the Case attempts to argue that he never admitted that the existence of an agency relationship was a disputed issue of material fact. Br. of Resp. at 9-10. Kirkendoll claims that Porter took a quote from his counsel out of context. Kirkendoll provides an additional two sentences of context ("the most important part") and, without attempting to explain what counsel actually meant, simply asserts that it was not about agency. However, there is no other explanation for counsel's statement.

Counsel for Kirkendoll stated in oral argument on the summary judgment motions,

[Porter's] Counsel said the only reason they cut where they did was because Pepper told them to, yet counsel argues there's no agency. Well, there are two scenarios under which Pepper could be 100 percent liable, like I had said. Either he told them where to cut, they had an independent duty to verify what they were doing, but the jury finds that they didn't breach that duty, and so based upon apportionment of fault, the apportionment is 100 and zero; or based on respondeat superior, which was they were following his orders. I think that's a jury question. It may be somewhat of a subtle jury question, but it's a jury question.

RP 37:12-23 (emphasis added). The "most important" first additional sentence plainly indicates that counsel was arguing about whether there was an agency relationship. Counsel then responded to that issue by arguing that there were two possible outcomes: either 1) the loggers had an independent duty, or else 2) respondeat superior applied. In other words, either 1) there was no agency relationship or 2) there was one. Counsel then said that this was a jury question—that is, the existence of agency was a disputed issue of material fact.

To make things even more clear, Porter's opening brief also pointed to Kirkendoll's reply brief on the motions for summary judgment. Br. of App. at 16 (quoting CP 203-04). The reply brief couldn't be clearer in telling the trial court that the existence of agency was a disputed issue of material fact that must be resolved by the jury at trial:

In conclusion, after presentation of the evidence, the jury should be instructed and should make a determination as to the elements of agency. If the jury finds that the Co-Defendants acted strictly under the control of Pepper Kirkendoll when they decided which trees to take, then all of the remaining Plaintiffs' claims against Kirkendoll should be dismissed. If the jury does not find the elements of agency, then it should be instructed to apportion fault among Kirkendoll and the released Defendants.

CP 203-04 (emphasis added). By pointing out the two, divergent outcomes possible depending on whether the jury found the elements of agency, Kirkendoll admitted that this disputed issue was material to the outcome, precluding resolution by summary judgment. According to Kirkendoll, dismissal was only proper if the loggers were agents, and it was possible for a jury to find that they were not. The trial court should never have granted summary judgment when even Kirkendoll admitted to this central dispute of material fact.

3. Reply Argument

3.1 The trial court erred in dismissing Porter's direct claims against Kirkendoll under *Glover*.

Porter's opening brief argued that the trial court was wrong to dismiss Porter's original, direct claims against Kirkendoll. Br. of App. at 11. First, release of an agent does not release the principal from liability for his own, culpable acts. Br.

of App. at 11-13. Second, there was no vicarious liability to release because the loggers were not Kirkendoll's agents. Br. of App. at 14-17. Finally, even if there were some vicarious liability that could be released, Kirkendoll would still be liable for his own share of fault, making the allocation of fault by the jury a material issue of fact that should have precluded dismissal of Porter's claims on summary judgment. Br. of App. at 17-18.

3.1.1 *Glover* does not release a principal from liability for his own culpable acts.

Porter's opening brief argued that *Glover* only applies to release a principal's vicarious liability; it does not release a party's direct liability for his own, culpable acts. Br. of App. at 11-13; *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 722, 658 P.2d 1230 (1983); *Seattle W. Indus. v. David A. Mowat Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1988). A landowner who, like Kirkendoll, directs his contractors to cut trees from land of another, is directly liable for affirmatively causing the trespass. *See Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495 (2002); *Ventoza v. Anderson*, 14 Wn. App. 882, 895-96, 545 P.2d 1219 (1976). Release of the loggers does not release Kirkendoll from his direct liability for ordering the trespass.

Kirkendoll argues that Porter misreads *Glover*, but Kirkendoll's confused alternative analysis of *Glover* does not withstand scrutiny. *See* Br. of Resp. at 17-19. Kirkendoll fails to

understand the fundamental difference between vicarious liability and liability of joint tortfeasors. As expressed in *Glover*, “In vicarious liability cases ... the claim is based on the conduct of one individual [the agent] and the liability is imposed [on the principal] as a matter of public policy,” even though the principal is not at fault. *Glover*, 98 Wn.2d at 722-23. “This situation is unlike that created by joint tortfeasor claims,” where multiple defendants are each directly liable for their own, culpable misconduct. *Id.* at 722.

Kirkendoll’s confusion is most evident in Br. of Resp. at 19. There, Kirkendoll appears to recognize that this is a case of “concerted breach of the same duty ... by joint tort-feasors.” Indeed, both Kirkendoll and the loggers are directly liable for their own, culpable misconduct: Kirkendoll for ordering the trees cut, the loggers for cutting them. All are jointly liable for the single, indivisible harm.

But, despite recognizing that this is a joint liability case, Kirkendoll then states, without any explanation, “By definition, there can be no theory of liability against Kirkendoll beyond respondeat superior.” Br. of Resp. at 19. There is no explanation for this self-contradictory leap of logic. As clearly spelled out in the *Glover* quote that Kirkendoll himself uses on the same page, vicarious liability is fundamentally different from liability based on concerted action by joint tortfeasors. In vicarious liability, the

principal did not cause of the harm. Here, Kirkendoll did cause the harm. By definition, then, Kirkendoll's liability for his own conduct is not vicarious. There is no respondeat superior.

Because Kirkendoll has direct liability for his own acts, *Glover* does not apply and there were no grounds for the trial court to dismiss Porter's statutory waste and timber trespass claims against Kirkendoll. This Court should reverse.

3.1.2 *Glover* does not release Kirkendoll from any portion of his liability because the loggers were not Kirkendoll's agents.

Porter argued that there could be no vicarious liability because the loggers were not Kirkendoll's agents under a respondeat superior analysis. Br. of App. at 14-17. Such an agency relationship exists only when the alleged principal has the right not only to determine the scope of work performed, but also the manner of performance. *Bloedel Timberlands Dev. v. Timber Indus.*, 28 Wn. App. 669, 674, 626 P.2d 30 (1981). Kirkendoll failed to show that he had the right to control anything other than the scope of work. Br. of App. at 14-16. Kirkendoll even admitted that the existence of an agency relationship under respondeat superior was a disputed issue of material fact. Br. of App. at 16; *see above* at 1-3. Because the loggers were not Kirkendoll's agents, *Glover* could not apply. The trial court erred in applying *Glover* to dismiss Porter's claims.

Kirkendoll's arguments to the contrary are unavailing. *See* Br. of Resp. at 15-17. Kirkendoll relies entirely on *Bloedel* to argue that because Kirkendoll controlled the location of the cutting, the loggers were therefore his agents. However, *Bloedel* expressly holds otherwise: "Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract." *Bloedel*, 28 Wn. App. at 674. In *Bloedel*, this Court held, under a substantial evidence standard, that the timber owner had a right to control the loggers because there was evidence that the field agent "supervised the entire logging operation nearly every day, including the cutting, branding and loading." *Id.* at 675. In contrast, if the field agent had only intermittently checked that outgoing logs were properly tagged, branded, and loaded, that would only be determining conformity with the contract and would not support an agency finding. *Id.*

Kirkendoll failed to present any evidence that he supervised or otherwise exercised any right of control outside of the terms of the contract. Telling the loggers which trees to cut was nothing more than ensuring the loggers performed in conformity with the contract. Kirkendoll failed to establish a right of control. He also admitted that the existence of an agency relationship was a disputed issue of fact that would have to be resolved at trial, not on summary judgment. *See above* at 1-3.

Even if this were a case in which vicarious liability could exist, Kirkendoll failed to demonstrate that he had the requisite level of control to establish an agency relationship under respondeat superior. There were no grounds for dismissal of Porter's direct claims. This Court should reverse.

3.1.3 Under comparative fault, a principal can be released from vicarious liability but still be directly liable for its own misconduct.

Porter argued that even if the loggers were Kirkendoll's agents and vicarious liability did apply, the jury would have to allocate fault between the parties, and Kirkendoll would still be liable for his own share of fault. Br. of App. at 17-18. *Glover* could only release Kirkendoll from vicarious liability for the loggers' shares. He would still be liable for his own share. The allocation of fault would have been an issue of material fact precluding summary judgment dismissal of the direct claims.

Kirkendoll argues that he cannot have any direct liability for the trespass. Br. of Resp. at 20-22.¹ Again, Kirkendoll fails to recognize the difference between vicarious liability and direct liability of joint tortfeasors acting in concert. Kirkendoll treats them as the same thing, when in reality they are very different.

¹ This section of Kirkendoll's brief carries a heading that would seem to indicate an argument about reasonableness hearings, but the argument itself fails to mention reasonableness hearings at all.

Kirkendoll reveals his misunderstanding again when he argues that RCW 4.22.070(1)(a) “makes each at fault party responsible for payment of all of the Plaintiff’s damages.” Br. of Resp. at 21. The statutory language shows this is incorrect:

A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.”

RCW 4.22.070(1)(a). The correct interpretation is simple: In cases of concerted action, all parties who acted in concert are jointly responsible for the total of their proportionate shares (not for “all of the plaintiff’s damages”). In cases of vicarious liability, the principal, in addition to being severally liable for their own proportionate share, is also jointly liable for the proportionate share of their agent or servant. The agent or servant does not become responsible for the principal’s proportionate share.

Thus, as Porter described in his opening brief, it would be possible in this case, after a jury apportions fault, for Kirkendoll to be released from vicarious liability for the loggers’ share, but still be directly liable for his own share. Br. of App. at 17-18.

Kirkendoll admits that an apportionment of fault should have been required in this case. Br. of Resp. at 12-13. The trial court could not dismiss Porter’s claims at summary judgment. This Court should reverse.

3.2 The trial court erred in dismissing Porter’s assigned claims because the Tort Reform Act does not apply to intentional torts.

Porter’s opening brief argued that the trial court erred in dismissing the assigned indemnity/contribution claims under the Tort Reform Act because the Act does not apply to intentional torts. Br. of App. at 18-27. First, Kirkendoll’s violation of the timber trespass and waste statutes was intentional, either as a matter of law or as a disputed issue of fact. Br. of App. at 20-21. Second, the Tort Reform Act does not apply to intentional torts. Br. of App. at 21-24. Third, under the applicable common law rule, the loggers were entitled to claim indemnity from Kirkendoll. Br. of App. at 24-26. Finally, Kirkendoll was not entitled to any protection under the Tort Reform Act because he had waived it by failing to raise it as an affirmative defense. Br. of App. at 26-27.

3.2.1 Timber trespass and statutory waste are classified as intentional torts as a matter of law or could have been found intentional by a jury as a matter of fact.

Porter’s opening brief argued that the torts at issue in this case were intentional torts, excluded from the operation of the Tort Reform Act. Br. of App. at 20-21. As a matter of law, both statutes have been treated as intentional torts. *E.g.*, *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 115, 942 P.2d 968 (1997) (timber trespass); *Standing Rock Homeowners v. Misich*,

106 Wn. App. 231, 246, 23 P.3d 520 (2001) (statutory waste). Alternatively, Kirkendoll’s conduct could have been found by a jury to have been intentional as a question of fact—a material fact that Kirkendoll himself admitted was in genuine dispute. Br. of App. at 21 (citing CP 79:21-24). Because of this material factual dispute, the trial court could not apply Tort Reform to dismiss the assigned claims on summary judgment.

Kirkendoll argues that the timber trespass statute is a strict liability tort. Br. of Resp. at 11-13. However, he fails to address Porter’s authorities treating waste and timber trespass as intentional torts as a matter of law.² He argues that timber trespass is not intentional if the defendant proves mitigation, Br. of Resp. at 22-24, but this merely transforms it into a factual question. Kirkendoll has admitted, “At a minimum, the issue of Kirkendoll’s intent is a factual issue for the jury to decide.” CP 79:21-24. His response brief makes a similar concession. Br. of Resp. at 15 (“it is the role of the trier of fact to determine the mental state of a tort-feasor”).³ Because the jury could find that

² Kirkendoll asserts, without explanation, that Porter has misread *Standing Rock Homeowners v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001). Br. of Resp. at 24. The decision clearly states, “any violation of [the waste] statute is analogous to an intentional tort.” Porter is unsure what else Kirkendoll could think the Court’s statement means.

³ Kirkendoll’s later claim that there was no evidence of intent, Br. of Resp. at 24, ignores the record. Kirkendoll knew that the boundary stakes were 10-40 feet west of the road edge. CP 38, 49, 51-52. Despite

Kirkendoll's conduct was intentional, the trial court erred in applying the Tort Reform Act. This Court should reverse.

3.2.2 The Tort Reform Act does not apply to intentional torts.

Porter argued that the Tort Reform Act's abolition of the right of indemnity between passive and active tortfeasors does not apply to intentional torts. Br. of App. at 21-24. The right of indemnity is only abolished in cases of fault-based joint and several liability under RCW 4.22.070(2). *See Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 296, 840 P.2d 860 (1992). Intentional torts are excluded from the operation of the Tort Reform Act because they are outside the Act's definition of "fault." *See* RCW 4.22.015; *Tegman v. Accident & Med. Inves., Inc.*, 150 Wn.2d 102, 110, 75 P.3d 497 (2003). Because Kirkendoll's torts were not fault-based, the loggers' right of indemnity remained. The trial court erred in dismissing the claims.

Kirkendoll criticizes Porter's use of *Washburn*, 120 Wn.2d 246, but not for the reason Porter cites it. Br. of Resp. at 20-22. Porter cited *Washburn* for the court's holding that because RCW 4.22.070 did not apply to the case, RCW 4.22.040, .050, and .060

this knowledge, he ordered the loggers to cut up to the edge of the road. CP 53, 186. Kirkendoll admitted that he caused the loggers to cut Porter's trees. CP 5. This is sufficient evidence of intent to create a genuine issue of material fact.

also did not apply. *See Washburn*, 120 Wn.2d at 296. Kirkendoll does not argue that Porter is wrong on this point. Under *Washburn*, RCW 4.22.040(3), which abolishes the right of indemnity in fault-based torts, does not apply to intentional torts. The trial court erred in dismissing the indemnity claim.

3.2.3 Under the applicable common law rule, Porter's assigned indemnity claims remained viable.

Porter argued that the loggers had a right to indemnity from Kirkendoll. Br. of App. at 24-26. Under the common law, a "passive" tortfeasor could seek full reimbursement from the "active" tortfeasor. *Stevens v. Sec. Pac. Mortg. Corp.*, 53 Wn. App. 507, 517, 768 P.2d 1007 (1989); *Olch v. Pac. Press & Shear Co.*, 19 Wn. App. 89, 93, 573 P.2d 1355 (1978).

Porter presented evidence supporting the indemnity claims. Br. of App. at 25-26. Kirkendoll knew the surveyed corners were 10 to 40 feet west of the edge of the road. CP 38, 49, 51-52. Despite this knowledge, Kirkendoll told the loggers that his property went to the road edge. CP 53, 186. The loggers relied on Kirkendoll's representation of the boundary and later testified that Kirkendoll was 100 percent responsible for the trespass. CP 139-40. Viewed in a light most favorable to Porter (the nonmoving party on this issue), the loggers were passive tortfeasors entitled to indemnity. The trial court erred in dismissing their claims on summary judgment.

Kirkendoll's response does not challenge Porter's presentation of the indemnity claim. Kirkendoll does not challenge the evidence that makes him the active tortfeasor. In fact, Kirkendoll has admitted that he caused the trespass. CP 5. There were no grounds to dismiss the indemnity claim. This Court should reverse.

3.2.4 Kirkendoll waived Tort Reform by not pleading it as an affirmative defense.

Porter argued that Kirkendoll was not entitled to any defense under the Tort Reform Act because he had waived it by not pleading it as an affirmative defense. Br. of App. at 26-27. A defendant seeking the benefit of the Tort Reform Act's comparative fault scheme must invoke the statute by pleading it as an affirmative defense. *See Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993); *Henderson v. Tyrrell*, 80 Wn. App. 592, 623, 910 P.2d 522 (1996); CR 8; CR 12(i).

Kirkendoll did not plead fault of others as a defense to Porter's direct claims and did not plead abolition of common law indemnity as a defense to the logger's indemnity claims. *See* CP 5-7, 22, 24-25. Quite the opposite: Kirkendoll asserted that he could claim indemnity from them. CP 25. Due to Kirkendoll's waiver, the trial court should have denied his motion for summary judgment without even reaching the merits.

Kirkendoll's response does not present any arguments or authorities on this issue. He admits that he failed to plead the defense in answer to Porter's claims. Br. of Resp. at 7. This Court should reverse dismissal of Porter's assigned claims.

3.3 Even if Tort Reform applies, the trial court erred in dismissing Porter's assigned claims.

Porter's opening brief argued in the alternative that even assuming that the Tort Reform Act applied, it still would have been error to dismiss Porter's assigned indemnity/contribution and equitable indemnification claims. Br. of App. at 27-32. First, the Tort Reform Act does not bar a contribution claim for failure to obtain a reasonableness hearing. Br. of App. at 28-30. Second, the Tort Reform Act does not abolish a claim for equitable indemnification for litigation expenses (the "ABC Rule"). Br. of App. at 30-31. Third, there was material evidence in support of the assigned ABC Rule claim. Br. of App. at 31-32.

3.3.1 The Tort Reform Act does not terminate a contribution claim for lack of a reasonableness hearing.

Porter argued that the Tort Reform Act does not bar a contribution claim on the grounds that a reasonableness hearing was not held at the time of settlement. Br. of App. at 28-30. The court hearing a contribution claim has authority to determine the reasonableness of the settlement even if no hearing was

held. *Fraser v. Beutel*, 56 Wn. App. 725, 733-34, 785 P.2d 470 (1990). Under the statute, a reasonableness hearing is not a prerequisite to a contribution claim. RCW 4.22.040, .050. Indeed, the statute does not set forth any consequence for failure to hold a reasonableness hearing. RCW 4.22.060. The correct remedy for a party's failure to obtain a reasonableness hearing at the time of settlement is to hold a reasonableness hearing prior to entry of judgment. Br. of App. at 29-30. There were no legal grounds for the trial court to dismiss the assigned indemnity/contribution claims as a consequence for failure to obtain a reasonableness hearing at the time of settlement.

Kirkendoll argues that Porter is misreading the statute, but fails to point to any statutory language that would bar a contribution claim due to failure to hold a reasonableness hearing. Br. of Resp. at 24-25. Although the statute places the burden of requesting a hearing on the settling defendant, it sets forth no consequences for failure to do so. RCW 4.22.060. The statute also sets no deadline for holding the hearing, except for "any time prior to final judgment." *Id.* Under that standard, there was still time to hold a hearing in this case.

In *Fraser*, 56 Wn. App. 725, a settling defendant obtained a reasonableness hearing but failed to provide the required notice. *Id.* at 733. As a consequence, the court held that the reasonableness determination was not binding and remained at

issue in the later contribution action. *Id.* at 733-34. The remedy for the settling party's failure was not to bar the contribution action, but to allow the non-settling party an opportunity to oppose reasonableness as part of the contribution action. The same remedy should have applied here. This Court should reverse dismissal of the indemnity/contribution claims.

3.3.2 The Tort Reform Act does not terminate a claim for equitable indemnification.

Porter argued that the Tort Reform Act does not abolish a party's claim for equitable indemnification (also known as the "ABC Rule"). Br. of App. at 30-31. The Tort Reform Act is very specific in abolishing only the right of indemnity for damages between passive and active tortfeasors. RCW 4.22.040(3). An ABC Rule claim is a separate claim—an equitable grounds for the recovery of attorney's fees and litigation costs. The Tort Reform Act does not address claims under the ABC Rule.

Kirkendoll's response does not challenge Porter on this point and apparently concedes that the claim was not abolished.

3.3.3 There was at least a disputed issue of material fact on the assigned equitable indemnification claims, precluding summary judgment dismissal.

Porter argued that the required elements of the ABC Rule were all met in this case. Br. of App. at 31-32. Kirkendoll committed a wrongful act toward the loggers by misrepresenting

his property boundaries. The loggers relied on Kirkendoll's misrepresentation when they cut trees, and thereby became involved in this litigation with Porter. Neither Porter nor the loggers were involved in Kirkendoll's wrongful act. Because there is material evidence supporting the ABC Rule claims, the trial court erred in dismissing them.

Kirkendoll argues that a party is not entitled to an award of fees "if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C." Br. of Resp. at 30 (citing *Tradewell Grp. v. Mavis*, 71 Wn. App. 120, 128, 857 P.2d 1053 (1993)). But then Kirkendoll fails to point to any other reasons. There are none. The only reason the loggers were sued is that Kirkendoll ordered them to cut Porter's trees. But for the wrongful act by Kirkendoll toward the loggers, the loggers would not have cut the trees and would not have been sued by Porter.

Kirkendoll argues that the loggers are not entitled to this equitable remedy because they have the legal remedy of contribution. Br. of Resp. at 30. But contribution for damages is not a remedy for the litigation expenses that the loggers should never have had to incur. The loggers have no other remedy and their claim meets all of the elements. This Court should reverse the erroneous dismissal of the ABC Rule claims.

3.4 The trial court erred in denying Porter's motion for partial summary judgment.

Porter's opening brief next addressed issues related to the trial court's erroneous denial of Porter's own motion for partial summary judgment. Br. of App. at 32-38. First, Porter was entitled to judgment in his favor on the assigned indemnity and ABC Rule claims. Br. of App. at 33. Second, Porter was entitled to judgment in his favor as to Kirkendoll's liability for violating the waste statute. Br. of App. at 33-36. Third, Porter was entitled to judgment in his favor as to Kirkendoll's liability for triple damages under either the waste statute or the timber trespass statute. Br. of App. at 36-38. The trial court erred in not granting Porter's motion.

3.4.1 Porter was entitled to judgment in his favor on the assigned indemnity/contribution and equitable indemnification claims.

Porter argued that the evidence presented to the trial court supported only one reasonable conclusion: that Porter was entitled to judgment in his favor on the assigned indemnity and ABC Rule claims. Br. of App. at 33. Kirkendoll was 100 percent at fault for the trespass. CP 139-40. Kirkendoll admitted that he caused the loggers to cut Porter's trees. CP 5. Kirkendoll was the active tortfeasor; the loggers were passive. But for Kirkendoll's misrepresentation, the loggers would not have been sued. The

trial court erred in not granting summary judgment in favor of Porter on the indemnity and ABC Rule claims.

Kirkendoll's response does not point to any genuine issues of material fact on these claims. Kirkendoll's only arguments against these claims are refuted in Parts 3.2.3 and 3.3.3, above. The evidence is undisputed and leads to only one reasonable conclusion. This Court should reverse and grant partial summary judgment in favor of Porter on the indemnity and ABC Rule claims.

3.4.2 Kirkendoll is liable for violating the waste statute, RCW 4.24.630.

Porter argued that he was entitled to judgment in his favor on the issue of Kirkendoll's liability for violating the waste statute. Br. of App. at 33-36. The waste statute applies to cases involving both damage to trees and damage to land. *Gunn v. Riely*, 185 Wn. App. 517, 525 n. 6, 344 P.3d 1225 (2015). Alternatively, the first prong of the statute applies to removal of timber, despite the timber trespass exception. The exception must be narrowly construed to give effect to the general provisions. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013); *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974). Porter was entitled to judgment in his favor on the issue of Kirkendoll's liability under either the first or second prong of the waste statute.

Kirkendoll argues that any conflict in the statutory language should be resolved through application of the statutory canon of general vs. specific statutes, arguing that the timber trespass statute would control over the waste statute. Br. of Resp. at 13-14. But the conflict is not between the two statutes. The conflict is between the first general provision of the waste statute, “every person who goes onto the land of another and who removes timber,” and the waste statute’s own exception, which would, if taken at face value, entirely eviscerate the general provision. *See* Br. of App. at 35-36.

“Removes timber” was deliberately added to the statute by the legislature and must have some meaning. As noted above, when a general provision conflicts with an exception, the courts must construe the exception narrowly in order to give effect to the general provision. The waste statute must apply to removal of timber. This Court should reverse and grant partial summary judgment in favor of Porter.

3.4.3 Kirkendoll is liable for triple damages under either the waste statute or the timber trespass statute.

Porter argued that he was entitled to judgment in his favor on the issue of tripling damages under either the waste statute or the timber trespass statute. Br. of App. at 36-38. Under the “removes timber” prong of the waste statute, damages are always tripled. *See* RCW 4.24.630. Under the “waste or

injury to the land” prong of the waste statute, damages are tripled if the defendant acted wrongfully. *Id.* Under the timber trespass statute, damages are tripled unless the defendant proves they had probable cause to believe that the land was their own. RCW 64.12.030, .040.

The only reasonable conclusion from the evidence is that Kirkendoll’s actions were wrongful under the waste statute and cannot qualify for mitigation under the timber trespass statute. Kirkendoll knew where the surveyed corner monuments were located, from 10 to 40 feet west of the edge of the road. CP 38, 49, 51-52. Despite this knowledge, Kirkendoll told the loggers to cut to the road edge, including Porter’s trees. CP 53, 186. Porter was entitled to judgment in his favor that Kirkendoll’s liability would be for triple damages.

Kirkendoll’s response does not appear to address this issue. Although he spends some time discussing mitigation to single damages under RCW 64.12.040, he does not point to any evidence that would enable him to carry his burden of proof on that issue. *See* Br. of Resp. at 22-23. The material facts are undisputed. The only reasonable conclusion is that Kirkendoll’s liability is for triple damages. This Court should reverse and grant partial summary judgment in favor of Porter.

3.5 The trial court abused its discretion in excluding rebuttal testimony by Galen Wright.

As a final matter, Porter's opening brief argued that the trial court abused its discretion in excluding, pre-trial, rebuttal testimony by expert witness, Galen Wright. Br. of App. at 38-41. Porter asked this Court to address the issue because it is likely to arise again on remand. Generally, a court cannot determine whether rebuttal evidence is admissible until the defendant's expert testimony is presented at trial. *Bede v. Overlake Hosp. Med. Ctr.*, No. 68479-5-I, 2013 Wash. App. LEXIS 2389, at *94 (Ct. App. Oct. 7, 2013).⁴ Rebuttal testimony by a new expert witness is a common and accepted practice. *E.g., Id.; State v. White*, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). The trial court had no legal or factual grounds for excluding Mr. Wright and therefore abused its discretion.

Kirkendoll argues that Porter failed to show his lead expert was prejudiced by the defendants' late production and therefore there was no need for a new expert on rebuttal. Br. of Resp. at 28-29. This is not the standard for admission of expert rebuttal testimony, and is irrelevant.

Rebuttal testimony is proper if it answers new matters presented by the defense. *White*, 74 Wn.2d at 394-95. Here, Patrick See would have testified in Porter's case in chief,

⁴ This unpublished opinion is persuasive authority. *See* GR 14.1.

offering his opinions regarding the amount of damages. CP 399. Kirkendoll's expert would have presented a different analysis of the damages. *See* CP 332-33. Wright would then have offered rebuttal regarding Kirkendoll's appraisal methods. CP 399. Wright's testimony would have been true rebuttal, answering the new matter of the defense's appraisal methods.

There is no statute, case law, or court rule that would prevent Porter from choosing a new expert to present rebuttal testimony. Rebuttal witnesses are not required to be disclosed in advance of trial. *See White*, 74 Wn.2d at 395.

Whether rebuttal evidence is proper depends on the testimony elicited at trial. *Bede*, 2013 Wash. App. LEXIS 2389, at *94; *see White*, 74 Wn.2d at 394-95. Until Kirkendoll's expert testifies at trial, the trial court cannot know whether there would be any reason to deny rebuttal testimony.

Pre-trial, the trial court had no tenable grounds or reasons for excluding Wright's rebuttal testimony. This Court should reverse.

3.6 Porter requests attorney fees on appeal.

Porter requested an award of costs and attorney fees on appeal under the ABC Rule and under the waste statute. Kirkendoll did not respond to Porter's request. If Porter prevails on appeal, this Court should award fees and costs to Porter.

4. Conclusion

The trial court erred in dismissing Porter's direct and assigned claims. Kirkendoll admitted to key, disputed issues of material fact—agency and intent—that made summary judgment dismissal improper.

The trial court also erred in denying Porter's motion for partial summary judgment. The facts were undisputed, leading to only one reasonable conclusion: Porter was entitled to judgment in his favor as a matter of law.

This Court should 1) reverse summary judgment dismissal of Porter's direct and assigned claims; 2) grant partial summary judgment in favor of Porter on the assigned claims, including indemnity/contribution and equitable indemnification; 3) grant partial summary judgment in favor of Porter on Kirkendoll's liability for triple damages under the waste statute and/or the timber trespass statute; 4) reverse the trial court's exclusion of rebuttal testimony by Galen Wright; and 5) award Porter attorney fees on appeal.

Respectfully submitted this 23rd day of June, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 23, 2017, I caused the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 23rd day of June, 2017.

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