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State of Washington

No. 96214-6

No. 49819-7-II

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

PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL

Respondents,

v.

JERRY PORTER and KAREN ZIMMER

Appellants,

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. RESTATEMENT OF THE ISSUES..... 3

A. Whether Chapter 4.22 RCW applies to timber trespass cases?

B. Whether RCW 4.22.070 required an apportionment of fault among the Co-Defendants?

C. Whether the trial court correctly held that the Loggers had no common law indemnity rights against Kirkendoll to assign to Porter?

D. Whether any rights of the Loggers seek contribution against Kirkendoll were cut off by the settling parties' failure to obtain reasonableness determination pursuant to RCW 4.22.060?

E. Whether Kirkendoll's direction and control over the loggers with regard to which trees to cut made Kirkendoll vicariously liable Loggers' timber trespass?

F. Whether the trial court correctly held that Porter's settlement with and release of the Loggers discharged Kirkendoll from any further liability for the timber trespass based on *Glover*?

G. Whether Porter's remedies were limited to those provided by the timber trespass statute, RCW 64.12.030?

H. Whether the Trial Court properly denied Porter's Motion for Partial Summary Judgment?

I. Whether the trial court properly excluded testimony from Porter's untimely disclosed expert, Galen Wright?

J. Whether the Trial Court properly denied Porter an award of attorney fees based on the "ABC Rule"?

III. RESPONDENTS' STATEMENT OF THE CASE..... 4

A. Respondents' Statement of the Facts 4

B. Procedural History..... 6

IV. ARGUMENT..... 10

4.1 Standard of review..... 10

4.2 RCW 4.22 applies to timber trespass cases..... 11

4.3 The Co-Defendants' duties were solely defined by the timber trespass statute..... 13

4.4 RCW 64.12, .030 and .040 must be read in harmony with the 1986 Tort Reform Act, RCW 4.22, to give effect to each..... 15

4.5 The Loggers were Kirkendoll's agents for purposes of liability..... 15

4.6 Porter retained no independent causes of action against Kirkendoll that survived Porter's release of all claims against the Loggers..... 17

4.7 Porter's settlement with and release of solvent joint tort-feasors without a reasonableness hearing extinguished the Loggers' contribution claims as a matter of law, making moot any further inquiry into Kirkendoll's potential percentage of fault..... 20

4.8 There is no basis either in legislative history or case precedent to infer that all violations of RCW 64.12.030 are "intentional," so as to negate apportionment of fault under RCW 4.22..... 22

4.9 RCW 4.22.015 and RCW 64.12.030 and .040 are consistent with common law definitions of trespass..... 24

4.10 The Court correctly held that Porter has no assigned rights to either indemnity or contribution..... 24

4.11 The Trial Court did not abuse its discretion in precluding expert testimony by Galen Wright, when such expert was not timely disclosed; where the Plaintiffs had not disclosed any of Mr. Wright's proposed opinions; and where such testimony would have been cumulative..... 28

4.12 The released Co-Defendants neither had, nor could they have assigned, any claim for equitable entitlement to attorneys' fees under the "ABC Rule." 29

V. CONCLUSION.....31

TABLE OF AUTHORITIES

Table of Cases

Ahmad v. Town of Springdale,
178 Wn. App. 333, 314 P.3d 729 (2013) 30

Armstrong Const. Co. v. Thomson,
64 Wn.2d 191, 390 P.2d 976 (1964) 29

Barber v. Bankers Life & Cas. Co.,
81 Wn.2d 140, 500 P.2d 88 (1972) 11

Bloedel Timberlands Dev., Inc.. v. Timber Indus., Inc.,
28 Wn. App. 669, 626 P.2d 30 (1981) 16, 17

Blueberry Place Homeowners Ass'n., v. *Northward Homes, Inc.*,
126 Wn. App. 352, 110 P.3d, 145 (2005)..... 30

Borden v. City of Olympia,
113 Wn. App. 359, 53 P.3d 1020 (2002)..... 24

Brewer v. Fireboard Corp.,
127 Wn.2d 512, 901 P.2d 297 (199) 24

Crown Controls, Inc. v. Smiley,
110 Wn.2d 695, 756 P.2d 717 (1988) 2

Emwright v. King County,
96 Wn.2d 538, 637 P.2d 656 (1981).....15

Failla v. Fixture One Corp.,,
181 Wn.2d 642, 336 P.3d 1112 (2014) 10

Gaines v. Pierce Cty.,
66 Wn. App. 715, 834 P.2d 631 (1992) 24

Gilbert v. Sacred Heart Med. Ctr.,
127 Wn.2d 370, 900 P.2d 552 (1995).....14

Glover for Cobb v. Tacoma Gen. Hosp.,
98 Wn.2d 708, 658 P.2d 1230 (1983) 2, 4, 10, 17, 18, 20, 26, 31

Gunn v. Reily,
185 Wn. App. 517, 344 P.3d 1225 (2015) 13

Guay v. Wash. Nat. Gas Co.,
62 Wn.2d 473, 383 P.2d 296 (1963) 22

Highline Sch. Dist. No. 401 v. Port of Seattle,
87 Wn.2d 6, 548 P.2d 1085 (1976) 10

Hill v. Cox.,
110 Wn. App. 394, 41 P.3d 495 (2002) 26, 27

JDFA Corp. v. Int'l Raceway, Inc.,
97 Wn. App. 1, 970 P.2d 343 (1999) 13

Lundberg v. All-Pure Chemical Co.,
55 Wn. App. 181, 777 P.2d 15 (1989) 12

Luedinghaus v. Pederson,
100 Wn. 580, 171 P. 530 (1918) 23

Mahoney v. Shinpoch,
107 Wn.2d 679, 732 P.2d 510 (1987) 10

Nielson v. Eisenhower & Carlson,
100 Wn. App. 584, 999 P.2d 42 (2000) 13

O'Brien v. Hafer,
122 Wn. App. 279, 93 P.3d 930 (2004) 16

Pennsylvania Life Ins. Co. v. Employment Secc. Dep't,
97 Wn.2d 412, 645 P.2d 693 (1982) 29

Pepper v. JJ Welcome Const. Co.,
73 Wn. App. 523, 871 P.2d 601 (1994) 24

Seattle-First Nat. Bank v. Brommers,
89 Wn.2d 190, 570 P.2d 1035 (1977) 23

Seattle-First Nat. Bank v. Shoreline Concrete Co.,
91 Wn.2d 230, 588 P.2d 1308 (1978) 18

Seattle W. Indus., Inc. v. David A. Mowat Co.,
110 Wn.2d 1, 750 P.2d 245 (1988) 26

S. Martinelli & Co.. v. Washington State Dep't of Revenue,
80 Wn. App. 930, 912 P.2d 521 (1996) 14

Standing Rock Homeowners Ass'n v. Misich,
106 Wn. App. 231, 23 P.3d 520 (2001) 24

Stevens v. Gordon,
118 Wn. App. 43, 74 P.3d 653 (2003) 28

Tacoma Mill Co. v. Perry,
40 Wn. 44, 82 P. 140 (1905) 11

Tradewell Grp., Inc. v. Mavis,
71 Wn. App. 120, 857 P.2d 1053 (1993) 30

Ventoza v. Anderson,
14 Wn. App. 882, 545 P.2d 1219(1979) 26, 27

Washburn v. Beatt Equip. Co.,
120 Wn.2d 246, 840 P.2d 860 (1992) 20, 21

Wilson v. Horsely,
137 Wn.2d 500, 974 P.2d 316 (1999) 28

Wilson v. Steinbach,
98 Wn.2d 434, 656 P.2d 1030 (1982) 11

Yong Tao v. Heng Bin Li.,
140 Wn. App. 825, 166 P.3d 1263 (2007) 16

Table of Statutes

RCW 4.22 .....2, 3, 11, 19
RCW 4.22.005 12
RCW 4.22.015 .....11, 23
RCW 4.22.0303, ... 25
RCW 4.22.040 ..... 3, 24
RCW 4.22.040(3).....32
RCW 4.22.060 .....3, 12, 21, 25, 27
RCW 4.22.060(2)..... 22
RCW 4.22.070 .....3, 13, 21, 32
RCW 4.22.070(1)..... 20, 21
RCW 4.22.070(1)(a) 12, 21
RCW 4.22.070(2)..... 21
RCW 4.24.630 ..... 6, 7, 13, 14, 31
RCW 4.24.630(2).....14
RCW 61.12.030 .....12, 22, 31
RCW 61.12.040 .....22, 31
RCW 64.12.030 .....2, 4, 6, 7, 11, 13, 14, 22,23,31
RCW 64.12.040 .....11, 23
RCW 84.34 4

Session Laws

Washington Legislative Session of 1869 22
Washington Legislative Session of 1877 23
Washington Legislative Session of 2009 23

I. INTRODUCTION

This litigation arose from the March 18, 2014 accidental cutting of 51 Douglas firs.[1] Pepper Kirkendoll's property is located in rural Lewis County, WA, is unoccupied and is classified as open space timber land pursuant to RCW Chapters 84.33 and 84.34. (CP 289, 299) Kirkendoll hired Kyle Peters and his company, G&J Logging, Inc. to clear cut his property. While Kirkendoll did reserve the right to argue at trial that his fault should be apportioned with that of the Loggers,[2][3] Kirkendoll exclusively controlled the selection of which trees to cut.

Kirkendoll's statement to his logging contractor that he owned all of the trees west of Madison Drive was the result of his misinterpretation of an old survey and survey monuments he had seen many times over the years, and his walkthrough of the site on March 18, 2014 with Kyle Peters, the owner of G & J Logging, Inc. These items reasonably led him to believe he owned all of the land up to the west edge of the as-built

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[1] Kirkendoll's expert, Michael D. Jackson, testified that the trees in question ranged between 7 or 8 and 20 inches in trunk diameter and were worth no more than $25,000, even applying landscape valuation methods to the trees CP 57-58.

[2] Throughout this brief the term "Loggers" will refer to G&J Logging, Inc. and its owners, Kyle Peters and Andrea Peters; G&J's subcontractor, Boone's Mechanical Cutting, Inc.; and Boone's Mechanical Cutting, Inc.'s owners and/or agents, Mitch Payne, John Boger, Daniel Sheets (a/k/a Boone Sheets) and Jennifer Sheets.

[3] For example, the jury could have found that Porter's property was excessively damaged through substandard logging practices exceeding the scope of Kirkendoll's control. Additionally, if the boundary line discrepancies were so obvious as to put a reasonable person on constructive notice that they were cutting the neighbor's trees, as Porter argued, then Kirkendoll wanted to reserve the right to apportion fault on that basis.

Madison Drive. Because the timber trespass statute, RCW 64.12.030 exclusively applies, and because no evidence supports Porter's contention that Kirkendoll intentionally converted Porter's trees, the Trial Court appropriately denied Porter's motion for summary judgment. The Trial Court correctly concluded that Chapter 4.22 RCW applied. The timber trespass occurred through the concerted action of multiple parties, breaching a common statutory duty, proximately giving Porter the right to seek one judgment for damages, jointly and severally against Kirkendoll, the Loggers and their agents.

The Loggers were Kirkendoll's agents for purposes of the harm caused. Porter's settlement with and release of the Loggers, shortly before trial and without notice to Kirkendoll or a reasonableness hearing, extinguished all Porter's further claims against Kirkendoll under *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983).[4] The Trial Court appropriately dismissed the remainder of Porter's claims against Kirkendoll as a matter of law. This is because by definition, such could only have been based on respondeat superior. Given Porter's entitlement to only a single award of damages jointly and severally against multiple tort-feasors, Porter had no independent causes of action against Kirkendoll beyond timber trespass that could survive a *Glover* analysis.

[4] Superseded on other grounds by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

Since this was a classic joint tort-feasor situation under RCW 4.22.030, the settlement cut off the Loggers' contribution rights under RCW 4.22.040, and they had no common-law indemnity rights to assign. There is no equitable theory, such as the "ABC" Rule regarding attorneys' fees, of which Porter can avail himself. Thus, the Loggers' pretended "assignment" to Porter of their causes of action against Kirkendoll was a nullity.

II. RESTATEMENT OF THE ISSUES

A. Whether Chapter 4.22 RCW applies to timber trespass cases?

B. Whether RCW 4.22.070 required an apportionment of fault among the Co-Defendants?

C. Whether the trial court correctly held that the Loggers had no common-law indemnity rights against Kirkendoll to assign to Porter?

D. Whether any rights of the Loggers seek contribution against Kirkendoll were cut off by the settling parties' failure to obtain a reasonableness determination pursuant to RCW 4.22.060?

E. Whether Kirkendoll's direction and control over the loggers with regard to which trees to cut made Kirkendoll vicariously liable for the Loggers' timber trespass?

F. Whether the trial court correctly held that Porter's settlement with and release of the Loggers discharged Kirkendoll from any further liability for the timber trespass based on *Glover*?

G. Whether Porter's remedies were limited to those provided by the timber trespass statute, RCW 64.12.030?

H. Whether the Trial Court properly denied Porter's Motion for Partial Summary Judgment?

I. Whether the trial court properly excluded testimony from Porter's untimely disclosed expert, Galen Wright?

J. Whether the Trial Court properly denied Porter an award of attorney fees based on the "ABC Rule"?

III. RESPONDENT'S STATEMENT OF THE CASE

A. Respondents' Statement of Facts.

In 2005, Kirkendoll purchased Lot 13 of Segregation Survey recorded under Auditor's File No. 3103393, in Lewis County, WA. (CP 289) Jerry Porter and Karen Zimmer (collectively referred to as "Porter") own the adjacent forested Lot 12 and live two lots away on Parcel 11. Kirkendoll bought his property for the sole purpose of logging it, and it is classified by the Lewis County Assessor as open space timberland, under RCW 84.34. (CP 289, 299)

The Porter and Kirkendoll properties and several other properties in the area are accessed via a 60-foot-wide easement over a private road called Madison Drive, which is maintained at the common expense of several owners, including Kirkendoll and Porter, pursuant to Road Maintenance Agreement. (CP 289, 307) The east boundary of Lot 13 is the west easement line. (CP 313) Therefore, based upon his references to the old survey and finding and inspecting survey monuments many times over the years, Pepper Kirkendoll always assumed he owned to the west shoulder of the as-built Madison Drive. (CP 48, 305) From 2005 on, Kirkendoll managed all of the timber located on his side of the existing drive. One of the things he did in 2005 as part of his preparation of the land for timber harvest included limbing up all of the trees along the southwest side of Madison Drive. Porter did not object. (CP 290)

On March 18, 2014 Pepper Kirkendoll hired G & J Logging Inc. ("G & J") to log Lot 13 pursuant to a one page written contract. (CP 94) Kyle Peters ("Peters") is the owner of G & J. G & J and Peters (the "G&J Defendants") were defendants in the litigation below, along with Daniel "Boone" Sheets, Jennifer Sheets and Boone's Mechanical Cutting, Inc. (collectively "Boone Defendants"). The Boone Defendants were subcontractors of G & J for the actual felling of the trees. (CP 94) Porter

also sued Mitch Payne and John Boger, employees of the Boone Defendants.

Before directing the loggers where to cut on March 20, 2014, Pepper walked the property with Kyle Peters. (CP 183) Peters downloaded and reviewed aerial photos before walking the property with Kirkendoll. They found a survey stake along Madison Drive and stakes on two interior corners. (CP 184, 185, 186-87) Peters did not see anything on the ground that would cause him to doubt Kirkendoll's representations that he owned all of the timber to the west of Madison Drive. (CP 188) Pepper did not realize that the as-built roadway meanders within a 60' wide recorded easement and that his ownership ends approximately 10' to the southeast of the as-built roadway. Therefore, when the loggers clear cut his up to the shoulder of the as-built road, they mistakenly cut a single line of 51 trees about 10'— 14' on center just off the road shoulder on a strip about 10' wide and 100 feet long located on Porter's fee title. (CP 139, 188, 332)

B. Procedural History.

Porter sued Kirkendoll and the Loggers, alleging that "defendants then, acting in concert for their joint benefit," converted the Porter's trees. The Amended Complaint seeks one award of damages jointly and

severally against all Defendants based upon the timber trespass statute, RCW 64.12.030 and the waste statute, RCW 4.24.630. (CP 1-3)

The Amended Complaint goes on to assert: "Defendants' cutting of Plaintiff's trees damaged Plaintiff's landscape in an amount to be proven at the time of trial[.]" It alleges after the cutting, "Defendants then, *acting in concert for their joint benefit*, . . . converted Plaintiffs' personal property, damaging Plaintiffs in an amount to be proven at the time of trial."[5] It goes on to allege that the collective "Defendants' trespass was in violation of RCW 4.24.630 and/or RCW 64.12.030" and seeks "Judgment against all Defendants in an amount to be proven at the time of trial."[6]

The G & J Defendants, (Kyle Peters, Andrea Peters and G&J Logging, Inc.) and the Boone Defendants (Defendants Payne, Boger, Sheets and Boone's Mechanical Cutting, Inc.) pled fault of other parties as affirmative defenses and also filed cross claims against all Co-Defendants for indemnity and contribution. (CP 104-09, 0110-15)

Although Kirkendoll did not raise the affirmative defense of fault of third parties and/or make any cross claims in his January 4, 2016 Answer and Affirmative Defenses to Plaintiff's Amended Complaint (CP 100-03), he did file an October 11, 2016 "Answer to Cross Claim of Boone Defendants," (CP 116-19) denying said cross claim, and further

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[5] Italics added.
[6] CP 2-3

alleging the following Affirmative Defenses:

> 1. Crossclaim Plaintiff's loss and damage, if any, was caused by the breach of crossclaim plaintiffs and not by any act or omission of these answering crossclaim defendants.
>
> 2. Crossclaim Plaintiffs loss and damage, if any, was proximately caused by third parties over whom these answering defendants have no control, and for whom these answering defendants bear no legal liability or responsibility.
>
> 3. Crossclaim Plaintiffs have failed to mitigate their damages.
>
> 4. Crossclaim Defendants are entitled to equitable indemnity from the co-defendants and/or offset to have Kirkendoll's liability reduced in this action to the extent that defendant Kirkendoll incurs liability as a result of the negligence, breach of contract or culpable conduct of co-defendants.

On October 19, 2016, with no advance notice to Kirkendoll and no reasonableness hearing, Porter settled with and released the co-defendants pursuant to identical CR 2A Settlement Agreements, whereby Boone and G & J agreed to pay Porter a collective $125,000 with assignments to Porter of "[a]ll claims and cause of action these settling defendants have against defendants [Kirkendoll]." (CP 65, 67)

On November 23, 2016, after learning of Porters' settlement with and release of the Loggers, Kirkendoll filed a motion for leave to amend his answer to include apportionment of fault among all Co-Defendants, and also to add the affirmative defense that Plaintiffs' claims were barred by Porter's settlement and release of the Co-Defendants. (CP 472, 477)

This motion became moot and was not ruled upon because of summary judgment dismissal of the remainder of Porter's claims.

After the settlement, on November 4, 2016, Porter filed a motion for partial summary judgment, seeking a ruling as a matter of law that Kirkendoll was liable for equitable indemnity, and also that the waste statute applied based on the allegation that Kirkendoll had acted willfully. (CP 27) On November 10, 2016, Kirkendoll filed a brief in opposition to Plaintiff's motion for summary judgment, together with a counter motion for summary judgment to dismiss all or some of Porter's remaining claims. (CP 72) The Trial Court dismissed all of Porter's claims (CP 236) and denied Porter's motion for reconsideration. (CP 275)

Porter's counsel takes half a paragraph out of context from Kirkendoll's counsel's argument at the summary judgment hearing (CP 270), and then falsely asserts that defense counsel "admitted *whether an agency relationship existed* was a jury question[.]"[7] This characterization of the argument is pure fiction. Porter omits the most important part of the paragraph, which reads in full as follows:

> Counsel said the only reason they were cut where they did was because Pepper told them to, yet counsel argues that there's no agency. Well, there are two scenarios under which Pepper could be 100 percent liable, like I said. Either he told them where to cut, they had an independent duty to verify what they were doing, but

[7] See Plaintiffs' Motion for Reconsideration, CP 244. Italics added.

> 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 orders. I think that's a jury question. It may be somewhat of a subtle jury question, but it's a jury question.

Kirkendoll has never argued that the existence of an agency relationship—a question of law—was a jury question. In any event, the argument of counsel is never evidence for purposes of summary judgment, on which the appellate court bases its review of summary judgment records de novo, engaging in the same inquiry as the trial court. *Failla v. Fixture One Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014).

The Trial Court correctly found that with joint and several liability pled, a reasonableness hearing had been required. The Court correctly held that the Loggers had no common-law indemnity rights to assign, and their failure to give notice of the settlement and obtain a reasonableness determination resulted in their having no contribution rights to assign. Hence, the Trial Court applied the Glover case compelled dismissal of all Porter's remaining claims. (CP 272)

IV. ARGUMENT

4.1 Standard of review.

This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch,* 107

Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if the record demonstrates "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." The Court construes all evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.,* 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

4.2 RCW 4.22 applies to timber trespass cases.

The timber trespass statute sounds in tort. *Tacoma Mill Co. v. Perry*, 40 Wn. 44, 47, 82 P. 140 (1905). RCW 64.12.030 is a strict tort liability statute in that it imposes liability without regard to intent on "any person [who] shall cut down, girdle, or otherwise injure, or carry off any tree . . . or shrub on the land of another person . . . without lawful authority . . . for treble the amount of damages . . . [.]" Intent only becomes relevant to mitigation of treble damages to the extent that the trespass was merely negligent per RCW 64.12.040.[8] Thus, a timber trespasser's conduct meets the definition in RCW 4.22.015 of "fault" as follows:

> "Fault" includes acts or omissions . . . that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability . . . [.] The

[8] Judgment shall be for single damages only, where the trespass is "casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his or her own, or that of the person in whose service or by whose direction the act was done[.]" RCW 64.12.040.

> term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.
>
> A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

The legislature has determined that the comparative fault doctrine applies to all actions based on "fault," including strict liability and product liability claims. See *Lundberg v. All-Pure Chemical Co.*, 55 Wn. App. 181, 186, 777 P.2d 15 (1989), a case involving apportionment of fault between strict liability and Plaintiff's negligence, where the Court held:

> "There currently is no reason to distinguish between negligence and strict liability actions for purposes of instructing a jury on the plaintiff's comparative fault . . . [.]"

The gravamen of Porter's Amended Complaint[9] is that Porter, a fault-free Plaintiff, suffered an indivisible harm (the loss of 51 trees in one logging operation) and that the Co-Defendants were jointly and severally liable based on agency and/or concerted action. RCW 4.22.070(1)(a) therefore requires that in these circumstances:

> Judgment shall be entered against each defendant except those who have been released by the claimant . . . in an amount which represents that party's proportionate share of the claimant's total damages.

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[9] CP 2.

Thus, RCW 4.22.070 required the trier of fact to apportion a percentage of fault to every "entity" that caused Porter's damages. After Porter's settlement with the Loggers, such "entities" would have included "empty chair" parties such as the Boone and G&J Defendants, against whom fault was required to be apportioned. However, those Defendants became unreachable because they settled and were released.

4.3 The Co-Defendants' duties were solely defined by the timber trespass statute.

To prevail on any tort claim, a plaintiff must prove (1) the defendant owed a duty, (2) breach of that duty, (3) damages and (4) the plaintiff's damages were proximately caused by the defendant's breach of duty. *See, Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 589, 999 P.2d 42 (2000). RCW 64.12.030 solely defines the Defendants' duty in the present instance.

The waste statute RCW 4.24.630 does not apply because Porter had a remedy under the timber trespass statute, RCW 64.12.030. The waste statute only applies if the trespass and damage *primarily* causes waste or collateral damage to the land. If the trespass is directed to the plaintiff's timber, trees or shrubs, only the timber trespass statute applies. *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015); *JDFA Corp.* v. *Int'l Raceway, Inc.*, 97 Wn. App. 1,5-7, 970 P.2d 343 (1999).

The waste statute, RCW 4.24.630(2) states:

> "This section does not apply in any case where liability for damages is provided under RCW 64.12.030[.]"

No words in this clause are ambiguous, so statutory construction is unnecessary. However, if one does apply the rules of statutory construction, the Court must construe two statutes dealing with the same subject matter so that the integrity of both statutes will be maintained. *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995). A specific statute will supersede and control a general statute when both might apply. *S. Martinelli & Co. v. Washington State Dep't of Revenue*, 80 Wn. App. 930, 912 P.2d 521 (1996). RCW 4.24.630 is a general statute regarding liability for damage to land and property; however, RCW 64.12.030 is a specific statute regarding damages for injury to or removing trees. The very language included in RCW 4.24.630 directs how the statute is to be interpreted in conjunction with RCW 64.12.030. The plain language of RCW 4.24.630(2) precisely requires the more specific statute, RCW 64.12.030, to supersede its application in this case.

Here, the land in question was designated forest land, with the Douglas Fir trees being planted for the sole purpose of producing forest products. Porter's sole remedy arose under the timber trespass statute.

4.4 RCW 64.12, .030 and .040 must be read in harmony with the 1986 Tort Reform Act, RCW 4.22, to give effect to each.

Statutory provisions and rules must be harmonized whenever possible. *Emwright v. King County,* 96 Wn.2d 538, 543, 637 P.2d 656 (1981). The legislature, when it enacted the Tort Reform Act in 1986, is presumed to have been aware of the timber trespass statutes. Reading both in harmony, there is no support for Porter's argument that a timber trespass statute is an "intentional" tort incapable of apportionment under RCW 4.22. Neither RCW 61.12.030 nor .040 uses the words "negligence," "willful," "wanton" or "intentionally." It is clear that the Legislature intended that it is the role of the trier of fact to determine the mental state of a tort-feasor.

4.5 The Loggers were Kirkendoll's agents for purposes of liability.

Porter repeatedly emphasizes how Pepper Kirkendoll alone controlled the Loggers' decision as to which trees to cut, but then argues in a paradoxical fashion that the Loggers were *not* Kirkendoll's agent for purposes of the harm caused. This argument is nonsensical in the absence of some independent cause of action against Kirkendoll over and above timber trespass, which there is not. The essential elements of an agency relationship are control over the manner in which the work is performed

and consent. *Yong Tao v. Heng Bin Li.*, 140 Wn. App. 825, 831, 166 P.3d 1263 (2007); *O'Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004). Porter misreads *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 669, 626 P.2d 30 (1981), by diverting the analysis to the wrong elements of "control." In *Bloedel*, the trial court awarded damages in favor of an adjoining property owner (Bloedel) against a timber purchaser Timber Industries, Inc. (referred to below as "TI") which had contracted with M&M Logging, a timber contractor, pursuant to a logging contract specifying that the loggers were independent contractors. *Bloedel*, 28 Wn. App. at 673-74. TI's field agent, who was assigned the task of supervising the loggers, failed to advise the loggers of the correct boundary lines, causing the loggers to mistakenly cut several trees on Bloedel's adjoining parcel. 28 Wn. App. at 672-73. The trial court awarded treble damages for timber trespass jointly and severally against both TI and M&M based upon agency. TI appealed, claiming that M&M Logging had committed the timber trespass as an independent contractor rather than as its agent. *Id.*, 28 Wn. App. at 673.

The Court of Appeals affirmed the trial court's finding that the loggers were the agents of TI because TI retained the right to control the location of the cutting due to the presence of TI's field supervisor on the job:

> The crucial factor is the right of control which must exist to prove agency. . . . [C]ontrol establishes agency only if the principal controls the manner of performance, in this case the actual cutting.

Id., at 674. Obviously, as in Kirkendoll's case, the only material aspect of the "actual cutting" was the *location* of the cutting. In summary, *Bloedel* is authority for Kirkendoll's position, not Porter's. In the case at bar, it is undisputed that Kirkendoll exclusively controlled the location of the cutting, rendering all of the other potential indices of control (*e.g.*, form of business entities; details as to tools and equipment; etc.) immaterial as a matter of law.

4.6 Porter retained no independent causes of action against Kirkendoll that survived Porter's release of all claims against the Loggers.

Porter misreads *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983) as somehow preserving "direct claims" against a non-settling joint defendant. Porter's analysis fails in the absence of any independent cause of action against Kirkendoll beyond timber trespass, of which there is none in this case. Porter seems to argue that if Kirkendoll acted intentionally (there is no evidence of this in the record) such would allow Porter to sidestep the *Glover* analysis. This is erroneous.

Porter avoids a meaningful discussion of *Glover*, which demonstrates the agency principles. In *Glover*, the plaintiff asserted a claim for damages caused by negligent administration of anesthesia in

Tacoma General Hospital by an anesthesiology resident/trainee, her supervising doctor and others. Plaintiff sued all defendants. Plaintiff brought two distinct claims against Tacoma General Hospital: (1) breach of "an independent duty to provide proper treatment," and (2) vicarious liability for the acts of the anesthesiologists. *Id.*, 989 Wn.2d at 712. The plaintiff settled with all defendants but the hospital for $575,000, which the trial court found reasonable based upon a reasonableness hearing. On appeal, the Supreme Court reversed the trial court's refusal to dismiss the vicarious liability claim and remanded the case for trial on claim for breach of the "independent duty to provide proper treatment." *Id.*, 98 Wn.2d at 700.

The Supreme Court's discussion of joint and several liability in *Glover* is instructive with regard to Porter's claims. Citing *Seattle-First Nat Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 234-35, 588 P.2d 1308 (1978), the Court noted the joint and several liability doctrine allows the plaintiff to proceed against one or all joint tort-feasors to obtain a full recovery, emphasizing that "the cornerstone of tort law is the assurance of full compensation to the injured party."[10] The court distinguished between *concurrent* tort-feasors versus *joint* tort-feasors:

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[10] *Glover*, 98 Wn.2d at 722, citing *Shoreline Concrete*, 91 Wn.2d at 236.

> On settling with one of the number of joint tort-feasors, the plaintiff may evaluate the relative conduct of each and determine that her best interest are served by a partial settlement. In such an instance she might settle for less than the full amount of her damages. Various factors, such as the percentage of such joint tort-feasor's fault compared to the conduct of the non-settling defendant, may influence this decision. **In vicarious liability cases, on the other hand, the claim is based on the conduct of one individual and the liability is imposed as a matter of public policy to ensure that the plaintiff has the maximum opportunity to be fully compensated. <u>When the plaintiff chooses to settle for less than the full amount, and that agent is solvent, the need to pursue the principal does not exist</u>.**[11]

Porter's only theory of liability is the concerted breach of the same duty (violation of the timber trespass statute) by joint tort-feasors with Porter's entitlement being to only one award of damages. By definition, there can be no theory of liability against Kirkendoll beyond respondeat superior. Porter was entitled to collect all of his damages out of either Kirkendoll or the loggers, but once he settled with the solvent agent, his right to pursue the principal on the same cause of action ceased to exist.

Discharge of Kirkendoll in this matter works no unfairness on Porter. Had Porter complied with RCW 4.22 and conducted a reasonableness hearing, the settlement would be the equivalent of a collected judgment under the principle that a creditor may not collect an amount in excess of the judgment against either the principal or agent.

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[11] 98 Wn.2d at 722-23. Emphasis added.

4.7 Porter's settlement with and release of solvent joint tort-feasors without a reasonableness hearing extinguished the Loggers' contribution claims as a matter of law, making moot any further inquiry into Kirkendoll's potential percentage of fault.

Porter seems to argue in section 5.2.3 of his brief that even if his respondeat superior claims were extinguished by his settlement with Kirkendoll's agents, material issues of fact would still exist as to Kirkendoll's percentage of fault, thereby precluding summary judgment. This argument fails for the same reason his *Glover* analysis fails: Porter has not pled and does not have, any independent form of liability beyond the indivisible harm created by the released tort-feasors acting in concert. *Glover* is controlling in this regard, and renders moot any further speculation into possible comparative fault scenarios among the Co-Defendants.

Porter similarly misreads *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992), which also did not involve jointly and severally liable defendants. In *Washburn*, the plaintiff, who was injured in an explosion of a propane pipeline system sued the contractor (Beatt) and three gas companies (Petrolane, Inc., Buckeye Gas Products Co. and Washington Natural Gas). The three gas companies settled with and were released by the Plaintiffs prior to trial. At trial, as required by RCW 4.22.070(1), the jury apportioned fault among all entities causing the

Plaintiff's damages, finding that Beatt was 80% at fault, that Petrolane, Inc. was 20% at fault and that the other Defendants were not at fault. *Washburn*, 120 Wn.2d at 290. The trial court entered judgment against Defendant Beatt by calculating 80% of the total verdict of $8 million dollars, amounting to $6,400,000, and then reducing that result by amounts paid by settling fault-free entities, ($730,000) for a net amount of $5,670,000. On appeal, the plaintiffs contended that the trial court erred in calculating the amount of the judgment against defendant Beatt. The Supreme Court found that defendant Beatt was not entitled to a credit or offset for any amounts paid by the settling entities "because none of those entities are jointly and severally liable defendants within the meaning of the express language of RCW 4.22.070. . . . If defendants were jointly and severally liable, then RCW 4.22.070(2) would have been applicable." *Id.*, 120 Wn.2d at 296.

In his discussion of *Beatt*, Porter ignores the effect of RCW 4.22.070(1)(a), which makes each at fault party responsible for payment of all of the Plaintiffs' damages in situations where "both were acting in concert or when a person was acting as an agent or servant of the party." In the present instance, RCW 4.22.070(1) does apply, and RCW 4.22.060 limited the settling Loggers' rights to contribution rights. Had the case

gone to trial, RCW 4.22.060(2) would have reduced Porter's claim against Kirkendoll by the amounts paid in settlement by the Loggers.

4.8 There is no basis either in legislative history or case precedent to infer that all violations of RCW 64.12.030 are "intentional," so as to negate apportionment of fault under RCW 4.22.

Porter erroneously reads RCW 61.12.030 in isolation from RCW 61.12.040. RCW 64.12.030 does not pretend to impute a tort-feasor's state of mind: its purpose is ". . . to punish a voluntary offender... [and] [t]o discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred." *Guay v. Wash. Nat. Gas Co.,* 62 Wn.2d 473, 383 P.2d 296 (1963).

Porter sidesteps the second part of the statute to create a false argument that the legislature by fiat declared as "intentional" the subjective state of mind of all who mistakenly take someone else's trees. Neither the wording of the statute nor the Legislative history support such a notion. When the 1869 Territorial Legislature enacted the timber trespass statute, it also simultaneously enacted RCW 64.12. 040, which provides for single compensatory damages "[i]f upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own...." Laws of 1869, p. 143, § 557.

That statute was intended by the Legislature to preclude treble damages where a defendant's actions were not "willful or reckless." *Seattle-First Nat. Bank v. Brommers*, 89 Wn.2d 190, 197, 570 P.2d 1035 (1977).

The "casual or involuntary" intent that precludes an award of treble damages under RCW 64.12.040 reflects the Legislative intent to only punish "the *willful* wrongdoer," who acts with "the *intent* to commit trespass." *Luedinghaus v. Pederson*, 100 Wn. 580, 583-84, 171 P. 530 (1918).[12] Similarly, the phrase "probable cause to believe that the land . . . was his own" in RCW 64.12.040 shows that the Legislature did not intend to punish a defendant who takes timber under a good faith claim of right, or without the intent to destroy or injure the plaintiff's trees.

The Territorial Legislature reenacted both RCW 64.12.030 and .040 in 1877, retaining the original language, Laws of 1877, p. 125, §§ 607-08, and these statutes became the law of Washington when it became a state in 1887. The statutory language remained unchanged until 2009, when RCW 64.12.030 was amended to clarify that treble damages were available for the unlawful cutting of Christmas trees, Laws of 2009, Ch. 349, § 4.5.

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[12] Emphasis added.

4.9 RCW 4.22.015 and RCW 64.12.030 and .040 are consistent with common law definitions of trespass.

Porter's notion that every trespass is intentional under Washington law is simply wrong. Porter's misreads *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001). A trespass claim requires "an intentional *or negligent* intrusion onto or into the property of another." *Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002). "Negligent trespass" requires proof of negligence (duty, breach, injury and proximate cause). *Gaines v. Pierce Cty.*, 66 Wn. App. 715, 719-20, 834 P.2d 631 (1992). Claims for trespass and negligence arising from a single set of facts are treated as a single negligence claim. *Pepper v. JJ Welcome Constr. Co.*, 73 Wn. App. 523, 546-47, 871 P.2d 601 (1994).

4.10 The Court correctly held that Porter has no assigned rights to either indemnity or contribution.

In a last-ditch effort to avoid the application of RCW 4.22, Porter simply recharacterizes Kirkendoll's conduct in this case as "intentional" with nothing more than the stroke of a pen. Accordingly – the argument proceeds from an evidentiary vacuum – Porter did not lose his common law right of indemnity by operation of RCW 4.22.040. He goes on to argue that either the reasonableness hearing was not required, or alternatively, it was Kirkendoll's duty to note it. This is an incorrect reading of the statute. While *Brewer v. Fireboard Corp.*, 127 Wn.2d 512,

901 P.2d 297 (1995) permits reasonableness hearings to be held at the request of nonsettling parties, the plain language of RCW 4.22.060 makes it clear that the obligation of noting a reasonableness hearing is on the party entering into the release:

> **1) A party prior to entering into a release**, covenant not to sue, covenant not to enforce judgment, or similar agreement **with a claimant shall give five days' written notice of such intent to all other parties and the court**. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. **A hearing shall be held on the issue of the reasonableness of the amount to be paid** with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured.
> . . .
> **The burden of proof regarding the reasonableness of the settlement offer shall be on <u>the party requesting the settlement</u>**.[13]

Porter cannot avoid the statute on the basis that some other party could potentially have enforced his compliance with it. Assuming that it would have been possible in this case for a jury to find that the Defendants acted intentionally—thereby precluding the apportionment of fault among the Co-Defendants—the Co-Defendants remained jointly and severally liable under RCW 4.22.030. The loggers cut off any right of contribution they had under RCW 4.22.060 by their failure to obtain a reasonableness determination, and Porter now stands in their shoes.

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[13] Emphasis added.

Without any meaningful discussion, Porter cites *Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 750 P.2d 245 (1988), which is, again, authority for Kirkendoll's position. In that case, a structural steel subcontractor on a bridge project sued the City of Everett, a project architect, the architect's subcontractor, the general contractor and the general contractor's surety on a variety of theories, including breach of contract, negligence and misrepresentation. The Court held that subcontractor's settlement with the City and field surveyor did not function as a release of clams against the architect under *Glover*. This was based upon the fact that the negligence claims were not joint and several, but rather based upon different breaches of duty on the part of the City (for negligence in administering the construction contract), the field surveyor (for negligence and performing field surveys) and against the architect (for negligence in designing the bridge addition). The court held that *Glover* was inapplicable to the case. *Id.*, 110 Wn.2d at 5.

Porter also cites *Hill v. Cox*, 110 Wn. App. 394, 41 P.3d 495 (2002) and *Ventoza v. Anderson*, 14 Wn. App. 882, 545 P.2d 1219 (1976), both of which, similarly are authority for Kirkendoll's position. *Ventoza* merely stands for the proposition that one is not responsible for the timber trespass of an independent contractor "unless the trespass is the result of the advice or direction of the principal, or unless the principal has notice

of the trespass and fails to interfere. *Ventoza*, 114 Wn. App. at 894-95. In *Hill*, the plaintiff sued a property owner who hired loggers who committed a timber trespass. The plaintiff did not initially sue the loggers; rather, the defendant joined the loggers as third party defendants. *Hill*, 110 Wn. App. at 400-01. Since there was no question that the defendant had engaged the loggers to do the cutting, the court entered judgement in favor of the plaintiffs against him. *Id.*, at 401. The court never discounted any agency relationship between the defendants and the loggers, but rather bifurcated the agency issues between the defendants and the loggers for a different suit. *Id.*, at 404.

In summary, whatever potential contribution rights Boone and G & J Logging might have had were not preserved, because (1) there has been no adjudication of comparative fault and (2) the settling parties failed to obtain adjudication of reasonableness per RCW 4.22.060. The settled Co-Defendants are now discharged and released. Porter cannot resurrect a potential claim for more damages based on Kirkendoll's hypothetical "intentional" conduct when he has collected $125,000, signed a dismissal order as to the loggers and now forever deprived the Court and Kirkendoll of any opportunity to have the issue adjudicated.

4.11 The Trial Court did not abuse its discretion in precluding expert testimony by Galen Wright, when such expert was not timely disclosed; where the Plaintiffs had not disclosed any of Mr. Wright's proposed opinions; and where such testimony would have been cumulative.

The Trial Court did not abuse its discretion in excluding the expert testimony of Galen Wright. Whether or not to admit or exclude expert testimony is discretionary with the Trial Court. *Stevens v. Gordon*, 118 Wn. App. 43, 51, 74 P.3d 653 (2003). The appellate court will not find abuse of discretion unless no reasonable person would take the position adopted by the Trial Court. *Id.* Any question of what issues, witnesses and evidence may be added is governed by the civil rules and remains in the discretion of the trial court, with unfair surprise and timeliness being factors properly considered by the Court in exercising this discretion. *Id.*, citing *Wilson v. Horsely*, 137 Wn.2d 500, 506-07, 974 P.2d 316 (1999). In the present instance, the Trial Court acted well within its discretion to reject Porter's claims that he was prejudiced by not being able to present rebuttal testimony through an entirely new arborist expert. The deposition of Porter's experts, Patrick See (arborist) and Jeffrey Glander (landscape architect) were set for October 6, 2016. (CP 371) Kirkendoll's counsel forwarded the working papers of Michael Jackson, Kirkendoll's expert to Porter's counsel prior to the deposition along with an email stating that "if this [the timing of production of Mr. Jackson's working papers] in any

way impacts your experts' ability to testify at their depositions tomorrow, please let me know right away so we can attempt to work something out." (CP 376) Porter's counsel allowed the depositions to go forward, and in fact his experts testified that they had received an reviewed the working papers prior to the depositions. (CP 372) The Court did not err in excluding Mr. Wright.

4.12 The released Co-Defendants neither had, nor could they have assigned, any claim for equitable entitlement to attorneys' fees under the "ABC Rule."

Porter's claim for attorneys' fees and costs under the "ABC Rule" theory of equitable indemnity fails both on the Appellants' own pleadings and on the evidence in the record. Absent a contract, statute or recognized ground of equity, attorneys' fees will not be awarded as part of the costs of litigation. *Pennsylvania Life Ins. Co. v. Dep't. of Employment Secc.*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). One of the recognized equitable grounds under which fees may be awarded is the theory of equitable and indemnity, or the "ABC Rule." Under this theory, where the acts or omissions of a party to an agreement or event have exposed one to litigation by third persons—that is, to suit by third persons is not connected with the initial transaction or event—the allowance of attorneys' fees may be a proper element of consequential damages. *Armstrong Const. Co. v. Thomson*, 64 Wn.2d 191, 195, 390

P.2d 976 (1964). However, a party may not recover attorneys' fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C. *Tradewell Group, Inc. v. Mavis,* 71 Wn. App. 120, 857 P.2d 1053 (1993). See also *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.,* 126 Wn. App. 352, 110 P.3d, 145 (2005).

Here, the allegedly wrongful conduct on the part of Kirkendoll is alleged to be his incorrect designation of which trees to cut. For this to support an award of attorneys' fees under the "ABC Rule" the Plaintiffs would have to demonstrate that Pepper's action was the only basis on which they got sued. The fallacy of this argument is demonstrated by the fact that Porter sued all defendants jointly and severally, alleging a concerted timber trespass producing an indivisible harm.[14] The "ABC" Rule is strictly an equitable remedy. Equitable remedies are extraordinary forms of relief, available solely when and aggrieved party lacks an adequate remedy at law. *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 314 P.3d 729 (2013). Here the Loggers had legal remedies for contribution under RCW 4.22, so they may not avail themselves of equity.

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[14] One only needs to consider a hypothetical situation in which Pepper Kirkendoll had disappeared or filed for bankruptcy. Porter would nevertheless have had independent grounds for pursuing the Co-Defendants. This negates the potential applicability of the "ABC Rule."

V. CONCLUSION

The Co-Defendants were joint tort-feasors, who breached a joint duty. The harm caused by the breach of duty was indivisible. Therefore, such tort-feasors were each liable for the entire harm caused, and Porter sued each for the entire harm caused. Respondeat superior applied to Kirkendoll and the Loggers, because he directed their critical action: which trees to cut. Under the principles in *Glover*, Porter's settlement with and release of the Loggers operated to extinguish the remainder of his claims against Kirkendoll. Porter retained no right to prosecute "direct" liability claims against Kirkendoll for the simple reason that he had no claims for breach of duty distinct from the underlying released claims, which was solely based upon RCW 64.12.030.

There is no factual, legal or logical basis for recharacterizing Kirkendoll's actions as "intentional" in order to sidestep the mandates of RCW 4.22. In any event, whether Kirkendoll, the Loggers or their subagents acted negligently or willfully is rendered moot by Porter's settlement with and release of the Loggers.

Similarly, Porter's argument that the legislature imputed an "intentional" mental state into RCW 61.12.030 ignores the legislative history of the statute, and would render meaningless the exculpatory function of RCW 61.12.040. The waste statute, RCW 4.24.630, does not

apply to this case by its plain language, which states that the waste statute does not apply in any case where a remedy is available under the timber trespass statute.

Finally, since Porter and the Loggers failed to obtain a reasonableness adjudication of their settlement pursuant to RCW 4.22.070, their settlement resulted in an extinguishment of any contribution rights they would have had against Kirkendoll. Pursuant to RCW 4.22.040(3), the Loggers had no common-law indemnity rights to assign. They had no rights to equitable indemnity, including rights to indemnity for attorneys' fees under the equitable "ABC Rule," because they had legal remedies under RCW 4.22, and because they were sued under the timber trespass statute for their own actions – not solely because of the actions of their Co-Defendant Pepper Kirkendoll. In summary, the Trial Court correctly understood the facts, and applied the proper legal standards in dismissing all of Porter's claims. This Court should affirm summary judgment.

DATED this 24th day of May, 2017.

WORTH LAW GROUP, P.S.

for

J. Michael Morgan, WSBA No. 18404
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and am competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below.

Mr. Jon E. Cushman Mr. Kevin Hochhalter Cushman Law Offices, P.S. 924 Capitol Way South Olympia, WA 98501 joncushman@cushmanlaw.com kevinhochhalter@cushmanlaw.com	☐ Via First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☒ Electronically via email ☐ Facsimile

DATED this 24th day of May, 2017.

Andrea Nielsen, Paralegal
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