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No. 63677-4-1

ORIGINAL

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

R. GARY WOOD, Appellant,

vs.

JAMES C. BRUMMOND and CAROL D. BRUMMOND, and
ROGER B. CLARK and KATHRYN CLARK, Respondents.

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OPENING BRIEF OF APPELLANT R. GARY WOOD

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I. ASSIGNMENTS OF ERROR

No. 1. The trial court erred when on 11/20/08 it denied Mr. Wood's summary judgment motion regarding timber trespass damages, RCW 64.12.040 mitigation, and joint ownership of boundary line Tree 596, and on February 10, 2009 granted defendants' motion on ownership of Tree 596. CP 348-51, 491-95.

No. 2. The trial court erred when on 3/9/09 it denied Mr. Wood's motions *in limine* to preclude evidence regarding the defense arborist's value appraisal of the trespassed tree, city critical area tree replacement ordinances, and city permitting practices in relation to critical area tree replacement, and admitted the same at trial. CP 551-54.

No. 3. The trial court erred when on 3/9/09 it granted defendants' motion *in limine* to preclude evidence that the trespassed trees were in a critical area, that no critical area tree may be cut without a permit, and that defendants did not obtain a permit before cutting Mr. Wood's trees. CP 551-54.

No. 4. The trial court erred denying Mr. Wood's CR 50 motions for judgment as a matter of law, at the conclusion of trial on 3/16/09 and after verdict on 5/22/09, regarding timber trespass damages, RCW 64.12.040 mitigation, and entitlement to emotional

distress damages. RP 48-64; CP 718-19.

No. 5. The trial court erred not giving proposed Instruction 19 regarding the purpose of restoration and replacement cost damages. CP 423, 593.

No. 6. The trial court erred not giving proposed Instruction 26 on the meaning of "reasonable" in the restoration and replacement cost measure of damages. CP 545, 597.

No. 7. The trial court erred giving Instructions 10 and 11 precluding emotional distress damages unless the trespass was "willful" as defined in WPI 14.01, and confusing the jury on RCW 64.12.040 mitigation. CP 631-32.

No. 8. The trial court erred giving Instructions 16 and 17 regarding Burien Municipal Code provisions. CP 637-41.

No. 9. The trial court erred using the Special Verdict Form rather than that proposed by Mr. Wood. CP 616-18, 605-07.

No. 10. The trial court erred when on 5/22/09 it denied Mr. Wood's motion for additur or a new trial, and entered judgment on a verdict that erroneously assessed damages, was outside the evidence, was contrary to law, demonstrated passion or prejudice, and did not do substantial justice. CP 718-22.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1. Is restoration and replacement cost the sole measure of damages in a residential timber trespass action per Sherrell v. Selfors, 73 Wn. App. 596, 603, 871 P.2d 168 (1994)? Is the purpose of the restoration and replacement cost measure of damages to restore the injured party to the position they were in before the trespass per Pearce v. G.R. Kirk Co., 92 Wn.2d 869, 873-75, 602 P.2d 357 (1979)? (Assignments 1-2, 4-6, 8, 10)

No. 2. Is a tree planted in 1982 on the boundary line between two residential properties, which grew into the steep slope over time at an uphill angle, and which over the years was covered by soil movement such that the base of the trunk now grows out of the uphill neighbor's property, while above ground the trunk crosses over the boundary line, a jointly owned boundary line tree per Happy Bunch, LLC v. Grandview North LLC, 142 Wn. App. 81, 93-94, 173 P.3d 959 (2007)? (Assignment 1)

No. 3. When the only competent evidence of record relevant to the reasonable cost to restore and replace trespassed property to its pre-trespass condition is from plaintiff, and the trespassers offer no evidence that this cost was unreasonable in relation to the property value, but instead only offer evidence

relevant to an inapplicable measure of damages, is there a material issue of fact precluding summary judgment or a directed verdict on the amount of restoration and replacement cost damages?

(Assignments 1, 4, 10)

No. 4. Is the legal standard for proving timber trespass mitigation established by RCW 64.12.040? Or is mitigation established if the trespass was not "willful" as defined in WPI 14.01? (Assignments 1, 3-4, 7, 9, 10)

No. 5. Is a material issue of fact raised on timber trespass mitigation by establishing merely a subjective belief of ownership of the trespassed trees, or must defendant provide objective evidence demonstrating probable cause to believe in ownership to make a *prima facie* case on the issue? (Assignments 1, 4, 10)

No. 6. Is the victim entitled to proven emotional distress damages under Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 116, 942 P.2d 968 (1997) in any residential timber trespass case? Or must the victim prove that the trespass was "willful" as defined in WPI 14.01? (Assignments 1, 7, 9, 10)

No. 7. Must a new trial be granted under CR 59 when a jury's damages verdict is less than the minimum amount of damages derived solely from defendant's damages evidence and

argument? Or when the verdict is outside the evidence, contrary to law, and demonstrated passion or prejudice? Or when substantial justice was not done? (Assignment 10)

No. 8. Must a new trial be granted under CR 59 when cumulative legal errors in evidentiary rulings and jury instructions prevent a fair trial? (Assignment 10)

III. STATEMENT OF THE CASE

This is a timber trespass case under RCW 64.12. On July 31, 2005, Respondent Roger Clark entered Mr. Wood's residential property and cut down two trees Mr. Wood had planted 23 years earlier. Mr. Clark had been hired to do this work by Mr. Wood's uphill neighbor, Respondent Carol Brummond. Prior to the cutting, Ms. Brummond asked Mr. Clark whether the trees were on her property, and Mr. Clark was unable to answer. They proceeded to cut down the trees anyway, leaving the debris on Mr. Wood's property. Mr. Wood replaced the two trespassed trees with two mature trees of a similar species that were of necessity smaller than the trespassed trees. Due to difficult access and topography, replacing the mature trees cost about \$100,000. Mr. Wood's suit sought restoration and replacement cost damages, treble damages under RCW 64.12.030, and emotional distress damages.

A. Facts¹

In 1981, Gary Wood purchased property in Burien on a former gravel pit overlooking Puget Sound. His property sits on a steep hillside. When Mr. Wood purchased this property, it was barren of vegetation and the steep sandy hillside was prone to substantial sloughing. CP 65-72; RP 3/09 82-91.

As part of his landscaping efforts, Mr. Wood planted two 10' Douglas Fir trees on the hillside above his house. He had received these trees as a gift from a friend. With permission from his uphill neighbor residing in the house now owned by the Brummonds, Mr. Wood planted one tree on the boundary line. The trees were positioned to maximize their slope stabilizing function. CP 32-35, 43-44, 70-71; RP 3/09 100-08, 117; 3/10 24-29.

In the early years of these Douglas Firs, Mr. Wood had to nurture and sustain the trees by carrying water up the sandy slope to the trees in order to insure their survival. CP 36-38; RP 3/09 101-02; 3/10 14-18.

These trees represented pioneer vegetation on the steep sandy hillside, providing slope stability, shade, and organic material

¹ Because Mr. Wood is appealing both the trial court's summary judgment rulings as well as its rulings before, during, and after trial, citations to the record will include both citations to the summary judgment record and to the trial record.

enhancing the soil—allowing other vegetation to take hold on the hillside. See Exs. 1-2. As the trees became larger, they also provided a visible screen between Mr. Wood's property and the uphill properties looking down on his house. CP 247; RP 3/10 108-11; 3/12 Vol. II 29-31. By 2005, one of the Douglas Firs planted by Mr. Wood had obtained a height of 38 feet, and the other Douglas fir had obtained a height of 47 feet. RP 3/10 44-46. As part of a tree inventory relating to development of neighboring properties, an arborist numbered the first Douglas fir planted by Mr. Wood, the 38 foot tree, Tree 595. The second Douglas Fir, the 47 foot tree, was badged Tree 596. CP 193-94.

The Brummonds bought the property uphill from Mr. Wood's in approximately 1992. CP 207 (showing layout of properties). Since approximately 2002, the Brummond property has been a rental house while the Brummond family lived elsewhere. RP 3/13 80. In July of 2005, corresponding with a change of tenants at the Brummond rental house, Mrs. Brummond decided that one of the trees planted by Mr. Wood obstructed the view from the Brummond property, and she wanted that tree "topped" to remove the view obstruction. CP 82, 109-10; RP 3/13 86-87; 3/13 Vol. II 114-15.

Mrs. Brummond hired Roger Clark, d/b/a Treebalance Tree

Service, to cut Tree 596. Mrs. Brummond testified that she did not receive a survey of her property upon its purchase, that she had never obtained a survey of her property, that she had never walked the boundary lines of her property, had never been near the area of her property bordering Mr. Wood's property, never spoke to Mr. Wood about the boundary lines, had never looked for or located the survey stakes put in place by a surveyor in 1983, and did not know where the boundary line was between the Brummond property and the Wood property. CP 83-85, 90-99, 110-30; RP 3/13 65, 69-70, 73, 112-17; 3/13 Vol. II 30-32, 35; 3/16 26-29.

Nonetheless, Mrs. Brummond instructed Mr. Clark to cut the tree that was visible from her property—Tree 596. When Mr. Clark descended the hill to Tree 596, he called Mrs. Brummond to inform her there was a second tree in the area that was almost as tall—Tree 595. When he asked her whether she wanted him to cut that tree as well, Mrs. Brummond's response was to ask Mr. Clark whether it was on her property. Despite not receiving an answer to that inquiry, Mrs. Brummond instructed Mr. Clark to cut both of the trees. CP 96, 102-05, 138-53; RP 3/13 90-96; 3/13 Vol. II 17-18.

Mr. Clark proceeded to cut Tree 595 down to a height of 10 feet, and to cut Tree 596 down to a height of 18 feet, completely

destroying both trees. CP 194, 744; RP 3/16 16-17, 20-24.

In addition, both trees are in a critical area as defined by the Burien Municipal Code (BMC), due to their location on a steep sandy hillside. Under the BMC, a permit is required before cutting or pruning any significant trees located in the critical area. RP 3/10 79. Neither Mrs. Brummond nor Mr. Clark obtained such a permit before cutting Trees 595 and 596. Because the Brummonds' never applied for the required critical area permit, and never contacted Mr. Wood about their plans to cut the trees, Mr. Wood had no idea of the Brummonds' intentions to cut them. CP 83, 86-91, 98-101, 113-19, 133-39, 149-51, 154.

The tree cutting apparently occurred on July 31, 2005. At the time of the cutting, Mr. Wood was not at home. Upon returning home, Mr. Wood discovered that the trees he had planted had been cut, and the cut portions of the trees, which had fallen downhill on his property and damaged another of Mr. Wood's trees, had been left lying on the ground. CP 47-50; RP 3/10 33-38. Mr. Wood immediately contacted the pertinent authorities, who investigated the tree cutting and issued stop work orders against both Mr. Wood and the Brummonds. RP 3/10 56-58.

Because Mr. Wood had received Trees 595 and 596 as a

gift from a friend, and because he had these trees form the foundation of his landscaping efforts to transform the steep sandy hillside from a gravel pit to his yard, and had laboriously nurtured these trees through their early years until they became self sustaining, Mr. Wood was distraught upon seeing the devastation wrought on his trees. CP 74-77 RP 3/11 33-36.

Initially, the Brummonds claimed that both cut trees were on their property, and challenged the accuracy of Mr. Wood's survey stakes. CP 28-31; RP 3/10 68. Mr. Wood therefore hired a surveyor to confirm the 1983 survey and the accuracy of the survey markers still in place. RP 3/10 Vol. II 98. It was determined that Tree 595 was wholly on the Wood property, but that the trunk of Tree 596 straddled the property line separating the Wood and Brummond properties as it rose out of the ground. CP 40-42, 45.

As directed by the city, and wishing to restore the functional and aesthetic benefits Trees 595 and 596 provided to his property, Mr. Wood hired arborist Scott Baker to replace the cut trees. Due to the limited availability of fir trees that size, the restrictions posed by the winding road leading to the Wood property, and the narrow strip of land between Mr. Wood's house and his neighbor's property (the Sears) which precluded using heavy equipment to

move the trees from the road up the hill to the planting site, Mr. Wood had to build a temporary scaffolding system to provide access to the planting site. CP 197-98, 59-64, 73-79; RP 3/10 Vol. II 28-35; 3/12 Vol. II 23-25.

These limitations prevented the planting of any trees larger than the 25' replacement trees planted by Mr. Wood. Replacing the two cut trees required the purchase of large trees, trucking them from the tree farm to Mr. Wood's property, employing a crane to lift the very heavy trees from the truck to temporary scaffolding, and manpower to prepare the planting site and to move the trees from the temporary scaffolding to the planting location. CP 197-98, 59-64, 73-79; RP 3/10 Vol. II 34-72; 3/11 Vol. II 15-25.

The cost of restoring and replacing the two cut trees with trees as close as was possible to their size was \$93,983.41. CP 185; 156-69, 213. The cost of replacing Tree 595 alone was \$85,545.58. Exs. 41, 43, 46, 76-79; RP 3/10 Vol. II 97-103; 3/11 10-20, 28-29; 3/11 Vol. II 25-43.

Mr. Wood spent countless hours bringing the restoration of the cut trees to fruition. RP 3/10 Vol. II 91; 3/11 29-33. Even after restoration, Mr. Wood is left with a 25' tree instead of the healthy 38' Tree 595 that he originally planted and nurtured which was cut

down by the defendants, and is left with saplings instead of the 47' Tree 596. CP 197-98; RP 3/11 Vol. II 30-31, 75. Mr. Wood notices the difference. CP 59-60; RP 3/11 29, 33-36.

B. Procedural History

Mr. Wood brought this action against the Brummonds and against Roger Clark and his marital community in June 2007. After discovery and on summary judgment, it became clear that there was no dispute that one or both of the defendants were liable for timber trespass against Mr. Wood's property, and that the two trees cut down by defendants were completely destroyed. The disputed matters were whether Tree 596 was owned by Mr. Wood, the reasonableness of Mr. Wood's restoration, whether defendants could establish timber trespass mitigation under RCW 64.12.040, and whether Mr. Wood was entitled to emotional distress damages.

In trial court proceedings, the trial court: denied Mr. Wood's summary judgment motion, CP 348-51; granted defendants' summary judgment motion, CP 491-95; denied Mr. Wood's motions *in limine* regarding what evidence is relevant to restoration and replacement cost damages and admitted the contested evidence, and granted defendants' motions *in limine* to preclude evidence regarding the defendants' failure to obtain the necessary critical

area permit prior to cutting the trees, CP 551-54; denied Mr.

Wood's motion for judgment as a matter of law at the conclusion of the evidence, RP 3/16 48-54; and erroneously instructed the jury, CP 616-17, 631-32, 637-41.

The jury entered a verdict that Mr. Wood's damages were only \$6,854.00, that the defendants proved mitigation, and that Mr. Wood was not entitled to any emotional distress damages. CP 616-17. Mr. Wood timely moved under CR 50 and CR 59 for judgment as a matter of law and additur, or in the alternative for a new trial. CP 648-700. The motion was denied. CP 718-19. Final judgment on the jury's verdict was entered. CP 720-23. This appeal timely followed. CP 724-29.

IV. ARGUMENT

A. The Trial Court Erred in Denying Mr. Wood's Summary Judgment Motion and in Granting Defendants' Summary Judgment Motion

Mr. Wood moved for summary judgment on ownership of Tree 596, on the proper measure of damages, on the restoration and replacement cost damages he incurred, on RCW 64.12.040 mitigation, and on Mr. Wood's right to recover emotional distress damages. CP 170-191. The defendants opposed the motion. CP 214-317. Mr. Wood established that Tree 596 was a boundary line

tree, that there was no material issue of fact regarding replacement costs, that there was no material issue of fact regarding RCW 64.12.040 mitigation, and that he was entitled to emotional distress damage as a matter of law in amounts to be proved at trial. CP 23-169, 192-213, 318-31, 731-55. Nonetheless, the trial court denied in its entirety Mr. Wood's summary judgment motion. CP 348-51. The court subsequently granted defendants' motion that Mr. Wood was not a joint owner of Tree 596. CP 491-95.

1. Discretionary Review

Although there is no appeal as of right from the denial of a motion for summary judgment, an appellate court may exercise its discretion and review in the interest of judicial economy where there are no genuine issues of material fact. Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). The court should do so here. Because the evidence submitted on summary judgment and at trial is in all important respects the same, and demonstrates that the facts are essentially not disputed—only the legal consequences flowing from those facts is disputed—this case is properly decided on summary judgment. See Walters v. A.A.A. Waterproofing, Inc., 151 Wn. App. 316, 320-321, 211 P.3d 454 (2009) (reviewing denied summary judgment

motion when the underlying facts were not in dispute and the issue is one that can be decided as a matter of law); In re Custody of A.C., 124 Wn. App. 846, 852, 103 P.3d 226 (2004) (denial of summary judgment may be reviewed after the entry of a final judgment if summary judgment was denied based on a substantive legal issue). But see Lopez v. Reynoso, 129 Wn. App. 165, 174, 118 P.3d 398 (2005) ("After a trial on the merits, we will not review a trial court's denial of a motion for summary judgment if the denial was based on the presence of material disputed facts.")

Deciding this case on summary judgment serves judicial economy because it would render unnecessary substantial further judicial effort in this case. First, review of the rest of the trial court's appealed rulings, including the motions *in limine*, the jury instructions, the trial evidence, and the post-trial motions, would become unnecessary. Second, should the court agree with the appellant that material trial errors were made, reviewing the summary judgment denial would render unnecessary a second trial on matters presented for summary judgment. See Douchette v. Bethel School Dist. No. 403, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991) (denial of motion for summary judgment may be reviewed to avoid a useless trial).

2. Summary Judgment Should Have Been Granted Regarding the Sole Measure of Damages in this Residential Timber Trespass Case—Restoration and Replacement Costs

In reviewing summary judgment, the appellate court evaluates the matter *de novo*, engaging in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c).

The policy and purpose of RCW 64.12.030 "is to protect the owner against unauthorized cutting of his trees—not to limit his right of recovery." Pearce, 92 Wn.2d at 873. Washington law is clear that Mr. Wood is entitled to restoration and replacement cost damages for this residential timber trespass. Sherrell, 73 Wn. App. at 603. Division One in the recent case of Happy Bunch, 142 Wn. App. at 94 n.6, held that either the diminishment of the value of the affected property or the restoration costs was the proper measure of damages in residential timber trespass cases, citing Tronsrud v. Puget Sound Traction, Light & Power, 91 Wash. 660, 661, 158 P. 348 (1916). In this case, no party has attempted to determine the diminishment of value of Mr. Wood's property, nor is there any

dispute that Trees 595 and 596 are "residential" trees.

Moreover, Washington law provides that in residential timber trespass cases the victim is entitled to damages that "return an injured party as nearly as possible to the condition in which it would have been had the wrong not occurred." Tatum v. R R Cable Co., 30 Wn. App. 580, 584 n.2, 636 P.2d 508 (1981); Aker Verdal A/S v. Neil F. Lampson, Inc., 65 Wn. App. 177, 183, 828 P.2d 610 (1992) (tort law's guiding principle is to make the injured party as whole as possible through pecuniary compensation); DeNike v. Mowery, 69 Wn.2d 357, 371, 422 P.2d 328 (1966).

The defendants did not disagree in their response to Mr. Wood's summary judgment motion. Rather, the defendants argued that the issue was whether Mr. Wood's restoration and replacement was reasonable. Thus, the trial court should have entered summary judgment that in this residential timber trespass case the sole measure of damages is the reasonable cost to restore and replace Mr. Wood's trespassed property as near as possible to its pre-trespass condition.

3. Summary Judgment Should Have Been Granted Regarding the Amount of Restoration and Replacement Cost Damages Because No Material Issue of Fact Was Raised by Defendants

On summary judgment, when the moving party has offered evidence supporting the factual basis for its motion, the non-moving party must come forward with admissible evidence to raise a genuine issue of material fact in order to avoid summary judgment. CR 56(c); Mission Springs v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998). The defendants failed to do so.

The only competent, relevant evidence of restoration and replacement costs was the testimony of Scott Baker, the expert arborist who managed the project for Mr. Wood. CP 318-21, 192-213. He testified that the following costs were reasonable:

Expense	Citation	Amount
Clean up of cut trees left on Wood property, August 2005	CP 156	\$408.00
Boundary line survey, August 2005	CP 158	1,685.00
Arborist services, Brian Gilles	CP 160-62	982.96
Investigator to locate neighbor for access easement for heavy machinery for tree replacement	CP 164	266.00
Arborist services, Scott Baker/Tree Solutions, Inc.	CP 166-69	2,913.50
Tree replacement, Tree 595	CP 213	79,290.12
Tree replacement, Tree 596 (at 50% of total)	CP 213	8,440.83
	Total:	\$93,986.41

a. There Was No Defense Evidence Raising an Issue of Fact on Damages

Defendants argued that a value appraisal according to the Trunk Formula Method (TFM) is a proper measure of restoration and replacement cost damages. CP 223, 236. But TFM is simply a value appraisal based on the cost of buying small trees to replace any size tree. *All* arborists agreed that TFM is not a measure of the costs of restoration and replacement to pre-trespass condition. CP 319-21, 330-31, 735-36; RP 3/13 Vol. II 91-99.

Defendants also maintained that the defense arborist's estimate of the cost to meet (allegedly) minimum Burien code requirements is consistent with the restoration and replacement cost measure of damages. But, again, *all* arborists agreed that planting saplings does not restore the Wood property to anything like its pre-trespass condition, and is not a replacement for cut down 38' and 47' tall trees. Id.

The defendants' summary judgment evidence and argument ignored the fact that their measures of restoration and replacement cost damages *do not restore the Wood property to its pre-trespass condition*. In fact, the defendants' proposed measure of damages would do no more than allow Mr. Wood to start his landscaping

over by planting nursery saplings of the same size he planted in 1982 when he first began his landscaping efforts at his home—eliminating 23 years of growth! A "restoration and replacement" which requires 23 years just to get back to pre-trespass condition is no "restoration and replacement" at all.

Because neither the TFM appraisal nor planting a few small trees is a restoration of Mr. Wood's property or a replacement of the trespassed trees, the defense arborist's testimony on damages is not relevant, is not helpful to the trier of fact, and would only confuse or mislead the jury on the proper measure of damages. It was therefore inadmissible under ER 402, 403, or 702.

Without some competent evidence that the restoration cost was unreasonable because the same job could have been done at much lower cost, there is no issue of fact on the reasonableness of the costs actually incurred by Mr. Wood. Defendants had no such evidence. All the defense had was the bald argument that the restoration project costs actually paid by Mr. Wood were excessive. But argument is not evidence.

The record on summary judgment was akin to a personal injury case in which the plaintiff has expert medical testimony supporting the reasonableness and necessity of post-injury medical

treatment. Absent contrary expert testimony from the defense, courts are instructed to rule as a matter of law on summary judgment or grant a directed verdict on the reasonableness and necessity of the medical expenses in question. Capital Hill Methodist Church of Seattle v. Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958) ("Questions of reasonableness and necessity of care, or the proximate causation of injury, however, only become jury questions if the non-moving party offers competent evidence to raise genuine issues of material fact."). In Palmer v. Jensen, 132 Wn.2d 193, 199-200, 937 P.2d 597 (1997), the Supreme Court listed and discussed the many Washington cases holding that a defendant must put forth admissible expert evidence to rebut a showing that medical expenses incurred were reasonable, and cannot simply rely on argument. Those damages must be awarded as a matter of law if not controverted with expert testimony.

b. There Was No Defense Evidence That Mr. Wood's Restoration and Replacement Exceeded the Value of His Property

Restoration and replacement costs must also be reasonable in relation to the total value of the affected property. Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997). The Allyn Court upheld a

trial court grant of a new trial to the defendant when the awarded damages of \$75,000 (before trebling) for timber trespass on 2 acres of a 10 acre undeveloped lot more than doubled the highest total appraised value of the property (\$35,000). Id. at 735. Likewise, the California case discussed in Allyn, held that a \$241,000 restoration was unreasonable for an unimproved property appraised at \$179,000. Id. at 734.

The Allyn Court resolved the issue of how to determine the reasonableness of timber trespass restoration and replacement by announcing the rule that restoration cost damages *may be greater* than the total value of the property:

In conclusion, we hold that although timber trespass damages may exceed the value of the underlying property in the proper case, the damages must still be reasonable in relation to the value of the property.

Id. at 735. Here, there is no evidentiary basis on which defendants could argue that the Wood restoration and replacement cost more than (or even approached) the total value of his property, so there is no material issue of fact regarding the reasonableness of the Wood restoration and replacement under Allyn. As long as it does not exceed the total value of the property, the actual cost of a true restoration and replacement is, as a matter of law, the only

measure of damages in this case. As emphasized in both Pearce and Tatum, supra, the measure of damages under RCW 64.12.030 must reflect the actual loss suffered by the owner of the trespassed trees according to the actual cost of returning the owner as nearly as possible to the condition the owner would have enjoyed had the trespass not occurred. As the Supreme Court held long ago:

[W]here the wrong consists in the removal or destruction of some addition, fixture or part of real property, the loss may be estimated upon the diminution in the value of the premises, if any results, or upon the value of the part severed or destroyed, and that valuation should be adopted which will prove most beneficial to the injured party, as he is entitled to the benefit of his property intact.

Park v. Northport Smelting & Refining Co., 47 Wash. 597, 599, 92 P. 442 (1907) (trespass case involving damage to standing timber).

In sum, all the defense did in opposition to summary judgment was point to the actual cost of Mr. Wood's restoration and replacement, deem it too expensive, and argue that their own preference of planting small trees at a very low price and waiting 23 years for them to grow to pre-trespass size is "restoration and replacement" enough for Mr. Wood. As the innocent victim, Mr. Wood is free to choose how best to restore his property to its pre-trespass condition, as long as the restoration and replacement is

reasonable in relation to the value of his property.

The trial court should have rejected the defendants' summary judgment arguments because there was no material evidence supporting them, and because they were directly contrary to Washington timber trespass law. Summary judgment should have been entered on the amount of replacement cost damages incurred by Mr. Wood as a result of defendants' timber trespass—\$93,986.41.

4. Summary Judgment Should Have Been Granted That Tree 596 Was a Jointly Owned Boundary Line Tree As a Matter of Law

There is only one Washington case addressing the issue of ownership of boundary line trees under RCW 64.12. In the 2007 Happy Bunch case, Division One held:

A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other. The trees being owned in common, the trial court correctly ruled that [the parties] had an interest in the tree proportionate to the percentage of their trunks growing on [each party's] property.

Id. at 93. Applying Happy Bunch to the facts of record on summary judgment, Tree 596 is jointly owned in equal 50% shares by Mr. Wood and the Brummonds.

The facts were not disputed, as no admissible evidence from the defendants disputed the fact that: Tree 596 was planted in 1982 on the boundary line between the Brummond and Wood property; Tree 596 was planted at an uphill angle and grew at an uphill angle; slope movement moving soil down the hill raised the ground level around Tree 596; by 2005 it emerged from the ground up the hill from where planted and on the Brummond side of the property line; Tree 596 now comes out of the ground between 2.6 and 3.0 feet on the Brummond side of the property line, per the surveys; and, due to the tree's angle of growth and kinks, at least 50% of its trunk is on the Wood side of the property line. CP 32-35, 322-26, 196.

Thus, the only issue was whether under Washington law a tree whose trunk crosses the boundary line approximately half-way up its 47 foot trunk is a boundary line tree, and thus commonly owned. Defendants argued that Happy Bunch stands for the proposition that the location of the tree trunk *at ground level* is the determinative factor. But defendants ignored their own expert arborist, who testified that the trunk of a tree runs from the ground to the top of the tree. CP 342 (Q: [W]hen you say trunk it is the bottom of the tree? A: It is all the tree, bottom to the top.").

Contrary to defendants' arguments, the determinative factor is not where the trunk comes out of the ground, but the "percentage of their trunks growing on [each party's] property."

Consistent with this, Mr. Wood contended that the court should have applied the Happy Bunch holding as written, and held that when the boundary "line passes through [the tree], [the tree] is the common property of both parties." Here, the trunk of Tree 596 is equally on both sides of the boundary line, so it is a commonly owned boundary line tree as a matter of law. Thus, under Washington law, the proper measure of Mr. Wood's damages for the defendants' trespass of Tree 596 is 50% of the reasonable cost of replacing it. The trial court therefore erred when it granted defendants' motion regarding ownership and refused to award timber trespass damages for the cutting down of Tree 596.

5. Summary Judgment Should Have Been Granted Regarding Timber Trespass Mitigation Because Neither Defendant Met Their Burden of Proof By Raising a Material Issue of Fact

There was no dispute that the defendants committed timber trespass. There was a dispute about whether the trespass was mitigated under RCW 64.12.040.

Treble damages under RCW 64.12.030 are mandatory

unless the defendants prove one of the mitigating factors listed in RCW 64.12.040.² The trespasser must prove one of the mitigating factors set out in RCW 64.12.040. Seattle-First Nat'l Bank v. Brommers, 89 Wn.2d 190, 197-98, 570 P.2d 1035 (1977). "It is clear that treble damages will be imposed . . . under RCW 64.12.030, unless those trespassing exculpate themselves under . . . RCW 64.12.040." Smith v. Shiflett, 66 Wn.2d 462, 464-65, 403 P.2d 364 (1965). "The punitive aspect of the trebling provision is one that has been mandated by the legislature, not left to the discretion of the courts." Pearce, 92 Wn.2d at 875.

Since the defendants bear the burden of proof, they must make a *prima facie* case of mitigation to avoid summary judgment. To prove mitigation under that statute, a defendant must prove that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the tree was on the Brummond property. Because the defendants' evidence did not make out a *prima facie* case of mitigation, summary judgment should have been entered in Mr. Wood's favor.

The Sherrell case is the most instructive on this issue given the facts in this case. The Sherrell Court noted that "[i]t is not a

² RCW 64.12.030 and .040 are attached in the Appendix.

mitigating factor for the trespasser to be acting in good faith." 73 Wn. App. at 604. In sustaining the trial court's findings under RCW 64.12.040 that the defendants had not proved any mitigating factors, the Sherrell Court identified the following key factors:

- The property line was marked with pins and stakes
- No boundary line survey was done by the defendants before cutting
- No neighbors or others familiar with the boundary lines were contacted before cutting
- The neighboring property owners (the plaintiffs) were not contacted before cutting
- The person relied upon for identifying the pertinent boundary line by the defendants had no authority to establish boundaries

Id. at 604. All the same facts are present here. In addition, Mrs. Brummond's testimony reveals that she never walked the property line; never even walked down the hill on her property towards the Wood property; did not look for or find the 1983 recorded survey of Mr. Lund; did not obtain the necessary critical areas permit; and, expressed doubt about who owned the cut trees by asking Mr. Clark about the property line, yet proceeded with the cutting despite not getting a satisfactory answer to her question.

Nor did Mr. Clark make a *prima facie* case of mitigation. In addition to not doing any of the things the Brummonds failed to do

to inform himself of the true ownership of the trees he cut down, Mr. Clark was on notice from Mrs. Brummond that she did not know whose trees were being cut when she asked him about the location of the property line. Mr. Clark proceeded to cut the trees anyway.

Both defendants Brummond and Clark argue that they had a good faith belief that the Wood trees were on the Brummond property. It is arguable, at best, whether this is so. But even assuming, for the sake of argument, that defendants can prove good faith belief, that is all the defendants can prove, and good faith belief alone is insufficient as a matter of law. "It is not a mitigating factor for the trespasser to be acting in good faith."

Sherrell, 73 Wn. App. at 604. More recently, Division One held:

A mere subjective belief in the right to cut trees is not sufficient for mitigation pursuant to RCW 64.12.040.

Happy Bunch at 96.

In requiring the defendant to prove mitigation, the legislature intended, "[i]n short, that there should be no self-created right of eminent domain." Shiflett, 66 Wn.2d at 463. This prevents defendants from gaining from their trespass, by preventing damages from being so limited that the trespass remains profitable to the defendant even after paying damages to the victim. Happy

Bunch at 97. "The legislature has mandated that in such circumstances the court has no discretion to award other than treble damages." Id.

What is relevant to mitigation is not the defendants' subjective belief, but evidentiary proof that the defendants had probable cause to believe Trees 595 and 596 were on the Brummond property, or proof that the cutting was casual or involuntary. See Trotzer v. Vig, 149 Wn. App. 594, 611, 203 P.3d 1056 (2009), affirming the trial court's finding of fact that mitigation was established under the statutory "probable cause" exception:

Here, [the trespasser] did not rely on his own subjective interpretation of the property line; rather, he relied on the victim's assertion that the fence was the property line.

The defendants did not make the same showing. On the facts of record on summary judgment, no reasonable trier of fact could find that the Brummonds had "probable cause" to believe that Trees 595 and 596 were on the Brummond property.

6. Summary Judgment Should Have Been Granted Regarding Mr. Wood's Entitlement to Emotional Distress Damages in an Amount to be Determined by the Jury

Under Washington law, emotional distress damages are recoverable in a timber trespass action under RCW 64.12. Birchler

v. Castello Land Co., Inc., 81 Wn. App. 603, 608, 915 P.2d 564 (1996), affirmed by 133 Wn.2d 106 (1997). Emotional distress damages are awardable in a timber trespass case because:

. . . emotional distress damages reflect the emotional value a particular person has attached to property. . . Timber or vegetation having little market value may have great emotional value to a particular person. Its removal would result in emotional distress not accounted for by the statutory restoration and replacement costs.

Birchler, 81 Wn. App. at 608.

On summary judgment the trial court adopted the defendants' argument that Birchler requires the victim to prove that the trespass was intentional or willful before emotional distress damages became recoverable. This is error because that is not Washington law. Rather, timber trespass emotional distress damages are recoverable in any case in which a timber trespass is proved. Birchler, 133 Wn.2d at 117 (emotional distress damages are recoverable for intentional torts; trespass is an intentional tort; timber trespass is a trespass).³

The timber trespass statute sounds in tort. Trespass is an intentional tort. We have liberally construed

³ Stating: "A hundred-year succession of Washington cases supports damages for emotional distress arising from intentional torts such as trespass generally. Emotional distress damages may be recovered for intentional interference with property interests specifically. We hold emotional distress damages, if proved, may be recovered under RCW 64.12.030."

damages for emotional distress as being available merely upon proof of an intentional tort.

Birchler, 133 Wn.2d at 115. See also DeWolf and Allen, Washington Practice: Tort Law and Practice, § 9.31 at 229 (1993) ("Although trespass is called an intentional tort, it is not necessary that the actor intend to enter the land of another.").

Thus, the Birchler Court did not hold that emotional distress damages were available in timber trespass cases *only when* the trespass is "intentional" or "willful"—it held that *because* timber trespass is an "intentional tort" emotional distress damages are available under RCW 64.12.030. Confirming this reading of Birchler—that neither "intent" nor "willfulness" need be proven to obtain emotional distress damages under RCW 64.12.030—is the Trotzer case. In that case, the trial court awarded emotional distress damages for the timber trespass, but found mitigation under RCW 64.12.040 because the victim had erroneously identified the property line to the trespasser prior to the trespass. Thus, the court ruled that general damages were recoverable under RCW 64.12.030 even when treble damages were not. None of these trial court decisions were disturbed on appeal. Id. at 603.

7. The Summary Judgment Order the Trial Court Should Have Entered

On the above facts and authorities, the trial court should have entered summary judgment in Mr. Wood's favor. Mr. Wood submits that the appellate court should reverse the trial court's rulings on summary judgment, and remand with instructions to enter summary judgment as he requested. CP 188-91. If the trial court had not erred on summary judgment, and had entered this order, then the only issue to be tried to a jury would have been the amount of emotional distress damages.

B. The Trial Court Erred in Denying Mr. Wood's Motions for Judgment as a Matter of Law

At the conclusion of the evidence, and after the jury's verdict, Mr. Wood moved for judgment as a matter of law under CR 50 on the issues of timber trespass damages, mitigation, and entitlement to emotional distress damages. The trial court denied these motions. RP 3/16 48-54; CP 718-19.

1. Standard of Review

Questions of statutory interpretation and claimed errors of law are reviewed *de novo*. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also *de novo*. Happy Bunch, 142

Wn. App. at 88. Judgment as a matter of law is proper when the evidence and the reasonable inferences therefrom, viewed most favorably toward the nonmoving party, are insufficient to sustain the verdict. Chaussee v. Maryland Casualty Co., 60 Wn. App. 504, 508, 803 P.2d 1339 (1991). Evidence is sufficient to sustain the verdict if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC, 138 Wn. App. 443, 454, 158 P.3d 1183, review denied 163 Wn.2d 1013 (2007) (reversing trial court's denial of CR 50 motion).

2. Judgment as a Matter of Law Should Have Been Granted on Restoration and Replacement Cost Damages

For the same reasons discussed above in § IV.A.2 and 3 regarding summary judgment, the trial court erred when it denied Mr. Wood's post-evidence and post-verdict motions for judgment as a matter of law under CR 50 regarding restoration and replacement cost damages. RP 3/16 48-54; CP 718-19. As only Tree 595 was at issue at trial, the evidence on those damages was different from that presented on summary judgment, but both Mr. Wood's and the defendants' damages evidence was qualitatively the same.

Because the defendants' damages evidence was irrelevant and misleading, and therefore inadmissible (see § IV.C.2 below), the only competent, relevant evidence was that put in the record by Mr. Wood. That evidence showed that the total cost of restoring Mr. Wood's property as close as was feasible to its pre-trespass condition, in relation to Tree 595 only, was \$84,562.62:

Debris removal (Ex. 41)	\$408.00
Boundary line survey (Ex. 43)	1,685.00
Investigator to locate Sears for easement (Ex. 46)	266.00
Arborist to develop and submit critical area restoration permit application to the City of Burien (Exs. 76-78)	2,913.50
Restoration and replacement project costs (Ex. 79)	79,290.12
Total Economic Damages	\$84,562.62

3. Judgment as a Matter of Law Should Have Been Granted on RCW 64.12.040 Mitigation

For the same reasons discussed above in § IV.A.5 regarding summary judgment, the trial court erred when it denied Mr. Wood's post-evidence and post-verdict motions for judgment as a matter of law under CR 50 regarding timber trespass mitigation. RP 3/16 48-54; CP 718-19. The evidence at trial on this issue was the same

as presented on summary judgment, except that Ms. Brummond added to her prior testimony that she thought, based on her recollection of the conversation she had with the previous owner when she bought property in 1993, that her property line extended down to the "toe" of the hill between hers and Mr. Wood's properties, which she believed would encompass Tree 595. RP 3/13 63-67 and Vol. II 9-10. There was no testimony as to the location of the toe.⁴ Mr. Clark testified only that it was his business practice to trust his customer to determine property lines. *Id.* at 108-09; 3/16 27. Based on the case law cited herein above in § IV.A.5, this evidence is insufficient to make a *prima facie* case for mitigation under RCW 64.12.040.

4. Judgment as a Matter of Law Should Have Been Granted on Mr. Wood's Entitlement to Emotional Distress Damages in Amounts to be Determined by the Jury

For the same reasons discussed above in § IV.A.6 regarding summary judgment, the trial court erred when it denied Mr. Wood's post-evidence and post-verdict motions for judgment as a matter of law under CR 50 regarding his entitlement to emotional distress damages proximately caused by the trespass. RP 3/16 48-54. CP

⁴ It was also obvious from Carol Brummond's testimony at trial that, prior to this

718-19. Under the proper legal standard appropriately applied, Mr. Wood is entitled to those damages as a matter of law in this case.

C. The Trial Court Erred in Admitting Irrelevant Damages Evidence and in Precluding Admissible Liability Evidence at Trial

If the appellate court agrees with Mr. Wood that the trial court erred in denying his summary judgment motions and his motions for judgment as a matter of law, then there is no need to address the court's trial errors or the sustainability of the jury's verdict. These matters are addressed below.

1. Standard of Review

Trial court rulings on evidentiary matters are reviewed on appeal for abuse of discretion. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). The trial court abuses its discretion when its "decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

2. The Trial Court Erred By Admitting Irrelevant Expert Testimony on Damages

The trial court errs when it admits expert testimony on an inapplicable measure of damages. Watkins v. FMC Corp.-

lawsuit, she had no idea that the boundary line between her own and Mr.

Niagara Chemical Division, 12 Wn. App. 701, 705, 531 P.2d 505 (1975) (excluding expert testimony relevant to the wrong measure of damages); State v. Shain, 2 Wn. App. 656, 661, 469 P.2d 214 (1970) (affirming exclusion of expert testimony relevant to wrong measure of damages). See also Doolittle v. City of Everett, 114 Wn.2d 88, 106, 786 P.2d 253 (1990):

The City's expert testimony here was clearly grounded upon a fundamentally wrong basis. The testimony was entirely premised on an incorrect legal principle . . . The City's expert testimony must be disregarded.

Mr. Wood brought several motions *in limine* prior to trial. CP 355-72, 483-90. The primary motion was to preclude the defendants from offering expert testimony by Mr. Greenforest calculating timber trespass damages in ways other than assessing the reasonable cost to restore and replace Mr. Wood's property to its pre-trespass condition. CP 363-64. The trial court denied the motion. CP 551-54.

At trial the court allowed the defense expert testimony on measures of damages other than restoration and replacement costs. RP 3/13 Vol. II 57-73. That evidence was Mr. Greenforest's

Wood's property was angled rather than rectangular. See Ex 42.

testimony on: the TFM appraisal of the market value of Tree 595,⁵ id. at 48-54; the cost of planting 5 saplings, id. at 82-84; the minimum city code planting requirements after critical area cutting, taken from non-critical area code provisions, id. at 75-82, 84-85; and, the alleged city practice of applying non-critical area code provisions to establish the minimum re-planting requirements after illegal cutting in a critical area, id. at 75-76. The trial court allowed this testimony even though the restoration and replacement cost measure of damages does not reference, is not based on, and is not limited by appraisal value or by any city standards.

Because this evidence was irrelevant, unhelpful, and could only mislead and confuse the jury, it was inadmissible.⁶ In fact, *all* the arborists in this case, including Mr. Greenforest, agreed that neither the TFM appraisal nor the cost of planting small nursery trees measured the cost of returning Mr. Wood's property to its pre-trespass condition. Id. at 91-99.

This evidence, however, did materially affect the outcome of the case. It allowed the defense to argue successfully to the jury,

5 Because the trial court ruled on summary judgment that Mr. Wood had no ownership interest in Tree 596, the trial was about the trespass of Tree 595 only.

6 Expert testimony applying the wrong measure of damages is inadmissible under ER 402 because it is irrelevant, is inadmissible under ER 702 because it

contrary to Washington law, that true restoration and replacement costs should not be awarded, but rather that Mr. Wood should be compensated according to either the appraised value of the trespassed tree or the cost of planting nurslings to replace the mature 38' Tree 595 that was trespassed.

Especially harmful was Mr. Greenforest's testimony about city code provisions and city practices regarding the use of non-critical area code requirements to establish the minimum requirements for restoring illegal cutting in a critical area. That is because the jury, upon hearing what minimal "restoration" was required by the city, could only logically conclude from this testimony (and the confusing jury instructions) that these minimal city "restoration" requirements were the same thing as the restoration and replacement standard embodied in Washington law as the measure of damages in a residential timber trespass case. But as a matter of law, they are not even close to being the same thing.⁷ Thus, admitting Mr. Greenforest's testimony was legal error

is not helpful to the jury, and is inadmissible under ER 403 because it misleads and confuses the jury as to the proper measure of damages.

⁷ This damaging effect of Mr. Greenforest's testimony could have been mitigated somewhat had the court instructed the jury that restoration and replacement under Washington law meant returning the property as close as possible to the way it was before the trespass, by giving proposed Instruction 19, but they were not given. CP 423.

which materially prejudiced Mr. Wood on the major issue in this case: restoration and replacement cost damages.

3. Evidence that the Trees Were Cut From a Critical Area Without a Permit Was Relevant

The trial court also erred when it prohibited Mr. Wood from introducing evidence that Burien required a critical area permit prior to cutting down Mr. Wood's trees, that such a permit application to cut down the subject trees would not have been granted, and that had a permit been requested Mr. Wood probably would have been timely alerted to defendants' plan to cut down his trees and been able to prevent it. CP 553. The absence of this evidence allowed defendants to argue successfully to the jury that Mr. Wood could not have truly valued his trees as much as he claimed, since he did not mark his property line with a fence to protect them. RP 3/17 63. The trial court's ruling precluded Mr. Wood from testifying that no fence could be built in the critical area. Mr. Wood was also precluded from responding to the defendants' argument that its trespass was mitigated because there was no boundary line marker, *id.* at 91-92, because he was not allowed to truthfully relate to the jury that a boundary line marker was unnecessary because

no one could lawfully cut down those critical area trees. The jury's verdict indicates it was receptive to these defense arguments.

This excluded evidence was material to both the damages and mitigation issues. It would have helped the jury understand Mr. Wood's actions in selecting the location to plant his trees, to understand why there was no need for a boundary line marker (in addition to the survey stakes), and to understand how the defendants' cutting down of legally protected trees without a permit—being so unexpected and inexplicable—had such a profound effect on him. Not allowing this relevant evidence contributed to the jury's lack of understanding as to why Mr. Wood's actions regarding these trees was reasonable, and why the defendants actions were so unreasonable.

4. Remedy For Prejudicial Evidentiary Errors

A material, prejudicial error of law warrants a new trial under CR 59(a)(8). In addition, when the admission of critical testimony was clearly erroneous, a new trial on the ground of failure of substantial justice is proper. Barth v. Rock, 36 Wn. App. 400, 404-05, 674 P.2d 1265 (1984) (applying CR 59(a)(9)).

D. The Trial Court Erred by Instructing the Jury the Way It Did on Damages and Mitigation

1. Standard of Review on Jury Instructions

It has long been Washington law that prejudice will be presumed from an erroneous instruction on a material issue. Nordeen Iron Works v. Rucker, 83 Wash. 126, 129, 145 P. 219 (1915). Jury instructions are adequate if, read as a whole, they allow argument of the parties' theory of the case, they are not misleading, and they properly inform the trier of fact of the law. Gammon vs. Clark Equipment Co., 104 Wn.2d 613, 617, 707 P.2d 685 (1985). Appellate courts review the propriety of jury instructions *de novo*. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to be prejudicial and requires a new trial unless it affirmatively appears that the error was harmless. Zwink v. Burlington Northern, Inc., 13 Wn. App. 560, 569, 536 P.2d 13 (1975).

2. The Trial Court Erred When it Failed to Give Proposed Instruction 19

The court refused to instruct the jury, as requested by Mr. Wood, CP 423 and 593, that under Washington law the purpose of timber trespass damages is "to return an injured party as nearly as

possible to the condition in which it would have been had the wrong not occurred" per Tatum, 30 Wn. App. at 584 n.2.

In Watkins, 12 Wn. App. at 705, it was held that the measure of damages for injury to land, when the property may be restored to its original condition, is the reasonable expense of such restoration. The Watkins Court stated:

[W]e reach this result bearing in mind the observation of C. T. McCormick, Damages § 137 (1935), that "[t]he primary aim in measuring damages is compensation, and this contemplates that the damages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred."

The trial court should have so instructed the jury, especially considering the evidentiary error of allowing Mr. Greenforest to testify on measures of damages which do not restore Mr. Wood's property to its pre-trespass condition.

The trial court's refusal to give Mr. Wood's proposed instruction was prejudicial error because it was an accurate statement of Washington law, and because the remaining instructions only provided the jury with half the relevant Washington law—that Mr. Wood could "restore and replace" his trespassed property, but without any explanation of what level of restoration the law provided. This omission in the instructions left the jury to

conclude that the non-restoration and replacement measures of damages testified to and argued by the defense in closing were proper measures of damages under Washington law.

3. The Trial Court Erred When it Failed to Give Plaintiff's Proposed Instruction 26

In anticipation of the defendants' arguments about the reasonableness of his restoration and replacement project, Mr. Wood proposed the following instruction:

Although timber trespass damages may exceed the value of the underlying property, the damages must be reasonable in relation to the value of the property.

CP 545, 597. See Allyn, 87 Wn. App. at 736 ("In conclusion, we hold that although timber trespass damages may exceed the value of the underlying property in the proper case, the damages must still be reasonable in relation to the value of the property.").

The trial court refusal to give this instruction was prejudicial error because it is an accurate statement of Washington law, and because its absence allowed the defense to argue the reasonableness of Mr. Wood's restoration and replacement without comparing its cost to the value of his property as required by Washington law. See also § IV.A.3.b and the following section.

4. The Trial Court Erred Giving Instructions 10 and 11

The trial court also erred when, over objection, RP 3/17 2-7, it gave Instructions 10 and 11. In Instruction 10, CP 631, the court instructed the jury to consider general damages only "if you find that the trespass was willful." "Willful" was defined per WPI 14.01 in Instruction 11. CP 632. Instructing the jury on the WPI 14.01 definition of "willful" was error because Mr. Wood's entitlement to emotional distress damages is not predicated on a "willful" trespass. See § IV.A.6 above. Mr. Wood does not bear the burden of proving that the timber trespass was "willful" in order to recover emotional distress damages. Instead of Instruction 10, the court should have used Mr. Wood's proposed instruction, which did not contain the "willful" requirement for emotional distress damages and accurately stated the law. CP 594-95.

Instructions 10 and 11 were also error because they confused the jury on the timber trespass mitigation issue. In the verdict form, Question 4 on "willful" equated Questions 2 and 3 on mitigation to the "willful" standard. CP 617. To establish mitigation, the defendants must prove probable cause—the plaintiff does not have to prove a "willful" trespass. See § IV.A.5.

These instructions prejudiced Mr. Wood because the jury's verdict on both the mitigation and the emotional distress issues, given the evidence, could only have been based on its belief that no defendant cut down Tree 595 knowing it was Mr. Wood's tree, *i.e.*, that their actions were not "willful." It is important to also note that the instructions did not inform the jury to limit application of the "willful" instruction to general damages only—allowing the defense to argue in closing that because defendants did not act "willfully" the answers to verdict questions 2 and 3 (on mitigation) should be in favor of the defense. RP 3/17 61-66, 93-94.

5. Instructional Error Remedy

It has long been Washington law that prejudice will be presumed from an erroneous instruction on a material issue. Nordeen, 83 Wash. at 129. Mr. Wood's claims of error relate to instructions on the main issues in this case—damages and mitigation. These prejudicial instructional errors require a new trial under CR 59(a)(8).

E. The Trial Court Erred in Denying Mr. Wood's Post-Trial Motion for Additur or a New Trial

After the verdict, Mr. Wood timely moved for judgment as a matter of law under CR 50 and additur, or in the alternative for a

new trial under CR 59. The CR 50 motion is addressed in § IV.B above. This section addresses the CR 59 motion.

1. Error in Law Occurring at Trial

The errors in law occurring at trial (evidence and instructions) are discussed above in §§ IV.C and D. Based on those material, prejudicial errors, the trial court should have granted a new trial. An error of law made by the court in the course of a trial is a proper basis for a new trial when the error is shown to be prejudicial to the rights of the losing party. CR 59(a)(8), Miller v. Yates, 67 Wn. App. 120, 125, 834 P.2d 36 (1992) (applying CR 59(a)(8) to jury instructions). No element of discretion is involved when the new trial is sought on the ground of an error of law. Jazbec v. Dobbs, 55 Wn.2d 373, 375, 347 P.2d 1054 (1960).

2. The Jury's Verdict Was Outside the Evidence

An error in the assessment of the amount of recovery in an action for injury to property, and a verdict that is outside the evidence, both constitute grounds for a new trial. CR 59(a)(6) and (a)(7). While there is a strong presumption of validity of jury verdicts on damages, those verdicts must be supported by the evidence. Himango v. Prime Time Broadcasting, Inc., 37 Wn. App.

259, 268, 680 P.2d 432, review denied 102 Wn.2d 1004 (1984). So long as the verdict is within the range of evidence, the trial court has no power to disturb the jury's award. Wooldridge v. Woolett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981). In contrast, if the jury's verdict conflicts with the uncontroverted evidence at trial, the moving party may overcome the presumption that the verdict is correct. Shaw v. Browning, 59 Wn.2d 133, 135, 367 P.2d 17 (1961). When the verdict is claimed to not be based on the evidence, courts review the trial record to determine whether sufficient credible evidence supports the verdict. Palmer, 132 Wn.2d at 197-198. "The requirement of substantial evidence necessitates that the evidence be such that it would convince an unprejudiced, thinking mind." Indus. Indem. Co. of N.W., Inc. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520 (1990). It is an abuse of discretion to deny a motion for a new trial when the verdict is contrary to the evidence. Krivanek v. Fibreboard Corp., 72 Wn. App. 632, 637, 865 P.2d 527 (1993). This jury's verdict was outside the evidence in several respects.

Restoration and Replacement Cost Damages. No relevant evidence was offered at trial challenging either the reasonableness of the cost or the necessity of obtaining the

following pre-restoration services: debris removal services; the boundary line survey; the investigator services; and pre-project arborist services. The only remotely relevant evidence at trial was that the survey was requested by the city in order to verify the boundary lines, and was necessitated by the Brummonds' claim that the existing survey pins were inaccurate. RP 3/10 Vol. II 98. Likewise, the only evidence at trial was that the permit application had to be submitted by a certified arborist in order to obtain the required permit to do any restoration at all. RP 3/10 Vol. II 20-26.

No reasonable jury, on this evidence, could find that any of these costs were unreasonable. No reasonable jury could find that Mr. Wood should not have removed from his yard the extensive tree cutting debris left behind on his property by the defendants. Exs. 28-30. No reasonable jury could find that complying with the City's demand for a survey was unreasonable. No reasonable jury could find that hiring an arborist to prepare and submit the permit application, as required by the City, was unreasonable. Given the evidence, no reasonable jury could find Mr. Wood's efforts to minimize project costs by contacting his neighbor to obtain an easement were unreasonable. On the evidence, these costs simply had to be awarded as damages by the jury:

Debris removal (Ex. 41)	\$ 408.00
Boundary line survey (Ex. 43)	1,685.00
Investigator to locate Sears for easement (Ex. 46)	266.00
Arborist to submit critical area restoration permit application to the City of Burien (Exs. 76-78)	<u>2,913.50</u>
Undisputed Economic Damages	\$5,272.50

Moreover, the jury was instructed that: "There has been no evidence that the amount of the costs in and of themselves were not reasonable. It is for you to decide whether the scope of the restoration and replacement of plaintiff's damaged property undertaken by plaintiff was reasonable under all the facts and circumstances." CP 636.

In addition to these undisputed pre-restoration and replacement project costs, Mr. Wood is also legally entitled to the reasonable cost to restore and replace his damaged property. Putting aside for now the legal errors related to the admission of Mr. Greenforest's testimony and the instructions, the lowest restoration and replacement cost estimate in evidence was Mr. Greenforest's \$3,447.00 estimate of the cost to meet minimum city code requirements. RP 3/13 Vol. II 48-49, 82-84. Adding these two figures together, \$5,272.50 + \$3,447.00, amounts to a minimum restoration and replacement cost damages verdict of \$8,719.50. Despite this, the jury's restoration and replacement cost

damages verdict was for only \$6,854.00. The jury's restoration and replacement cost damages verdict was plainly less than the *minimum* required by the evidence, and was therefore done in error and was outside the evidence.

Emotional Distress Damages. The jury's verdict that Mr. Wood incurred no emotional distress damages is also contrary to the evidence. Though this result was based on the trial court's instructional error, see § IV.D.4, it was also contrary to the evidence. The uncontroverted evidence demonstrated that Mr. Wood had a strong emotional attachment to the trees that were damaged by the defendants' timber trespass, due to their source; due to the time, effort, and expense he invested in establishing them; and due to what they meant to him. RP 3/11 33-36. Mr. Wood also testified that he had to spend at least 175 hours dealing with the consequences of the trespass and restoring his property. On this evidence, no reasonable jury could find that no emotional distress were incurred at all. As a result, the jury's finding of \$0.00 in general damages is outside the range of the evidence.

Mitigation. As discussed in § IV.B.3 above, at trial the defendants' evidence established, at best, only good faith. This is insufficient as a matter of law to establish RCW 64.12.040

mitigation. Though the jury's verdict on mitigation was affected by the confusion created by the WPI 14.01 instruction and the verdict form given by the court, the verdict was still outside the evidence.

3. The Jury's Verdict Was Contrary to Law

In addition to being contrary to the evidence, the jury's verdict was also contrary to Washington law. Under CR 59(a)(7), a new trial should be granted when the jury's verdict is contrary to law. In part because the jury was erroneously instructed, and in part because the jury heard misleading and irrelevant damages evidence, the jury's verdict on restoration and replacement cost damages, on timber trespass mitigation, and on emotional distress damages were contrary to Washington law.

In addition, when a directed verdict should have been granted on a liability issue but was not, our Supreme Court has held that the jury's consideration of a liability issue that should have been decided by the court is likely a contamination of the jury's deliberations on damages:

Thus, as in this case, where liability has been established as a matter of law, keeping it in issue under the whole instructional spectrum on the subject quite probably affected the jury's view on quantum of damages.

Worthington v. Caldwell, 65 Wn.2d 269, 277, 396 P.2d 797 (1965).

The Worthington Court affirmed the trial court's post-trial order of additur, which because the defendant refused to accept, resulted in an order for a new trial.

Because the jury was instructed to apply legal standards on the timber trespass mitigation issue that are contrary to Washington law, the jury's verdict finding mitigation was contrary to law. Likewise, because the jury was instructed to apply legal standards on the emotional distress damages issue that are contrary to Washington law, the jury's verdict on emotional distress damages is contrary to Washington law.

4. The Jury's Verdict Was the Result of Passion or Prejudice

When a jury's verdict is the result of passion or prejudice, a new trial is authorized by CR 59(a)(5). The jury's verdict in this case was so low compared to the actual cost of the restoration and replacement project actually undertaken and paid for by Mr. Wood—it was even lower than the absolute minimum damages verdict consistent with the evidence and instructions—that passion or prejudice was unmistakably the source of the jury's inadequate restoration and replacement cost damages verdict.

One need not look too deeply into the trial proceedings to

determine the likely source of this passion or prejudice against Mr. Wood. The defense strategy was to make Mr. Wood look unappealing and unlikeable. First, there was discussion in voir dire among many in the jury panel that people should not plant trees that will interfere with a neighbor's views; the jury learned that Mr. Wood has done so twice. Second, there was testimony at trial by Mrs. Brummond that she thought Mr. Wood was unfriendly and unneighborly because he put a chain across his driveway, RP 3/13 71-73, 99; 3/13 Vol. II 14-15, 17. Third, Mr. Wood is single and childless, while the defense clearly emphasized that defendants fit the norm of being married with children. RP 3/13 56-57.

Finally, and most importantly, the jurors were apparently motivated by passion and prejudice for the simple reason that he sued his neighbors for cutting down the trees he planted, when they thought he should instead have simply let it go and moved on.

Because the jury's verdict was so inadequate as to unmistakably indicate that it was the result of passion or prejudice, a new trial should have been granted.

5. Substantial Justice Was Not Done

CR 59(a)(9) provides that a new trial may be ordered when substantial justice has not been done. Substantial justice has not

been done in this case. Mr. Wood did nothing wrong at all. He was the victim of an extremely thoughtless, careless act by his neighbor which destroyed property very precious to him. The City of Burien threatened him with fines if he did not restore the damage done by his neighbor. He had to spend at least 175 hours dealing with the trespass and restoring his property. He restored his property as close to the way it was as was feasible, and did so at the lowest possible cost. Washington law entitles him to the cost of restoring his property to the way it was before the trespass. Nonetheless, the jury's verdict only provided him with 8% of the costs he has actually paid to restore his property, provided him nothing for his emotional distress damages, and found that the defendants had probable cause to believe Tree 595 was on the Brummond property when there was no evidence to support such a finding. This result is not substantial justice—it is a travesty of justice. A new trial is not just appropriate—it is absolutely necessary for the sake of justice.

6. Remedy for Unsustainable Jury Verdict

The trial court erred when it denied Mr. Wood's post-trial motion for additur, or in the alternative for a new trial. Mr. Wood recognizes that, as a rule, appellate courts do not grant additurs or

remittitur, but leave that to the trial court. On appeal of the trial court's denial of a justified motion for additur or a new trial, then, it appears the appropriate remedy would be to reverse the trial court's order, and remand to either reconsider its additur decision or hold a new trial. Should the court decide not to reverse the trial court's orders on summary judgment or on Mr. Wood's motion judgment as a matter of law and remand for entry of judgment, then Mr. Wood urges the court to remand for a trial on all issues.

F. Even if None of the Above-Stated Grounds, Standing Alone, Are Sufficient to Warrant a New Trial, When Taken Together the Cumulative Errors Justify a New Trial

Even if one error, alone, would not justify a new trial, the cumulative effect of multiple errors can. Storey v. Storey, 21 Wn. App. 370, 374, 585 P.2d 183 (1978):

The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not.

The cumulative effect of the prejudicial trial errors made in this case prevented Mr. Wood from getting a fair trial. The trial court therefore erred when it denied Mr. Wood's motion for a new trial.

G. RAP 18.1(b)

Pursuant to RAP 18.1, appellant Mr. Wood requests that,

should he prevail, the appellate court award to him the taxable costs he has incurred on appeal. See RAP 14.2.

V. CONCLUSION

Based on Washington timber trespass law and the demonstrated facts of the case, Mr. Wood requests that this court:

1. Reverse the trial court's orders denying Mr. Wood's motion for summary judgment and granting defendants' motion for summary judgment, and remand with instructions to enter summary judgment in Mr. Wood's favor and for trial on the amount of emotional distress damages only.

OR

2. Reverse the trial court's order denying Mr. Wood's motions for judgment as a matter of law and remand for entry of a directed verdict in Mr. Wood's favor regarding restoration and replacement cost damages and timber trespass mitigation, and for trial on the amount of emotional distress damages only.

OR

3. Reverse the trial court's order denying plaintiff's motion for a new trial, and remand with instructions to hold a new trial on the issues of damages and mitigation in accordance with this court's decisions on evidence and jury instructions.

Respectfully Submitted on MAR 4th, 2010.

HAWKES LAW FIRM, P.S.



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Appendix

1. **RCW 64.12.030. Injury to or removing trees, etc.-- Damages** (in 2005, before 2009 amendments)

Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

2. **RCW 64.12.040. Mitigating circumstances--Damages**

If 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, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.

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ORIGINAL

**COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON**

R. GARY WOOD,
Appellant, No. 63677-4-1

vs.

JAMES C. BRUMMOND and
CAROL D. BRUMMOND,
husband and wife, and their
marital community; ROGER B.
CLARK AND KATHRYN
CLARK, husband and wife d/b/a
Treebalance Tree Service,
Respondents.

DECLARATION OF SERVICE
OF APPELLANT'S OPENING
BRIEF

COMES NOW the undersigned and declares under penalty
of perjury under the Laws of the State of Washington as follows:

1. I am of legal age, have personal knowledge of the facts set forth herein, and am competent to testify.
2. I am an employee of Hawkes Law Firm, P.S., 19929 Ballinger Way N.E., Shoreline, WA 98155, attorney of record for appellant in this matter.
3. Per RAP 18.6(b), on March 4, 2010, I sent by U.S. mail, first class postage prepaid, an original and one copy of the Opening Brief of Appellant Gary Wood, addressed to: