

FILED
SUPREME COURT
STATE OF WASHINGTON
11/27/2018 11:09 AM
BY SUSAN L. CARLSON
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Supreme Court No. 96214-6
COA No. 51615-2-II

**THE SUPREME COURT
OF THE STATE OF WASHINGTON**

JERRY PORTER and KAREN ZIMMER

Appellants,

v.

PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL

Respondents

**PEPPER E. KIRKENDOLL'S REPLY TO
ANSWER TO MOTION FOR DISCRETIONARY REVIEW**

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONER/CITATION TO COURT OF APPEALS DECISION.....1

II. ISSUE RAISED BY PORTER’S ANSWER TO PETITION FOR REVIEW.....1

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT.....2

 A. The Court of Appeals correctly determined the waste statute does not apply to the instant case based upon the plain language of RCW 64.12.030 and RCW 4.24.630. There is no ambiguity in the plain language of either statute that requires or warrants statutory construction.2

 B. *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1226 (2015) is controlling and disposes of Porter’s arguments.....5

V. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

<i>Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.</i> , 182 Wn.2d 342, 350, 340 P.3d 849 (2015)	4-5
<i>Birchler v. Castello Land Co.</i> , 133 Wn.2d 106, 115, 942 P.2d 968 (1997)	3
<i>Bloedel Timberlands Devel., Inc. v. Timber Industries, Inc.</i> , 28 Wn. App. 669, 626 P.2d 30 (1981)	3
<i>City of Snohomish v. Joslin</i> , 9 Wn. App. 495, 513 P.2d 293 (1973)	5
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	5
<i>Gunn v. Riely</i> , 185 Wn. App. 517, 344 P.3d 1226 (2015)	1, 5-8
<i>Jongeward v. BNSF Ry.</i> , 174 Wn.2d 586, 592, 278 P.3d 157 (2012)	6
<i>NW Animal Rights Network v. State</i> , 158 Wn. App. 237, 242 P.3d 891 (2010)	7
<i>State v. Bolar</i> , 129 Wn.2d 361, 917 P.2d 125 (1996)	5
<i>State v. Donaghe</i> , 172 Wn.2d 253, 256 P.3d 1171 (2011)	4
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005)	4
<i>State v. McCraw</i> , 127 Wn.2d 281, 898 P.2d 838 (1995)	5

Stone v. Chelan County Sheriff's Dep't,
110 Wn.2d 806, 756 P.2d 736 (1988) 4

Tommy P. v. Board of County Comm'rs,
97 Wn.2d 385, 645 P.2d 697 (1982) 4

Statutes/ Rules

RCW 4.24.630..... Passim
RCW 4.24.630(1)..... 3-4
RCW 4.24.630(2) 4
RCW 64.12.030..... Passim

I. IDENTITY OF PETITIONER/CITATION TO COURT OF APPEALS DECISION

On August 14, 2018, Pepper E. Kirkendoll (hereinafter “Kirkendoll”), Defendant and Respondent below, filed a Petition for Discretionary Review asking the Supreme Court to review the Court of Appeals’ published decision, *Jerry Porter, et ux., et al., v. Pepper E. Kirkendoll, et ux., et al.*, Court of Appeals Case No. 49819-7-II (published decision issued July 17, 2018). On November 14, 2018, Respondents Jerry Porter and Karen Zimmer filed their Answer to Petition for Review, addressing the issues raised in the Petition for Discretionary Review, and raising a new issue of whether the Court of Appeals erred in its interpretation of RCW 4.24.630. This Reply is limited to only the new issue raised in Porter’s answer.

II. NEW ISSUES RAISED BY ANSWER TO PETITION FOR REVIEW

- A. Whether the language of RCW 4.24.630, which precludes remedies under the waste statute if the plaintiff has a remedy under the timber trespass statute, RCW 64.12.030, is sufficiently clear and unambiguous that application of the rules of statutory construction is inappropriate and unnecessary?
- B. Whether *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1226 (2015)¹ controls and disposes of Porter’s claim that the two statutes are in conflict?

1. *Review denied*, 183 Wn.2d 1004, 349 P.3d 857 (2015)

- C. Whether the Court of Appeals correctly held that RCW 4.24.630 is inapplicable to this case?

III. STATEMENT OF THE CASE

For purposes of this reply, Kirkendoll relies upon the Statement of the Case contained in his previously filed Motion for Discretionary Review.

IV. ARGUMENT

A. The Court of Appeals correctly determined the waste statute does not apply to the instant case based upon the plain language of RCW 64.12.030 and RCW 4.24.630. There is no ambiguity in the plain language of either statute that requires or warrants statutory construction.

Porter attempts to inject ambiguity into RCW 64.12.030 (the timber trespass statute) and RCW 4.24.630 (the waste statute) where none exists. He argues that because the timber trespass statute references “trees” and the waste statute references “timber” somehow the waste statute is the general default rule, with the timber trespass statute representing the exception. This false dichotomy fails to recognize that the two statutes are independent, that they harmonize and that they address different situations.

RCW 64.12.030, which has been in effect with the same basic language for over a century, is limited to trespasses directed to timber, trees and shrubs:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree . . . timber, or shrub on the land of another person . . . without lawful authority, in an action by the person . . . against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

Citing *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 115, 942 P.2d 968 (1997), the Court of Appeals below held that timber trespass is deemed an intentional tort. Slip op. at 10. Available damages in a timber trespass case include stumpage value, *Bloedel Timberlands Devel., Inc. v. Timber Industries, Inc.*, 28 Wn. App. 669, 626 P.2d 30 (1981); emotional distress damages, see *Birchler, supra*;² diminished property value, *Id.*; and lost production value in the case of fruit trees, *Sparks v. Douglas County*, 39 Wn. App. 714, 695 P.2d 588 (1985).

The waste statute, RCW 4.24.630, covers intentional trespass involving damages to valuable property of all types – not just trees or shrubs - and sets forth a distinct damages scheme, including statutory liability for investigative and litigation costs, including reasonable attorney's fees:

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

2. Aff'd 133 Wn.2d 106, 942 P.2d 968 (1997).

For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

RCW 4.24.630(1). Subsection (2) of the statute states:

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

The court's primary objective is to determine and to apply the intent of the legislature. *State v. Donaghe*, 172 Wn.2d 253, 261-62, 256 P.3d 1171 (2011) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Courts must interpret and construe statutes so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). Legislative intent is derived from the statute's plain language, "considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015) (citing *Dep't of*

Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Courts do not construe unambiguous statutes. “[T]he court should assume that the legislature means exactly what it says. Plain words do not require construction.” *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995).³ Here, the legislature’s intent as to the applicability of RCW 64.12.030 and RCW 4.24.630 is so clear that no statutory construction is necessary. If the trespass and damage was directed to trees or shrubs, then RCW 64.12.030 applies. If the trespass was intentional and directed to some other type of property, then RCW 4.24.060 applies.

B. *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1226 (2015) is controlling and disposes of Porter’s arguments.

Porter misreads *Gunn v. Riely*, which controls. Defendant Riely hired a well digging company to build a well on Riely’s property. Riely directed the contractor to use a path over Gunn’s property over which Riely knew there was no easement. His contractor cut down of 107 of Gunn’s trees over the unauthorized access to make room for the well digging equipment. *Gunn*, 185 Wn. App. at 520. The trial court awarded damages to Gunn under the waste statute on the basis that while the timber trespass statute could apply, it provided for an inadequate award of damages. *Id.*, at 524. Division II reversed, holding that the adequacy of

3. Quoting *City of Snohomish v. Joslin*, 9 Wn. App. 495, 498, 513 P.2d 293 (1973), superseded by statute as cited in *State v. Bolar*, 129 Wn.2d 361, 917 P.2d 125 (1996).

damages is not the determining factor as to which statute applies, noting that since the legislature enacted RCW 4.24.630 in 1994, not a single reported decision has applied the waste statute to an RCW 64.12.030 timber trespass case:

In each of [Washington's] cases construing the statute over the last 142 years, the defendant entered the plaintiff's property and committed a direct trespass against the plaintiff's timber, trees, or shrubs, causing immediate, not collateral, injury. Examples include . . . where the defendant encroached on plaintiffs' properties and removed trees and shrubbery; . . . where the defendants cut a swath on plaintiff's property, destroyed trees, brush and shrubs, and denuded the strip; . . . where the defendants entered a disputed area and destroyed trees; . . . where the defendant trespassed upon plaintiff's land and removed standing timber; . . . where the defendants entered plaintiff's land, cut down and converted into shingle bolts and removed plaintiff's cedar trees; . . . where the defendant entered a disputed area and destroyed trees and plants.

. . .

The cases interpreting RCW 64.12.030 are clear that it governs direct trespass against a plaintiff's timber, trees, or shrubs. . . . Here, the dispute arises from the Rielys cutting 107 trees on Gunn's property. . . . The damages awarded were for the value and cleanup of the cut trees, surveying costs related to the cut trees, court costs, and attorney fees. Beyond the value of the trees, there was no evidence or damages awarded related to waste or damage to the land. The damage fits squarely within the bounds of the timber trespass statute. **Thus, the timber trespass statute provides liability for damages in this case and precludes application of the waste statute.**

Id., 185 Wn. App. at 526-27⁴

4. Emphasis added; quoting *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012)(Internal citations omitted.)

Gunn is directly on point and disposes of Porter's position.

Although Kirkendoll denies he intentionally trespassed, his actions and those of the loggers were directed solely at trees, not some other form of property. In all material aspects, Porter's claims are indistinguishable from those made by the plaintiff in *Gunn*, which stands for the position that the critical inquiry concerns the type of property to which the trespass and damage was directed.

It is not the court's role to second guess the wisdom of the legislature as to why the statutes are worded as they are. *NW Animal Rights Network v. State*, 158 Wn. App. 237, 245, 242 P.3d 891 (2010). Nor is it useful for this Court to postulate hypothetical situations in which "timber" might be removed in connection with a waste claim under RCW 4.24.630. Here it is undisputed the instant case arose purely out of a logging operation. Besides damages for the trees (either stumpage or as determined by the "trunk formula method"), Porter claims he suffered emotional distress and damages for restoration of damages to the site. All of these categories of damages fall squarely within the purview of the timber trespass statute, as upheld by decades of case law, and preclude application of the waste statute.

V. CONCLUSION

The legislative intent of RCW 4.24.630(2) is clear: if the plaintiff has a remedy under RCW 64.12.030 then he does not have a remedy under RCW 4.24.630. *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1226 (2015), of which this Court has previously denied review, disposes of Porter's contentions. The Court of Appeals applied the correct two-step statutory analysis by first determining that RCW 64.12.030 applies, and second, by concluding that the waste statute does not apply. Both statutes are independent and harmonize, and are so clearly written that statutory construction is inappropriate and unnecessary. In conclusion, this Court should deny review of Porter's new issue.

DATED this 27 day of November, 2018.

J. MICHAEL MORGAN, PLLC



J. Michael Morgan, WSBA No. 18404
Attorney for Pepper and Clarice Kirkendoll

CERTIFICATE OF SERVICE

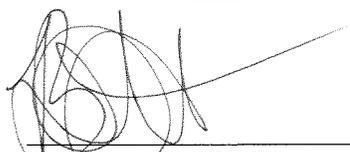
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and am competent to be a witness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

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

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DATED this 27 day of November, 2018.



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November 27, 2018 - 11:09 AM

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Filed with Court: Supreme Court
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Superior Court Case Number: 14-2-00783-1

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