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**Supreme Court
of the State of Washington**

Jerry Porter and Karen Zimmer,

Respondents,

v.

**Pepper E. Kirkendoll and
Clarice N. Kirkendoll,**

Petitioners.

Supplemental Brief of Respondents Porter and Zimmer

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1. Introduction

The issues in this case relating to agency and vicarious liability in timber trespass cases are well-settled:

- A person who directs another to commit timber trespass is personally, directly liable for the trespass. Kirkendoll admitted that he directed the loggers to cut Porter's trees. Kirkendoll was directly liable.
- Vicarious liability is only imposed where the principal has control over the manner of the agent's performance as opposed to merely the scope of the performance. Kirkendoll did not control the manner of the cutting, only the scope of which trees to cut. This was not a vicarious liability case.
- Release of a solvent agent also releases the vicarious liability of the principal but has no effect on the principal's direct liability for his own culpable acts. Porter's settlement with the loggers did not release Kirkendoll's direct liability for ordering the removal of Porter's trees.

The indemnity issue boils down to a basic principle of summary judgment: Summary judgment must be denied if there are genuine issues of material fact in dispute. The second element of the indemnity claim—the cause of the loggers being dragged into litigation with Porter—was a material fact in dispute. The Court of Appeals was correct to remand this issue for resolution at trial.

The most interesting issue is the conflict within the waste statute. The legislature intentionally applied the additional remedies of the waste statute to “every person who ... removes timber” from the land of another. Yet the legislature also crafted an exception, stating the statute did not apply to cases where liability was provided under the timber trespass statute. Unfortunately, because “every person who ... removes timber” is also always necessarily liable for timber trespass (“carry off any tree”), the exception, if taken at face value, entirely eviscerates the meaning of the first general provision of the statute. Surely the legislature meant the “removes timber” language to have some effect. This Court should harmonize the conflicting provisions of the waste statute and apply its additional remedies to cases involving removal of timber from land of another.

2. Issues Presented for Review

1. A person who directs another to commit a trespass is personally, directly liable for the trespass. Kirkendoll told his loggers to cut Porter’s trees. Is Kirkendoll directly liable for the removal of the trees?
2. A principal is vicariously liable for negligent acts of an agent within the scope of the agent’s duties if the principal had control over the manner of the agent’s performance. Kirkendoll only controlled the scope of the contract, not the manner of performance. Did Kirkendoll fail to establish that there was any vicarious liability?

3. A principal's vicarious liability for the acts of the agent is released by operation of law when a plaintiff releases a solvent agent. Kirkendoll's liability in this case was direct, not vicarious. Does Porter still have a viable claim for Kirkendoll's direct liability?
4. Under the ABC Rule, party B is entitled to indemnity from party A if the only reason for B's involvement in litigation with C was an act of misconduct by A toward B. Here, the only reason the loggers cut Porter's trees was because Kirkendoll misrepresented to the loggers that Porter's trees were actually his. Do the loggers have a viable indemnity claim against Kirkendoll?
5. The waste statute, RCW 4.24.630, states that it applies to "every person who ... removes timber" from land of another. Defendants removed timber from Porter's land. Does the waste statute apply?

3. Statement of the Case

The facts of the case relevant to the issues on review are sufficiently set forth in the Published Opinion of the Court of Appeals, slip op. at 2-4, 7-8, and in Porter's Answer to Petition for Review, at 1-5.

In short, Kirkendoll directed his loggers to harvest trees from Porter's property. Porter sued Kirkendoll and the loggers under the timber trespass and waste statutes (RCW 64.12.030 and RCW 4.24.630, respectively). The loggers made cross-claims against Kirkendoll for contribution or indemnity. Before trial, Porter settled with the loggers, obtaining an assignment of the loggers' indemnity claims against Kirkendoll.

On summary judgment, the trial court dismissed all claims against Kirkendoll. The Court of Appeals reversed the dismissal of Porter's timber trespass and indemnity claims but affirmed dismissal of the waste claim.

Kirkendoll sought review in this Court on issues relating to agency, vicarious liability, and indemnity. Porter raised the waste statute as an additional issue in his answer. This Court granted review without limiting the issues.

4. Argument

The issues raised in Kirkendoll's petition are well-settled. They will be addressed only briefly in this Supplemental Brief. More detail can be found in Porter's Answer to Petition for Review. Part 4.2 of this brief will show that Kirkendoll is directly liable for ordering the loggers to remove Porter's trees. Part 4.3 will explain that because Kirkendoll did not control the manner of the loggers' performance, this is not a case of vicarious liability. Part 4.4 demonstrates the result: because Kirkendoll's liability is direct, not vicarious, his liability is not released by Porter's settlement with the loggers.

Part 4.5 shows that summary judgment dismissal of the indemnity claim was improper because there was a genuine issue of material fact on at least one key element of the claim—

whether the loggers were subjected to litigation because of Kirkendoll's misrepresentation of who owned the trees.

Part 4.6 addresses the waste statute in depth. It shows that by enacting the waste statute, the legislature created new remedies against “every person who ... removes timber” or other valuable property from land of another. However, the legislature also included an exception for timber trespass, which, if taken at face value, renders the “removes timber” language entirely meaningless. Because courts cannot read “removes timber” out of the statute and must give it some meaning—especially considering the legislative history behind that language—this Court should harmonize the statutory conflict by applying the waste statute's additional remedies to “every person who ... removes timber,” while preserving existing remedies under timber trespass.

4.1 This Court reviews summary judgment de novo.

This case stems from the trial court's dismissal of Porter's claims on summary judgment. This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). Summary judgment is only proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). “A material

fact is one that affects the outcome of the litigation.” *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). The court views the facts in a light favorable to the nonmoving party. *Failla*, 181 Wn.2d at 649.

4.2 Kirkendoll is directly liable for ordering the loggers to remove Porter’s trees.

On the issue of the nature of Kirkendoll’s liability for ordering the loggers to remove Porter’s trees, Porter refers the Court to his arguments in his Answer to Petition for Review, at 6-9 (citing, *e.g.*, *Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495 (2002) (holding Cox liable for ordering the loggers to cut trees); *Ventoza v. Anderson*, 14 Wn. App. 882, 895-96, 545 P.2d 1219 (1976) (holding that an employer is personally liable when he directs his agent to commit timber trespass)).

“Where a trespass is committed on the property of another by the advice or direction of a defendant, the relationship between the immediate agent of the wrong and the person sought to be charged is unimportant. ... [The principal] is not entitled to nonliability ... in such circumstances. A trespass will have occurred because of the culpable misfeasance of the [principal].” *Ventoza*, 14 Wn. App. at 896.

Kirkendoll directed the loggers to cut Porter’s trees. CP 5, 53, 186. Kirkendoll is directly, personally liable for the trespass.

4.3 This is not a case of vicarious liability because Kirkendoll did not control the manner of the loggers' performance, only the scope of which trees to cut.

On the issue of vicarious liability, Porter directs the court to the Answer to Petition for Review at 6-7, 9-11 (citing, *e.g.*, David K. DeWolf and Keller W. Allen, *Tort Law and Practice*, 16 Wash. Prac. § 4:1 (2013) (in vicarious liability, an otherwise faultless principal is held liable for the negligence of an agent under his control); *Bloedel Timberlands Dev. v. Timber Indus.*, 28 Wn. App. 669, 626 P.2d 30 (1981) (“control establishes agency only if the principal controls the manner of performance,” not merely conformity with the contract)).

Kirkendoll's only claim of control was that he told the loggers which trees to cut. This is merely establishing the scope of his contract, not controlling the manner of the loggers' performance. Kirkendoll is not an otherwise innocent principal being held vicariously liable for the loggers' acts as a matter of public policy. He is directly liable for his own culpable actions in directing the loggers to cut Porter's trees.

4.4 Because Kirkendoll's liability is direct, not vicarious, it was not released by Porter's settlement with the loggers.

On the issue of release of a principal's vicarious liability upon release of the agent, Porter directs the Court to Answer to Petition for Review at 6-7, 11-13 (citing, *e.g.*, *Seattle W. Indus. v.*

David A. Mowat Co., 110 Wn.2d 1, 5, 750 P.2d 245 (1988) (holding that claims of direct liability of a principal are not affected by release of an agent); *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983) (vicarious claims were released by plaintiff's settlement with the agents, but direct claims against the hospital remained for trial)).

Porter's claims against Kirkendoll have always been direct, not vicarious. *See* CP 136 ("Kirkendoll is the only party asserting an agency relationship"). This direct liability is not released by Porter's settlement with the loggers. Kirkendoll is liable for 100 percent of Porter's damages, less an offset for the amount of the settlement. A trial is necessary to determine the amount of those damages.

4.5 Genuine issues of material fact precluded dismissal of the indemnity claims on summary judgment.

Porter asserted, by assignment, the loggers' claims against Kirkendoll for common law indemnity, seeking damages paid by the loggers in the settlement and attorney's fees and litigation expenses incurred by the loggers in defending against Porter. Porter's arguments on this issue are set forth in Answer to Petition for Review at 14-15. Even if Porter must prove that the loggers' own conduct did not cause the litigation, the Court of Appeals was correct to reverse and remand for trial.

Kirkendoll himself argued to the trial court that it was possible for a jury to conclude from the evidence that the loggers were not at fault. *E.g.*, RP 37:16-18 (suggesting that a jury could find that the loggers did not breach any independent duty to verify the property boundary). Kirkendoll admitted that he caused the loggers to cut Porter's trees. CP 5. One of the loggers testified that Kirkendoll was 100 percent at fault for the trespass. CP 139-40. But for Kirkendoll's misrepresentation, the loggers would not have cut Porter's trees and there would have been no litigation.

Because there is evidence that supports every element of the indemnity claims, it was improper for the trial court to dismiss the claims on summary judgment. The Court of Appeals was correct to reverse and remand for trial.

4.6 This Court should reverse dismissal of Porter's claim under the waste statute because the legislature intended to provide additional remedies against "every person who ... removes timber" from land of another.

Porter argued before the trial court and again at the Court of Appeals that Kirkendoll is liable under the waste statute, RCW 4.24.630. Br. of App. 33-36. Porter drew the court's attention to a conflict in the language of the general provisions of the waste statute in subsection (1) and the exception provided

in subsection (2). Br. of App. 35-36; Reply Br. of App. 21. Porter raised the issue again in Answer to Pet. for Rev. at 16-19.

The sections below will go into more detail on this issue. When the legislature enacted the waste statute, it created new remedies against “every person who ... removes timber” from land of another. However, the legislature also included an exception for timber trespass, which, if taken at face value, renders the “removes timber” language entirely meaningless. Because courts cannot read “removes timber” out of the statute and must give it some meaning—especially considering the legislative history behind that language—this Court should harmonize the statutory conflict by applying the waste statute’s additional remedies to “every person who ... removes timber,” while preserving existing remedies under timber trespass.

4.6.1 When the legislature enacted the waste statute, it created additional remedies applicable to “every person who ... removes timber” from land of another.

Under the first subsection of the waste statute, liability for triple damages, costs, and attorney’s fees applies to “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.” RCW 4.24.630(1). Because the statutory language is disjunctive, it applies if any one of the prongs is met. The first prong, “removes timber, crops, minerals, or other similar valuable property from the land” is also disjunctive, meaning that removal of any one thing on the list subjects the person to liability. This plain language applies the remedies of the waste statute to a person who does nothing more than “removes timber” from land of another.

The remedies provided under the waste statute are more expansive than the triple damage remedy of the timber trespass statute. Under the waste statute, a person “is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.” RCW 4.24.630(1). The damages that must be tripled, “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.” RCW 4.24.630(1). “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).

In summary, a person who removes timber from land of another is liable for 1) triple the market value of the timber removed; 2) triple the cost of restoration of the land; 3) investigative costs; 4) reasonable attorney’s fees; and 5) other

litigation-related costs. Investigative and litigation costs would include, for example, the cost of an arborist's investigation and expert testimony on damages.

The plain meaning of the first prong of the waste statute is straightforward: "Every person who goes onto the land of another and who removes timber ... is liable to the injured party" for all the remedies set forth in the statute. Surely the legislature intended this language—the very first provision in the statute—to have meaning.

4.6.2 The statute's exception for liability for timber trespass, if taken at face value, renders the "removes timber" language meaningless.

However, the statute also includes an exception in subsection (2), which has been misapplied to remove all meaning from the phrase "removes timber," making it of no effect. Subsection (2) provides, "This section does not apply in any case where liability for damages is provided under RCW 64.12.030..." RCW 4.24.630(2).

Although subsection (2) seems clear, it is in the application of the exception that the conflict between (1) and (2) reveals itself. RCW 64.12.030, the timber trespass statute, provides liability "Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree ... on the land of another person ... without lawful authority." RCW 64.12.030.

There is no conceivable situation in which a person can “go onto the land of another and remove timber” (under the waste statute) and not also be “carrying off any tree ... on the land of another person” (under the timber trespass statute). In every “removes timber” claim under the waste statute, liability for damages will also be provided under the timber trespass statute, triggering the exception in subsection (2). If this were a correct result, the “removes timber” language in the waste statute would never apply, rendering it entirely meaningless.

4.6.3 This Court cannot read “removes timber” out of the statute but must give it some meaning.

The result of applying the exception in this manner is no different from removing the word “timber” from the statute altogether. This, the courts cannot do. The legislature purposefully used the words “removes timber.” The courts must give effect to those words, not write them out of the statute.

“The meaning of a statute is a question of law reviewed de novo.” *Dep’t of Ecology v. Campbell Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court’s primary goal “is to give effect to the legislature’s intent ... by construing the language as a whole, giving effect to every provision.” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). The Court assumes the legislature does not intend to create inconsistent statutes. *Am. Legion Post No.*

149 v. Dep't of Health, 164 Wn.2d 570, 588, 192 P.3d 306 (2008). “No clause, sentence or word shall be superfluous, void, or insignificant.” *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009).

Statutory exceptions such as the one at issue here “are narrowly construed in order to give effect to legislative intent underlying the general provisions.” *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013). Any doubt should be resolved in favor of the general provisions, not the exceptions. *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974).

To apply the waste statute’s exception to bar any application of the statute to “removes timber” cases would be to write those words out of the statute. This Court must, instead, assume that the legislature did not intend such an inconsistency between subsections (1) and (2). This Court must narrowly construe the exception in order to give effect to the general provision, “removes timber.”

4.6.4 The legislative history demonstrates that the legislature intended its new remedies to apply to removal of timber.

The legislative history lends further support to applying the new remedies under the waste statute to “every person who ... removes timber.”

The original bill, SB 6080, was introduced in the Senate. CP 209-10. The original text of the bill included legislative findings: “forest lands and agricultural lands ... are particularly vulnerable to wrongful property damage, especially vandalism and theft.”¹ CP 209. The operative section provided liability for triple damages for “every person who goes onto open space land as defined in this section and who wrongfully uses or occupies the land, wrongfully removes anything of value from the land, or wrongfully causes waste or injury to the land.” CP 209.

However, when the bill went to the House, the House Judiciary committee amended the bill, striking the legislative findings and entirely replacing the original text of the bill with the language now found in RCW 4.24.630. CP 211. The committee deliberately changed the language of the bill to remove any reference to vandalism as a motivation for the law and to specifically include the removal of timber as a wrong that the law should remedy. *See* CP 211.

¹ When the bill was presented for a vote on the floor of the Senate, Senator Owen made a statement that expanded on these legislative findings. *Gunn v. Riely*, 185 Wn. App. 517, 525 n. 6, 344 P.3d 1225 (2015). Senator Owen’s comments were consistent with the bill as it then existed, but the final language of the enacted statute said nothing about vandalism. Because the House entirely rewrote the bill before it was passed, Senator Owen’s early comments on the original, rejected text are not helpful in determining legislative intent.

The committee intentionally added “removes timber” to the general provisions even though the timber trespass exception was already part of the original bill. If the legislature intended the exception to nullify application of the statute to all “removes timber” cases, the word “timber” would never have been added in the first place.

On the floor of the House, the committee’s amendment was adopted and the amended bill passed.² The Senate originally refused to concur in the amendments, but the House insisted on the changes. The Senate concurred, passing the amended bill nearly unanimously. The House’s amended version became law and was codified at RCW 4.24.630.

The legislature intended the additional remedies in the waste statute to apply to “every person who goes onto the land of another and removes timber.” The exception in subsection (2) cannot be allowed to render those words meaningless. Instead, this Court should interpret the exception as preserving timber trespass law, while also allowing for the additional remedies the legislature intended to provide under the waste statute.

² It appears a page of the legislative history was omitted from the clerk’s papers between CP 207 and 208. The bill summary for SB 6080 (1993-94 biennium) can be accessed online at <https://app.leg.wa.gov/bills/bills/summary?BillNumber=6080&Year=1993&Initiative=false> (last accessed Feb. 7, 2019). The history described in this paragraph is set forth in the bill summary.

4.6.5 This Court can harmonize the statute by applying the new remedies of the waste statute while preserving the prior remedies under timber trespass.

In order to give meaning to all of the statutory language, this Court should harmonize the provisions. “Related statutory provisions must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statute.” *Koenig v. City of Des Moines*, 158 Wn.2d 173, 184, 142 P.3d 162 (2006). This can be done by interpreting the exception narrowly to mean that the additional remedies of RCW 4.24.630 (e.g., attorney’s fees and expert costs) would apply generally to “[e]very person who goes onto the land of another and who removes timber,” except to the extent that the statute duplicates remedies already available under RCW 64.12.030. Duplicated remedies (e.g., triple damages) would remain available under RCW 64.12.030 and its existing body of case law.

To be more specific, the waste statute provides liability for 1) triple the market value of the timber removed; 2) triple the cost of restoration of the land; 3) investigative costs; 4) reasonable attorney’s fees; and 5) other litigation-related costs. Only the first remedy—triple the market value of the timber—is provided by the timber trespass statute and its existing case law.

Under a narrow interpretation of the waste statute's exception, that first remedy would still be provided under the timber trespass statute and its existing case law (which also provides for emotional distress damages). Excluding this remedy from the operation of the waste statute prevents double recovery. The remainder of the additional remedies provided by the waste statute would not be excluded and would still apply in a "removes timber" case. Such an interpretation allows the exception to operate narrowly without rendering the general provisions meaningless.

The result would be that a plaintiff whose timber has been removed can claim triple damages under the timber trespass statute (where damages include the market value of the trees and emotional distress damages, if proven) and can claim investigative costs, attorney's fees, and other litigation costs under the waste statute.

In this case, an interpretation that harmonizes the general provisions and the exception in this manner would require remand for further proceedings on Porter's claims under both timber trespass, RCW 64.12.030, and the waste statute, RCW 4.24.630.

4.6.6 *Gunn v. Riely* does not apply here because *Gunn* was not a “removes timber” case and did not address the statutory conflict.

Kirkendoll is incorrect when he argues that *Gunn v. Riely* controls the outcome. *Gunn* was not a “removes timber” case and did not address the statutory conflict.

The Rielys, as appellants, informed the Court of Appeals that it was not a “removes timber” case:

In this case, the trial judge analyzed the first section of RCW 4.24.630 and determined that the while the alder saplings were cut, they were not removed. Furthermore, no crops, minerals, or other valuable property were removed from Mr. Gunn’s land. ... In his analysis, the trial judge felt that the only available avenue under RCW 4.24.630 was the separate element of “wrongfully causes waste or injury to the land.”

CP 222 (Reply Brief of Appellants in *Gunn v. Riely*).

Gunn involved saplings (not valuable as timber) that were cut but not removed. The first prong of the waste statute did not apply. It is unsurprising, then, that the court’s opinion in *Gunn* did not address the first prong of the waste statute. Because the “removes timber” prong was not part of the case, there was no reason for the court to address, or even notice, the conflict in the statutory language. *Gunn* is not helpful in resolving the present case because it does not address the issue at hand.

Here, Kirkendoll directed the loggers to remove Porter's timber. Porter raised claims under both timber trespass and the waste statute, seeking the additional remedies the waste statute provides. The statutory conflict is front and center. This Court cannot permit the timber trespass exception in subsection (2) to render the general provision of subsection (1) meaningless. This Court should harmonize the statute and give all of the provisions meaning by giving the exception a narrow interpretation that allows a plaintiff to simultaneously claim triple damages under the timber trespass statute and the other additional remedies provided under the waste statute, as described in Part 4.6.5, above.

5. Conclusion

The Court of Appeals decided correctly on all issues except the waste statute. This Court should affirm the Court of Appeals' reversal of the trial court's dismissal of Porter's timber trespass and indemnity claims. This Court should also reverse dismissal of Porter's claim under the waste statute, harmonizing that statute as described above. This Court should remand to the trial court for further proceedings on Porter's trespass, waste, and indemnity claims.

Respectfully submitted this 8th day of February, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on February 8, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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