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COA No. 49819-7-II

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

JERRY PORTER and KAREN ZIMMER

Appellants,

v.

PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL

Respondents

**SECOND SUPPLEMENTAL BRIEF OF PEPPER E.
KIRKENDOLL IN SUPPORT OF MOTION FOR
DISCRETIONARY REVIEW**

J. MICHAEL MORGAN, PLLC
J. Michael Morgan
1800 Cooper Point Rd. SW
Olympia, WA 98502
(360) 292-7501
WSBA No. 18404

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Senate Journal, 53d Leg., Reg. Sess., at 154 (Wash. 1994) 3-4

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American Heritage Dictionary (1979 New College Edition) at 458 2

I. INTRODUCTION

Pepper E. Kirkendoll (hereinafter “Kirkendoll”) submits this Second Supplemental Brief pursuant to the Court’s April 15, 2019 order. The purpose of this brief is to address the statutory arguments contained in Section 4.2 of Porter’s Answer to Petition for Review.

II. QUESTIONS PRESENTED

A. Whether the legislature intended RCW 64.12.030 and .040 to exclusively apply to all cases where a trespass is directed toward trees or shrubs?

B. Whether the legislature’s inclusion of the words “removes timber” in the first sentence of RCW 4.24.630 creates a distinct cause of action for waste where the trespass is primarily directed to the land, structures, personal property or valuable materials thereon?

C. Whether the Court of Appeals in its decision below correctly applied the analysis of *Gunn v. Riley*, 185 Wn. App. 517, 344 P.3d 1225 (2015),¹ which applies RCW 64.12.030 in all cases where the trespass is directed toward a plaintiff’s timber, trees or shrubs, as opposed to the land itself or structures or property thereon?

III. STATEMENT OF FACTS

See Statement of Facts contained in Petition for Review.

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

IV. ANALYSIS

A. RCW 4.24.630 and RCW 64.12.030 create separate statutory actions, neither of which is a subset of the other.

Porter begins from the false premise that RCW 4.24.630 should be read to state the general rule in every case where one “removes timber,” with RCW 64.12.030 being the *exception* to that general rule.² RCW 4.24.630(2) *excludes* from the waste statute “any case where liability for damages is provided under RCW 64.12.030.” “Exclude” means to “omit or leave out.”³ Thus, if an “action for damages” is available under the timber trespass statute, the waste statute does not apply.

Neither the legislative history nor the case law supports the type of linking of the two statutes that Porter advances. The timber trespass statute has been in existence since the territorial legislature enacted it in 1869 to (1) punish a voluntary offender, (2) provide treble damages, and (3) “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.” Laws of Wash. Terr. 1869, ch. XLVIII, §556, 143; *Guay v. Wash. Natural Gas Co.*, 62 Wn.2d 473, 476, 383 P.2d 296 (1963). Its relevant language has remained constant for over 150 years. The timber trespass statute has never

² “Exception” is defined as “a case that does not follow the general rules, principles or the like.” American Heritage Dictionary (1979 New College Edition) at 457.

³ American Heritage Dictionary (1979 New College Edition) at 458.

contained any provision for the plaintiff to recover investigative costs, reasonable attorneys' fees or other litigation-related costs.

The waste statute was enacted in 1994. Absent an indication that the legislature intended to overrule prior law, new legislation is presumed to be consistent with prior judicial decisions. *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984); *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983); *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982); *Green Mt. Sch. Dist. 103 v. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960). The legislature is therefore presumed to have been aware of over 125 years of judicial decisions construing the timber trespass statute.

RCW 4.24.630 was designed to address a different type of harm than the timber trespass statute: trespass with removal of crops or other valuable material – including timber – and damage to land, personal property or other improvements thereon. There is some evidence of legislative intent in the records of the Senate debate in the 1994 Legislative Session, in which Senator Owen explained that:

[T]he idea is to deal with the tremendous amount of damage that we are having with people coming in and shooting up signs, shooting up restrooms. In the case of forest lands, shooting up trees, taking four-wheel drives and running them all over [agricultural] land and ripping up the ground. You know a variety

of things like that is really what we are getting after in this situation.⁴

Thus, as is explained in the following section, the critical factor in determining which statute applies is the physical target or focus of the trespass, *i.e.*, trees and shrubs versus the land itself or other valuable materials, structures or personal property on the land.

B. The physical target or focus of the trespass determines which statute applies.

The holding of Division II of the Court of Appeals in *Gunn* states the correct approach to analyzing the applicability of the two statutes, which is a strict application of timber trespass statute where the trespass is directed at the Plaintiff's trees. The correctness of this approach is verified by considering two hypothetical fact patterns: (1) where an owner logs his property and accidentally takes some of his neighbor's trees due to mistaken boundary lines, and (2) a situation where a person goes onto the plaintiff's land, steals minerals, damages the land, and removes some timber in the process. An action under the waste statute would be barred in the first hypothetical by RCW 4.24.630(2), because "liability for damages is provided under RCW 64.12.030." In the second hypothetical, no "action for damages is provided under RCW 64.12.030," because the

⁴ Senate Journal, 53d Leg., Reg. Sess., at 154 (Wash. 1994); *Gunn*, 185 Wn. App. at 525.

timber trespass statute does not extend to injuries primarily to the land or to the theft of valuable property other than trees. Any other reading of the statutes leads to absurd consequences, such as the interpretation proposed by Porter.

Under Porter's interpretation, every case involving the removal of timber would be presumed to be, as part of the threshold inquiry, a waste case arising under RCW 4.24.630, with the additional remedies of RCW 4.24.630 (*e.g.*, attorney's fees and expert costs, applying by default to "[e]very person who goes onto the land of another and who removes timber." Porter would then have the court graft into this analysis at some point (Porter does not specify exactly where) the language, "*except to the extent that the statute duplicates remedies already available under RCW 64.12.030.*"⁵ The problem is, even if one could figure out what Porter's proposed language means or how to put it in practice, no court could do so without impermissibly reading language into the statute that the legislature never put there. Courts are required to look to the plain language of the statute in order to give effect to the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). Where a statute is clear on its face, its meaning must be derived from the language of the statute alone. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 1585 (2006). Courts

⁵ Answer to Petition for Review Page 17.

may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute, *Killian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

Porter's proposal to maintain the expanded remedies of the waste case while importing parts of RCW 64.12.040 cannot get past the first sentence of RCW 4.24.630(1), which provides for automatic trebling of damages for removal of timber, minerals, crops and other valuable materials, without any exculpatory mechanism. Porter proposes to import an exculpatory mechanism via the mitigating circumstances provisions of RCW 64.12.040. However, the plain language of both statutes create an all-or-nothing exclusion: once the timber trespass statute applies, the waste statute does not.

RCW 64.12.030 creates a unique action under a completely separate statutory framework. Its language could not be clearer: if a defendant cuts, girdles, injures or carries off a tree or shrub, the legislature created "***an action*** by the person [*i.e.*, a timber trespass action] . . . against the person committing the trespasses" in which "any judgment for the plaintiff shall be treble the amount of damages claimed or assessed." RCW 64.12.030.⁶ The mitigating circumstances in RCW 64.12.040 are only available "if upon trial of ***such action*** [*i.e.*, the timber trespass

⁶ Emphasis added.

action] it shall appear that the trespass was casual or involuntary” or that the other listed mitigating circumstances apply.⁷ Nowhere does the timber trespass statute mention the waste statute, which can have no effect or bearing on the RCW 64.12.030 analysis or the burdens of proof at the timber trespass trial.

In summary, there is no support in either the statutory language, the legislative history or the case law for the notion that by including “removes timber” in RCW 4.24.630 the legislature intended to expand remedies of the timber trespass statute to include those available under the waste statute. If such expansion is logical and appropriate, then it is the job of the legislature to change the statutory language. The legislature has not done so, and there is no reason to believe it ever will. *Gunn* was decided in 2015. The 2016 legislature is presumed to have been aware of *Gunn*’s holding. Absent a legislative change, this Court must presume that the legislature approves of *Gunn* court’s interpretation of both statutes. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004).

V. CONCLUSION

The correct reading of RCW 4.24.630(2) is to exclude from its operation every case in which an action for damages is available under

⁷ Emphasis added.

RCW 64.12.040. The Court of Appeals in *Gunn* applied the correct analysis by holding that the timber trespass statute exclusively applies where the trespass is directed toward timber, trees or shrubs, as opposed to the land or valuable property or improvements thereon. If, on the other hand, the trespass is primarily directed at the land and valuable property thereon other than timber, then the waste statute strictly applies. This is because there can be no “action for damages” for anything other than trees under the timber trespass statute. This Court should reject Porter’s invitation to graft parts of the two statutes together to add language and create absurd results that the legislature never intended. In conclusion, this Court should affirm the Court of Appeals decision affirming the trial court’s dismissal of Porter’s waste claims under RCW 4.24.630.

DATED this 19 day of April, 2019.

J. MICHAEL MORGAN, PLLC



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

CERTIFICATE OF SERVICE

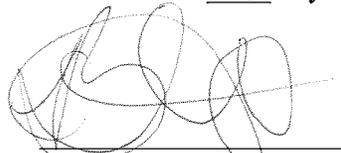
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and am competent to be a witness 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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Mr. Kevin Hochhalter Olympia Appeals PLLC 4570 Avery Lane SE Suite 217 Lacey, WA 98503 kevin@olympicappeals.com	<input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
--	---

DATED this 19 day of April, 2019.



Brennan Morgan, Paralegal
brennan@jmmorganlaw.com

J. MICHAEL MORGAN, PLLC

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