

# CUTTING DOWN DAMAGES AWARDS IN TIMBER TRESPASS CASES

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## ABSTRACT

*The Alaska Supreme Court recently heard two cases addressing damages awards for timber trespass claims. Both cases, Wiersum v. Harder and Chung v. Park, emphasized the difficulty of obtaining restoration damages and the close scrutiny given to the size of the damages award itself. This Note explores the history of timber trespass and the current method by which courts determine the appropriate damages award. The Note also proposes a possible alternative to the current reticence toward restoration damages in which the plaintiff may elect to receive restoration damages but would be required to use those damages to restore their trees.*

## INTRODUCTION

### A. A Timber Trespass Hypothetical

You own a plot of land in the Matanuska-Susitna Valley, on which you have built a cabin overlooking a river and enveloped by numerous mature Sitka spruce trees. Work and family obligations keep you busy during the week but you sneak out to the cabin every weekend to unwind. In five years, when you retire, you hope to move to the cabin full-time to be surrounded by nature.

Marring this idyllic vision is your contentious relationship with your neighbor, Ms. McAdams. Her plot overlooks your land, which sits between hers and the river. Some of your tall trees partially block McAdams' view of the water. Annoyed, McAdams hires men to cut down the tallest of your trees to create a panoramic view for her cabin. You are outraged by the loss of trees because their beauty was one of the

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reasons for your purchase of the land. When you consult a nursery about replacing the trees, the arborist tells you that shipping in mature spruce trees would cost \$25,000.

How much of this cost should be borne by Ms. McAdams? It seems to you that she should pay the whole \$25,000 cost to replace the trees she cut down. But what if, putting your sadness aside, your land's fair market value has gone down only \$5,000 or has not decreased at all as a result of McAdams's behavior? In fact, it's possible that your plot is actually worth *more* with the trees removed. Under that circumstance, is it still fair to make McAdams pay the \$25,000? Or is it unfair to make you bear the cost of planting replacement trees yourself because the fair market price does not accurately capture the value your spruce trees added to the land?

This hypothetical involving the destruction of trees on the property of another was traditionally covered by the common-law tort of trespass.<sup>1</sup> However, in Alaska and several other states, statutes create an alternative cause of action for such cases.<sup>2</sup>

One of the earliest cases in the United States regarding timber trespass is *E.E. Bolles Wooden-Ware Company v. United States*,<sup>3</sup> in which the Supreme Court grappled with the valuation of felled trees.<sup>4</sup> Courts today still struggle to determine the appropriate amount of damages in timber trespass cases because the costs of restoring mature trees often outweigh the land's diminution in market value.

## B. Alaska's Timber Trespass Statute

The state of Alaska quickly recognized timber trespass claims in its courts. The timber trespass statute, Alaska Statute § 09.45.730, was enacted in 1962.<sup>5</sup> Though there had been cases involving the destruction or removal of timber under common-law trespass claims before Alaska's statehood,<sup>6</sup> the earliest case to reach the Alaska Supreme Court under

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1. ERIC M. LARSSON, *Causes of Action for Damages Resulting from Timber Trespass*, § 2, in 45 CAUSES OF ACTION (2d ed. 2010).

2. *Id.*

3. 106 U.S. 432 (1882).

4. *See id.* at 433. Trespassers intentionally cut and removed trees on plaintiff's land. After being felled, the trees on the ground had a value of only about \$60. *Id.* However, the trespassers carried the trees a long distance to town, where the timber was purchased for \$850. *Id.* The Court determined that \$850 was the correct valuation of the timber, in part because an award of the lesser amount would encourage trespassers to continue to cut and abscond with timber. *Id.* at 433-36.

5. ALASKA STAT. § 09.45.730 (1988).

6. *E.g.*, *Duffy v. Strandberg*, 5 Alaska 353 (D. Alaska 1915); *McQuilan v.*

the timber trespass statute was *Mertz v. J.M. Covington Corporation* in 1970.<sup>7</sup> The current version of the timber trespass statute reads:

A person who without lawful authority cuts down, girdles, or otherwise injures or removes a tree, timber, or a shrub on (1) the land of another person or on the street or highway in front of a person's house, or (2) a village or municipal lot, or cultivated grounds, or the commons or public land of a village or municipality, or (3) the street or highway in front of land described in (2) of this section, is liable to the owner of that land, or to the village or municipality for treble the amount of damages that may be assessed in a civil action. However, if the trespass was unintentional or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, or where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge on or adjoining the land, only actual damages may be recovered.<sup>8</sup>

### C. Other States' Statutes

Other than Alaska, forty-two states also have statutes relating to timber trespass.<sup>9</sup> A Missouri court suggested that separate statutory timber trespass actions beyond common-law trespass are necessary because "[s]tatutory trespass attempts to redress plaintiff for injuries that often have intangible qualities, such as aesthetic value, and such damages are often difficult to measure."<sup>10</sup> While many states' statutes resemble Alaska's in focusing on the destruction and removal of trees, some states have enacted statutes targeting the impermissible destruction or removal of various natural resources, including trees. Although discussion of each of these states' statutes is beyond the scope

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Tanana Elec. Co., 3 Alaska 110 (D. Alaska 1906).

7. 470 P.2d 532 (Alaska 1970).

8. § 09.45.730.

9. LARSSON, *supra* note 1, § 37. The forty-two states are: Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

10. *Hale v. Warren*, 236 S.W.3d 687, 695 (Mo. Ct. App. 2007) (quoting *Ridgway v. TTnT Dev. Corp.*, 26 S.W.3d 428, 435-36 (Mo. Ct. App. 2000)).

of this Note, the Washington and Oregon statutes deserve greater attention because of the shared Pacific Northwestern environmental context of Alaska, Washington, and Oregon.

Oregon's statute applies to trespasses that result in damage to or destruction of trees, produce, or other vegetation.<sup>11</sup> Like Alaska's statute, it allows for the collection of treble damages in cases where the trespass was committed "willfully, intentionally and without plaintiff's consent."<sup>12</sup> Washington's statute<sup>13</sup> applies to natural resources more generally than either Alaska's or Oregon's statutes; it covers timber, crops, minerals, and any other valuable resource from the land.<sup>14</sup> A separate statute,<sup>15</sup> which addresses only the destruction or removal of timber, specifies that any award for timber trespass is subject to treble damages, regardless of defendant's knowledge or intent.<sup>16</sup>

It is no surprise that these states have enacted statutes to protect trees on private lands, as economic and environmental issues surrounding timber loom large in the Pacific Northwest's public discourse. Alaska has enormous forests scattered across the state for a total of 129 million forested acres.<sup>17</sup> Unsurprisingly, Alaska is home to the two largest national forests in the United States.<sup>18</sup> There are boreal forests throughout Alaska's interior and southern central region.<sup>19</sup> Along the southeast, there are coastal rainforests like those in Washington and Oregon.<sup>20</sup> Meanwhile, in Oregon and Washington alone, there are sixteen national forests that attract large numbers of tourists.<sup>21</sup> For the Pacific Northwest, careful stewardship of the region's timber resources

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11. OR. REV. STAT § 105.810(1) (2014).

12. *Id.*

13. WASH. REV. CODE § 4.24.630 (1999).

14. *Id.*

15. § 64.12.030 (2011).

16. *Id.*

17. *Alaska Forest Facts*, ALASKA FOREST ASS'N, <http://www.akforest.org/facts.htm> (last visited Feb. 23, 2016).

18. The Tongass National Forest is the largest national forest in the United States, while the Chugach National Forest is the second largest. *Id.*

19. *Id.* ("The forests found in Alaska's interior are known as Boreal Forests. These forests extend from the Kenai Peninsula to the Tanana Valley near Fairbanks, and as far north as the foothills of the Brooks Range. They stretch from the Porcupine River near the Canadian border and west down the Kuskokwim River valley.")

20. *Id.* ("The coastal rainforest begins in southern southeast Alaska, and extends through Prince William Sound, and down the Kenai Peninsula to [the] Afognak and Kodiak Islands.")

21. The U.S. Forest Service highlights the beauty of these sixteen Pacific Northwestern forests in its tourism video. *Visit Your Pacific Northwest National Forest, Pacific Northwest Region*, U.S. DEP'T OF AGRIC., FOREST SERV., <http://www.fs.usda.gov/r6> (last visited Mar. 7, 2016).

is important for the local economy, environment, and identity.<sup>22</sup> In Oregon and Washington, the logging industry has been cut back in order to protect the region's sensitive environment.<sup>23</sup>

The timber industry remains an important part of Alaska's economy.<sup>24</sup> Recently, however, environmentalists have lobbied and filed lawsuits to curb logging in the Tongass National Forest.<sup>25</sup> The Forest Service in Alaska is trying to balance the tension between the conservation of forests and the economic benefit the timber industry provides.

## I. MECHANICS OF DAMAGES AWARD CALCULATIONS

### A. Compensatory Damages based on Diminution of Fair Market Value

At trial, the amount of damages for most timber trespass claims equates to the diminution of the land's fair market value as a result of the trespass.<sup>26</sup> Although Alaska has not yet calculated damages this way, at least one other state court has held that the value of the lost timber itself can be recovered in addition to the diminution in fair market value of the land.<sup>27</sup>

In order to determine the loss of fair market value, testimony by

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22. See U.S. DEP'T OF AGRIC., FOREST SERV., PACIFIC NORTHWEST REGION ALMANAC 1, [https://fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5378417.pdf](https://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5378417.pdf) ("These [public lands, including National Forests] provide the people and communities of the Pacific Northwest their livelihood, recreation, visual backdrop, and identity.").

23. *Id.* ("The wetter west-slope vegetation zones were aggressively logged during the last few decades. Timber harvest has declined substantially due to environmental and Threatened, Endangered, and Sensitive (TE&S) species concerns.").

24. *Alaska Forest Facts*, *supra* note 17 ("Today, Alaska's forest products industry provides hundreds of jobs and contributes millions of dollars to Alaska's economy. Furthermore, each direct timber job creates at least three indirect jobs for doctors, retailers, teachers, and more.").

25. Michael Wines, *In Alaska's Tongass, a Battle to Keep Trees or an Industry*, *Standing*, N.Y. TIMES, Sept. 27, 2014, at A22 ("Environmental groups filed three lawsuits against the Forest Service last month. Perhaps the most significant of them contends that further logging threatens an already struggling Alaskan wolf, defying a federal law requiring the service to protect wildlife on its lands.").

26. RESTATEMENT (SECOND) OF TORTS § 929 (1979).

27. LARSSON, *supra* note 1, § 22 ("At least one court has held that it is possible to recover statutory damages for the value of timber removed, plus a diminution in value of the land if there is identifiable loss separate from the removal of the timber.") (citing *Sells v. Robinson*, 118 P.3d 99, 107 (Idaho 2005)).

both the landowner and experts is admissible.<sup>28</sup> “In Alaska, lay testimony offered by the landowner as to property value is admissible because of the owner’s presumed knowledge about the value of such property.”<sup>29</sup> Additionally, real estate agents familiar with the property and the neighboring area can provide expert testimony on the diminution of the land’s fair market value.<sup>30</sup>

## B. Statutory Treble Damages

Many plaintiff landowners are not limited to recovery of actual damages because Alaska Statute section 09.45.730 allows for recovery of treble damages in timber trespass cases, with three exceptions.<sup>31</sup> Treble damages punish defendants for intentionally removing trees from another’s property, and thereby discourage them from committing timber trespass again.<sup>32</sup>

There is an exception for unintentional trespasses that result in damage to plaintiff landowner’s trees.<sup>33</sup> One example would be an unintentional fire on the defendant’s property, which spreads to the plaintiff’s land and destroys his trees. For unintentional or involuntary trespasses, treble damages would fail to discourage future trespasses by the defendant, because the forces behind these trespasses, such as fires, are difficult to predict and control.

Treble damages are also not awarded where the defendant had probable cause to believe that his destruction or removal of plaintiff’s trees was permissible.<sup>34</sup> Here, probable cause means “an honest and reasonable belief” that the defendant had the “authority to enter and cut on the property.”<sup>35</sup> Because a reasonable belief is required for probable

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28. See *Osborne v. Hurst*, 947 P.2d 1356, 1361–62 (Alaska 1997).

29. *Schymanski v. Conventz*, 674 P.2d 281, 286 (Alaska 1983) (citing *Wernberg v. Matanuska Elec. Ass’n*, 494 P.2d 790, 795 (Alaska 1972)).

30. See *Osborne*, 947 P.2d at 1362. The court allowed the expert testimony of a “certified residential specialist” and “certified residential broker” familiar with the plaintiff’s lot and neighborhood. *Id.* The expert had explained that “her job require[d] her to be familiar with the value of real property and that she [was] frequently asked to give ‘a fair market value or a fair estimation value’ of property.” *Id.*

31. ALASKA STAT. § 09.45.730 (1988).

32. LARSSON, *supra* note 1, § 24 (“Generally, the recovery of statutory damages multipliers is regarded as a substitute for punitive damages for the intentional or knowing removal of agricultural products from the land of another, and it follows that it is improper to award both treble damages and punitive damages against a defendant for the destruction of such products.”).

33. *Matanuska Elec. Ass’n v. Weissler*, 723 P.2d 600, 608 (Alaska 1986).

34. *E.g., id.*

35. *Id.*

cause, a defendant who cuts down another's trees because of a negligent mistaken belief that he had permission lacks "probable cause."<sup>36</sup> In such cases, treble damages would be unduly punitive on less culpable defendants who had no intention of trespassing on the plaintiff's property.

However, even if the timber trespass did not fall within one of the three exceptions, courts may only award treble damages if the plaintiff demands them in his complaint.<sup>37</sup> If the plaintiff does request treble damages in the pleadings, then the defendant bears the burden of proving that his actions fell within one of the three exceptions.<sup>38</sup>

### C. Restoration Damages

While damages based on the diminution of fair market value are the norm, courts in Alaska may award restoration damages in certain cases. The Alaska Supreme Court has adopted the Restatement (Second) of Torts § 929 approach for determining damages in trespass claims.<sup>39</sup> Section 929 reads in relevant part:

- (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
  - (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred.<sup>40</sup>

Because restoration damages would be inappropriate in cases where the land could not be restored, restoration damages are only awarded when the harm to the land is not "fixed and irreparable."<sup>41</sup>

In determining whether restoration damages are appropriate, Alaska courts look to the Restatement (Second) of Torts § 929, Comment (b).<sup>42</sup> Comment (b) advises that disproportionately large restoration damages are only appropriate when the landowner has a "reason

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36. *Id.* ("Here, [defendant]'s negligence 'verg[ing] on recklessness' negates any probable cause to cut the affected trees. [Defendant]'s negligence in believing it could cut the trees made its mistake unreasonable. The probable cause exclusion will not limit [defendant]'s liability.").

37. *McQuillan v. Tanana Elec. Co.*, 3 Alaska 110, 112 (D. Alaska 1906).

38. *Weissler*, 723 P.2d at 604-05.

39. *See G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379, 1385-86 (Alaska 1974) (applying the Restatement approach).

40. RESTATEMENT (SECOND) OF TORTS § 929 (1979).

41. *G & A Contractors, Inc.*, 517 P.2d at 1386.

42. *Andersen v. Edwards*, 625 P.2d 282, 288 (Alaska 1981).

personal” to him that justifies the expense of restoration.<sup>43</sup> As an example, Comment (b) provides that “when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premises has not been decreased by the defendant’s invasion.”<sup>44</sup> In *Andersen v. Edwards*,<sup>45</sup> the Alaska Supreme Court wrote,

We believe the appropriate rule is that if the cost of restoring the land to its original condition is disproportionate to the diminution in the value of the land caused by the trespass, the restoration measure of damages is inappropriate unless there is a ‘reason personal to the owner’ for restoring the original condition.<sup>46</sup>

There is no set method of deciding whether there is a sufficient reason personal to the plaintiff that justifies restoration damages. Rather, there are multiple factors about the land and its owners that should be considered at trial, with none of the factors being necessarily dispositive. The Alaska Pattern Jury Instructions § 13.05 for Trespass Damages informs jurors:

To determine whether there is a reason personal to the plaintiff for restoring the property, you may consider the nature of the property, how it was used, the likelihood that the plaintiff

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43. RESTATEMENT (SECOND) OF TORTS § 929 cmt. b. Comment (b) reads in part:

Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. Thus if a ditch is wrongfully dug upon the land of another, the other normally is entitled to damages measured by the expense of filling the ditch, if he wishes it filled. If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm. This would be true, for example, if in trying the effect of explosives, a person were to create large pits upon the comparatively worthless land of another.

*Id.*

44. *Id.* However, some other jurisdictions may award disproportionate restoration damages whether or not the plaintiff has a “reason personal,” if an award of diminution of fair market value would be unjust. See *B.A. Mortg. Co. v. McCullough*, 590 S.W.2d 955, 957 (Tex. Civ. App. 1979) (holding that the particular facts of the case warranted deviation from the standard fair market value damages calculation in order to prevent defendants from evading liability for the unlawful re-gradation of plaintiff’s land).

45. *Andersen*, 625 P.2d at 282.

46. *Id.* at 288.

would actually restore it, or any other factors you think are important.<sup>47</sup>

Given this nebulous factors test, a close examination of timber trespass cases in which restoration damages were demanded provides the most insight into what generally qualifies as a “reason personal” to the plaintiff. In *Andersen v. Edwards*, the court found that the plaintiff lacked a reason for requesting restoration damages.<sup>48</sup> The defendant, a development corporation, wrongfully cut more trees than necessary on a section line easement through plaintiff’s land in order to build a public road.<sup>49</sup> The plaintiff expressed his concern to the defendant about the possible destruction of trees on his land before construction of the road began. The defendant assured the plaintiff that the construction “would do as little damage to the area as possible”; nevertheless, defendant cleared almost the entire one hundred foot width of the easement, despite the road’s much smaller twenty-five foot width.<sup>50</sup>

After the jury awarded the plaintiff \$25,000 in restoration damages, the defendant appealed.<sup>51</sup> The Alaska Supreme Court reversed, holding that “the trial court erred in using the cost of restoration as the measure of damages in this case.”<sup>52</sup> The court determined that the destroyed trees did not possess “beauty, location, quality, size or other particular features” that would make them “of peculiar value to the landowner.”<sup>53</sup> The court concluded that the lack of reason personal to the plaintiff to restore the trees made it unlikely that the plaintiff would use the damages to actually restore the land.<sup>54</sup>

In *Osborne v. Hurst*,<sup>55</sup> the Alaska Supreme Court reversed the lower court’s grant of summary judgment for the defendant, finding that the court should have considered whether the plaintiffs, a married couple, possessed a “reason personal” that justified restoration.<sup>56</sup> The court remanded for a jury trial because sufficient evidence existed to support

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47. *Trespass Damages*, in ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 13.05 (1996).

48. *Andersen*, 625 P.2d at 288–89.

49. *Id.* at 284.

50. *Id.* at 285.

51. *Id.*

52. *Id.* at 288.

53. *Id.* at 289. Therefore, “[t]he severed trees were without special value beyond the fact that they were located on the [defendant]’s property . . . . Consequently, we hold that the diminution in value of the property or the economic value of the timber cut was the appropriate measure of damages.” *Id.*

54. *Id.*

55. 947 P.2d 1356, 1360 (Alaska 1997).

56. *Osborne*, 947 P.2d at 1360.

the finding of a reason personal to the plaintiffs by a jury.<sup>57</sup> The plaintiffs testified in depositions that they bought their property because of “its unique views, its abundant trees, and the unusual juxtaposition of the trees, the cabin, and the views.”<sup>58</sup> In addition to claiming that none of the nearby properties were comparable, the plaintiffs stated that they intended to use their property as their primary residence after retirement.<sup>59</sup> Thus, the plaintiffs’ special circumstances might have convinced a jury that a restoration damages award disproportionate to the land’s diminution of fair market value was reasonable.<sup>60</sup>

Likewise, in *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*,<sup>61</sup> the Alaska Supreme Court ruled that the plaintiff landowner “use[d] its property for purposes peculiar to its business” and “therefore restoration [was] necessary.”<sup>62</sup> The plaintiff, Alaska Greenhouses, Inc., owned a thirty-acre parcel of land, through which a creek ran downstream from the defendant’s land.<sup>63</sup> This land was used for the operation of a horticulture business.<sup>64</sup> The plaintiff wanted the property to be a “garden showplace” for his business, as well as a “recreation area” and arboretum.<sup>65</sup>

The defendant, G & A Contractors, Inc., owned a fifty-three acre land parcel, through which the creek also ran.<sup>66</sup> It intended to develop its property into a multi-family housing development.<sup>67</sup> The defendant needed to divert the creek running through the property in order to develop the land.<sup>68</sup> During the excavation of land to divert the creek, “heavy earthmoving equipment” hired by the defendant trespassed on plaintiff’s land numerous times.<sup>69</sup> These trespasses resulted in “extensive damage to trees and ground cover” on plaintiff’s property.<sup>70</sup>

This damage prevented the plaintiff from using its property to display the variety and quality of trees and other plants available through its nursery business.<sup>71</sup> The total damages award against the

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. 517 P.2d 1379 (Alaska 1974).

62. *Id.* at 1382.

63. *Id.* at 1381.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

defendant was \$15,661.25, of which \$12,555 was attributable to the destruction of various trees and vegetation.<sup>72</sup> Defendant argued that the award of restoration damages for the destroyed trees and vegetation was unreasonable and that diminution of fair market value was the better measure of damages.<sup>73</sup> However, the Alaska Supreme Court was not persuaded because the defendant did not prove that the damages amount was clearly erroneous or unreasonable in light of the trial court's finding that plaintiff had a sufficient reason personal to restore its property.<sup>74</sup> Because maintaining the trees on its land was necessary for Alaska Greenhouses, to continue its business, the court held that the plaintiff had a personal reason warranting restoration damages.<sup>75</sup>

## II. RECENT CASES

### A. Timber Trespass Claims in Alaska

Although there have been a limited number of timber trespass claims in Alaska,<sup>76</sup> two recent Alaska Supreme Court cases highlight the dual difficulties these claims encounter: determining whether the plaintiff has a genuine "reason personal" and determining what amount of restoration damages would be "objectively reasonable."

### B. *Wiersum v. Harder*

In *Wiersum v. Harder*,<sup>77</sup> the plaintiff-respondent, Paul Harder, filed a timber trespass claim against defendants Darlene and Joel Wiersum

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72. *Id.* at 1382.

73. *Id.* at 1385-86. Interestingly, defendant argued that diminution of fair market value of the land was the more appropriate measure of damages because the damage to plaintiff's land was "permanent." *Id.* at 1386. However, defendant presented no evidence that the injury to the land was permanent, which would have made planting new trees futile. *Id.* Furthermore, defendant failed to show the trial court's finding on restoration damages was clearly erroneous. *Id.*

74. *Id.* at 1386.

75. *Id.* at 1382, 1385.

76. Since its inception in 1962, only eleven cases under the statute have reached the Alaska Supreme Court. *See* *Chung v. Rora Park*, 339 P.3d 351 (Alaska 2014); *Wiersum v. Harder*, 316 P.3d 557 (Alaska 2013); *Hayes v. A.J. Assocs., Inc.*, 960 P.2d 556 (Alaska 1998); *Osborne v. Hurst*, 947 P.2d 1356 (Alaska 1997); *Matanuska Electric Ass'n v. Wissler*, 723 P.2d 600 (Alaska 1986); *Shane v. Rhines*, 672 P.2d 895 (Alaska 1983); *Andersen v. Edwards*, 625 P.2d 282 (Alaska 1981); *Scavenius v. City of Anchorage*, 539 P.2d 1161 (Alaska 1975); *Mertz v. J. M. Covington Corp.*, 470 P.2d 532 (Alaska 1970); *Rohaley v. Compere*, 2004 WL 2260293, No. S-11004, at \*1 (Oct. 6, 2004); *Coffel v. Larsen*, 1988 WL 1514913, No. S-2186, at \*1 (Sept. 28, 1988).

77. 316 P.3d 557 (Alaska 2013).

after the Wiersums cut numerous trees on plaintiff's land.<sup>78</sup> Harder bought land in Kodiak in 1976, on which he built a small house he lived in for a number of years.<sup>79</sup> Later, in 1982, he "subdivided the property into three lots: Lots 1A, 1B, and 1C."<sup>80</sup> The house stood on Lot 1B, which plaintiff sold to his sister, Lisa Wietfeld, in 1993.<sup>81</sup> Although he lived outside of Alaska for the next fifteen years, Harder visited the property frequently and intended to build a cabin on Lot 1A "in the old growth forest for his retirement."<sup>82</sup>

The Wiersums then bought their property, which was adjacent to Lot 1A and also overlooked Lot 1B.<sup>83</sup> Because the Wiersums could view Wietfeld's cabin on Lot 1B, they believed Wietfeld owned all the property between Lot 1A and Lot 1B.<sup>84</sup> In 2005, the Wiersums asked Wietfeld if they could cut down some trees on her property that might "come down with the wind' and harm their property."<sup>85</sup> Wietfeld consented at the time but became upset when she saw that they had cleared the entire hillside, rather than removing a few potentially dangerous trees.<sup>86</sup> In 2007, Harder visited the property again and discovered that the clear-cut hillside was on his land, and not Wietfeld's Lot 1B.<sup>87</sup>

Harder filed a timber trespass claim against the Wiersums in early 2008.<sup>88</sup> He sought restoration costs as well as statutory treble damages under Alaska Stat. § 09.45.730.<sup>89</sup> The Wiersums argued in their answer that any liability should be apportioned between themselves and Wietfeld, and that statutory treble damages were inappropriate because they had probable cause for believing that Wietfeld owned all the property and had given them permission to cut down Harder's trees.<sup>90</sup>

The trial began in May 2010, during which both parties testified and presented expert testimony as to the costs of restoration.<sup>91</sup> While Harder admitted that the property's value of \$27,500 had not been

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78. *Id.* at 559.

79. *Id.* at 560.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 560-61.

91. *Id.* at 561-62.

diminished due to the loss of trees,<sup>92</sup> he testified that he wanted to restore the trees on Lot 1A because:

As a boy, he had hiked across the property with his friends while hunting and fishing. He lived in the house that he had built on Lot 1B for several years. Even after he moved out of Alaska, he continued to fish in Kodiak in the summers and periodically spent time at the Monashka property with his family. He testified that he held on to the Monashka property for 34 years and that he intended to build a house and live on Lot 1A once his son graduated from college.<sup>93</sup>

Furthermore, Harder testified that Lot 1A was a particularly beautiful and private area of the property because “the tall trees screened the neighboring houses from view.”<sup>94</sup> Disturbed by the property’s loss of beauty and privacy following the trespass, he declared on the stand “It’s been . . . altered forever, and all I’m asking is that it’s repaired . . . I mean, I don’t want money. I want my trees back.”<sup>95</sup>

In order to prove Harder’s intention to restore the land, he “testif[ied] to and submit[ted as] evidence a purported notarized ‘contract’” to the jury.<sup>96</sup> In the “contract” with the jurors, he promised that all restoration damages would be used solely to replant trees similar to those the Wiersums had destroyed.<sup>97</sup> On appeal, the Wiersums argued that the jury should not have been allowed to consider the “contract,” as it in no way legally bound Harder to actually restore his land with the damages award.<sup>98</sup> As will be discussed in greater detail below, the court agreed, noting that the jury could easily have been misled by the word “contract” and its implication of legal

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92. *Id.* at 561.

93. *Id.*

94. *Id.*

95. *Id.* (alteration in original).

96. *Id.* at 570–71.

97. *Id.* at 570. Harder’s proposed “contract” with the jurors read:

I Paul Harder do hereby solemnly swear, at the risk of being prosecuted for fraud, to replant a minimum of 70 Sitka spruce trees and no less than 6500 square feet of understory on Lot 1A block 8 Monashka bay subdivision, if awarded restoration damages from the Harder versus Wiersum[]s law suit. I Paul Harder agree to use all those restoration damages solely for restoration and to plant the largest trees that the award will afford . . . . Paul Harder agrees that restoration damages shall be held in an escrow trust by his attorney Jill Wittenbrader and doled out as needed to complete the job.

*Id.* at 573–74 (Carpeneti, J., concurring in part and dissenting in part).

98. *Id.* at 571.

enforceability.<sup>99</sup> The court ruled that this evidence was inadmissible and could not be considered in the determination of damages upon remand.<sup>100</sup>

Following his own testimony, Harder presented the expert testimony of a forester, an arborist, and a horticulturist to establish the cost of restoration.<sup>101</sup> The forester noted that almost seventy trees had been cut on Harder's property.<sup>102</sup> To transplant seventy nine to ten foot tall sitka spruce trees, Harder's arborist estimated that it would cost \$161,000.<sup>103</sup> In addition, the arborist testified that another \$162,000 would be necessary to replace the property's lost ground cover.<sup>104</sup> Using a different technique for the transplantation of large trees, the horticulturist believed it would cost an astonishing \$620,537 to restore plaintiff's land.<sup>105</sup>

The Wiersums testified about their mistaken belief that they had permission from Wietfeld to cut down the trees on Lot 1A, which they believed she owned.<sup>106</sup> A real estate expert testified that Harder's property in 2005 had a listing value of \$30,000-\$40,000 and that its value would only have been "minimally affected, if at all," by the lost trees.<sup>107</sup> Finally, defendants' arborist testified that restoration of Harder's property would cost approximately \$34,000.<sup>108</sup> But this arborist suggested the transplantation of smaller Sitka pines from nearby areas of Kodiak than Harder's experts suggested; furthermore, the arborist

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99. *Id.* Furthermore:

Because contracts are widely recognized to be legally enforceable agreements, proposing such a 'contract' with the jurors was likely to have misled jurors into believing that Harder's promise to restore his property was legally enforceable when it was not. The jury's decision on the proper amount of damages could thus have been impermissibly influenced by a false belief that Harder was legally bound to use a damage award to restore his property.

*Id.*

100. *Id.*

101. *Id.* at 561.

102. *Id.*

103. *Id.*

104. *Id.* In total, the arborist's restoration strategy would have cost \$323,000.

*Id.*

105. *Id.* Thus, the horticulturist's restoration plan would cost almost double that of the arborist.

106. *Id.* However, "they admitted that they did not check public records to verify ownership" of the property. *Id.* This undercut the reasonableness of their mistake.

107. *Id.* at 561. Additionally, defendants' real estate expert noted that Harder's property had appreciated to a value of \$50,000-\$55,000 by 2009 despite the lack of trees. *Id.*

108. *Id.* at 562.

included some additional funds to compensate for very tall trees that could not be replaced easily.<sup>109</sup> The arborist stated “his restoration plan specifically took into account [Harder]’s interest in restoring the privacy that his property had previously enjoyed.”<sup>110</sup>

Upon concluding their defense, the Wiersums requested a motion for a directed verdict on the theory that Harder could not prove there had been a diminution in the property’s fair market value.<sup>111</sup> They also argued that the restoration cost estimates presented during trial were all unreasonable because they were disproportionate given the lack of a diminished fair market value.<sup>112</sup> But the trial judge denied the motion.<sup>113</sup>

Instead, the jury deliberated and found that Harder had a sufficient “reason personal” and would use any restoration damages to restore the property.<sup>114</sup> They awarded him \$161,000 in compensatory damages and found that he was entitled to statutory treble damages.<sup>115</sup> The Wiersums filed a motion requesting the trial judge grant a judgment notwithstanding the verdict (JNOV), reprising their argument that “the restoration cost damages awarded to the [plaintiff] are manifestly unreasonable as a matter of law in light of the zero diminution in the value of [plaintiff]’s property that resulted from the trees being cut.”<sup>116</sup> The trial court denied defendants’ motion and the Wiersums appealed.<sup>117</sup>

On appeal, a majority of the Alaska Supreme Court reversed the lower court by ruling that the \$161,000 in restoration damages was objectively unreasonable.<sup>118</sup> But as Justice Stowers points out in the dissent, the court here overtook the fact-finding responsibility of the jury in order to substitute its own concept of reasonableness.<sup>119</sup> When an

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109. *Id.* Defendants’ arborist used the “trunk formula method” to determine the value of the trees removed. *Id.* “This method determines the value of a lost tree by first identifying the price of a replacement tree that is ‘the largest common available size,’ and then measuring a cross-section of the lost tree and extrapolating its price based on the price of the replacement tree. The arborist testified that this method is used when it is not possible to replace exact trees due to their size or their growth in a forested environment where their root zones are intertwined.” *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 570.

119. *Id.* at 578 (Stowers, J., dissenting).

We have long relied on juries to serve as the quintessential collective

Alaskan court reviews the denial of a JNOV motion by a trial court, generally “the only evidence that should be considered is the evidence favorable to the non-moving party . . . .”<sup>120</sup> Yet, in this case, where Harder’s experts testified that restoration of the trees could cost up to \$620,537, the court ruled that the much smaller damages award of \$161,000 reached by the jury was unreasonable.<sup>121</sup>

Also grappling with what constitutes reasonableness in restoration awards, Chief Justice Fabe proposed an upper limit for the amount of reasonable restoration damages in her concurrence.<sup>122</sup> She concluded that “compensatory damages to restore land based on a reason personal should not ordinarily exceed the total value of the property prior to trespass.”<sup>123</sup> Because the restoration award of \$161,000 was four times the highest estimate for the land’s pre-trespass value (\$40,000), Fabe agreed with the majority that the restoration damages award was unreasonable and additionally suggested that, upon remand, the damages award should be capped at \$40,000.<sup>124</sup>

### C. *Chung v. Park*

The most recent timber trespass case heard by the Alaska Supreme Court, *Chung v. Park*,<sup>125</sup> was decided on December 12, 2014. In this case, plaintiff-landowner Rora Park filed a timber trespass claim against her tenant Christopher Chung for clearing trees from her property without permission.<sup>126</sup>

Around August 2007, Park leased a unit (Unit 13) on her property to defendant.<sup>127</sup> In exchange for a reduced rent, Chung agreed to make

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‘reasonable’ person and entrusted them to make important factual determinations. A jury of twelve did exactly that here and arrived at a consensus after following proper jury instructions and evaluating conflicting evidence, and yet the court holds their determination was unreasonable. I disagree with this holding and therefore dissent from the court’s decision to vacate the damages award and order a new trial on damages.

*Id.*

120. *Cameron v. Chang-Craft*, 251 P.3d 1008, 1018 (Alaska 2011).

121. *Wiersum*, 316 P.3d at 577 (Stowers, J., dissenting).

122. *Id.* at 571 (Fabe, C.J., concurring).

123. *Id.* at 572 (Fabe, C.J., concurring).

124. *Id.* at 571-72. In support of her proposed rule, Chief Justice Fabe cites a Nebraska Supreme Court case, *Keitges v. VanDerineulen*, 483 N.W.2d 137 (Neb. 1992), in which the court ruled that restoration costs could only be recovered up to the fair market value of the land before the trespass occurred. *Id.*

125. 339 P.3d 351 (Alaska 2014).

126. *Chung*, 339 P.3d at 353.

127. *Id.* at 352.

improvement to the unit and a chapel that also stood on the property.<sup>128</sup> Shortly thereafter, Chung purchased a lot (Lot 3) from Park adjacent to the leased property.<sup>129</sup>

Chung had plans to build a house on Lot 3, for which he hired Glacier Masonry and Excavation, Inc. (Glacier) in August 2008.<sup>130</sup> One of Glacier's duties was to remove trees and vegetation from Chung's lot.<sup>131</sup> An employee of Glacier, Tracy, cleared vegetation in the power line easement between Lot 3 and Park's property while working on Lot 3.<sup>132</sup> When Glacier's owner advised Tracy that he was working beyond Chung's property and should work within Lot 3, Tracy responded "that he was clearing out there to get a view, and that he'd been paid by [Chung]" to do so.<sup>133</sup> At that time, only between three and eight trees had been removed from the easement or Park's property.<sup>134</sup>

But, at trial, Park presented an expert who estimated that in total "562 trees were cleared from about a third of an acre of [plaintiff]'s property."<sup>135</sup> The trees that had been removed from Park's property appeared to be those that stood "more or less directly behind the house built on [Chung]'s property," presumably to create a better view.<sup>136</sup> The expert testified that the cost of restoring these trees would be "over \$400,000."<sup>137</sup> Despite this significant restoration cost, Chung's expert testified that Park's property likely did not decrease in value as a result

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* Aside from the Glacier owner's testimony about Tracy's clearing of trees,

there was no direct evidence of who was responsible for removing the trees from Park's property. Park testified that she saw workers on her property and that [defendant] told her that the workers cut the trees. But Park did not personally see anyone remove trees from her property. Although she suggested that [defendant] may have cleared the trees so that he could see a nearby lake from his house, [defendant] denied that his house had any view of the lake even after the trees were cleared. Nevertheless, he offered no alternative explanation for the trees' disappearance.

*Id.*

134. *Id.*

135. *Id.* "Aerial photographs presented by the parties indicate that some trees were removed from Park's property near the border of Lot 3 between August 2008 and September 27, 2008, and more trees were removed between 2008 and 2009." *Id.*

136. *Id.* Additionally, "[t]imber debris, presumably from the cleared trees, was also discovered buried on Park's property." *Id.*

137. *Id.*

of the trees' removal.<sup>138</sup>

Park testified at trial that she possessed a "reason personal" that would justify an award of restoration damages:

I have a previous history of cancer, and this natural beauty of my yard is [a] healing spot for me, and . . . in the future I'm going to [live] here, after [defendant] move[s] . . . [A]fter work I come by, see my property and see the natural beauty and the trees and all that. [W]hen I [saw] that all cut out it just [made] me very – [it] just [broke] my heart, and then very angry . . . I don't know how [I can] explain . . . it's just my healing natural stop [sic]. [It] is just healing my health and [helping] me for day-by-day living, and then when I saw that it just really hurt my feeling[s] . . .<sup>139</sup>

However, the trial court did not credit her testimony and found that she had not established a "reason personal" for restoration damages.<sup>140</sup> Nevertheless, the trial court awarded restoration damages for the lost trees in the amount of \$23,500, as well as statutory treble damages, stating that "it would be reasonable both aesthetically and legally to award damages that would permit replacement of trees . . ."<sup>141</sup>

Defendant Chung appealed to the Alaska Supreme Court, arguing that the award of restoration damages was clearly erroneous because plaintiff lacked a "reason personal" to restore the land and the restoration damages were disproportionate given the lack of diminution in fair market value of plaintiff Park's property.<sup>142</sup> Because the trial court had explicitly found that Park did not have a "reason personal," the court ruled that restoration damages were inappropriate and vacated the award of damages. Furthermore, the court remanded the case back for the trial court to enter an award of only nominal damages because of defendant's intentional trespass.<sup>143</sup>

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138. *Id.*

139. *Id.* at 354.

140. *Id.* The trial court was skeptical of Park's testimony because she "downplayed her visits to the property later in the trial." *Id.*

141. *Id.* The \$23,500 was the cost to restore fifty trees on Park's property. *Id.* So, with the statutory treble damages, her total damages recovery for the timber trespass claim would have been \$70,500.

142. *Id.* at 353.

143. *Id.* at 354.

#### D. Implications

*Wiersum* and *Chung* imply that it is increasingly difficult to receive restoration damages in timber trespass cases. These cases reveal judicial skepticism and reticence toward awarding disproportionately large restoration damages. In *Chung*, the trial court approached plaintiff Park's testimony under oath with great suspicion, refusing to accept her avowal of personal attachment to the property as a sufficient reason personal, even though the trial court still awarded her some restoration damages. Although the plaintiff Harder in *Wiersum* presented significant evidence of a "reason personal" that warranted an award of restoration damages, the court displayed its distaste for outsized restoration damages by rejecting the jury's "unreasonable" restoration award.

Thus, although *Wiersum* was technically a victory for the plaintiff who was able to prove a "reason personal" and recover some restoration damages, the case illustrates the difficulty of establishing just what amount of restoration damages is "reasonable." While the estimated restoration costs presented by experts at trial seemed enormous, they were the necessary expenses of restoring the land to its original condition. In *Wiersum*, the jury chose the intermediate amount of damages estimated to restore the plaintiff's lost trees; in fact, the jury awarded only half of the total restoration costs calculated by the plaintiff's arborist.<sup>144</sup> Nevertheless, the court implied that planting saplings and smaller trees is likely to be the most reasonable restoration possible, even when the plaintiff has lost numerous large trees.<sup>145</sup> The majority wrote that "[i]n such cases, the achievement of a reasonable approximation of the land's former condition may involve something less than substantially identical restoration . . ." <sup>146</sup> If that is the case, then the court seems to believe that leaving plaintiffs who have suffered an injury substantially less than "whole" is a reasonable resolution in timber trespass cases.

Additionally, the *Wiersum* case quashes the unprecedented "contract" method undertaken by the plaintiff. While the implication of the "contract"—that plaintiff was legally bound to restore the property—was potentially misleading, this ruling still underscores the

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144. *Wiersum v. Harder*, 396 P.3d 557, 561 (Alaska 2013). The Harder's' arborist estimated that a total of \$323,000 was necessary (\$161,000 to restore the trees and \$162,000 to restore the ground cover). *Id.* However, the jury awarded him only \$161,000 for the restoration of the seventy trees. *Id.* at 562.

145. *See id.* at 570 (citing *Heniger v. Dunn*, 101 Cal. App. 3d 858, 866 (Cal. Ct. App. 1980)).

146. *Id.* (quoting *Heniger*, 101 Cal. App. 3d at 865).

court's distrust of plaintiffs who swear they will restore their land but might pocket the money as a large windfall instead. If the testimony of plaintiffs like those in *Wiersum* and *Chung* is insufficient to weed out which land owners will actually restore their property, then how should the courts determine which plaintiffs will likely use an award of restoration damages to restore their land?

### III. HOW SHOULD DAMAGES IN A TIMBER TRESPASS ACTION BE CALCULATED?

The recent Alaska Supreme Court cases as well as other timber trespass cases across the country reveal competing conceptions of what makes the plaintiff "whole" after suffering loss as a result of another's trespass. An undercurrent in these opinions and the Restatement of Torts (Second) discussion of restoration damages is that damages awards need to be calculated differently, depending on the plaintiff's unique situation, in order to make the plaintiff "whole." Thus, a plaintiff who values her land primarily for the privacy and immersion with nature it provides, like the plaintiff in *Wiersum*, requires restoration damages in order to recover the element of the land she most valued. But, for a developer or landlord who values his land primarily for the income it may provide, damages in the amount of the land's diminution of fair market value sufficiently compensate him.<sup>147</sup> While this

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147. For example, Christopher E. Brown, Comment, *Dump It Here, I Need the Money: Restoration Damages For Temporary Injury to Real Property Held for Personal Use*, 23 B.C. ENVTL. AFF. L. REV. 699, 699-700 (1996) (footnotes omitted) provides an illustration of this intuitive difference:

After a long day, you come home to find that the construction crew at the new homesite next door negligently drove a truck through the back yard of your dream house. The truck left deep ruts in the soil and destroyed all of your prized ornamental Japanese shrubs. The injury is temporary and restorable. Fully restoring the back yard and shrubbery will cost \$20,000, but the market value of your property was lowered by just \$2000. You are devastated and want nothing but to have your back yard restored to its original condition. Obtaining general damages equal to the cost of restoration would seem fair, and in almost any court in the United States you would be entitled to such recovery.

However, imagine the same situation, but instead of ornamental shrubs, the truck destroyed unattractive yet hard to replace bushes. Furthermore, you never liked the house much anyway and were planning to move. You would appear to have hit the jackpot to the tune of \$18,000. If you were to receive an award of general damages equal to the cost of restoration you then could sell the property for \$2000 less than its pre-tort market value (i.e., its current market value), pocket the award of damages, and end up with an \$18,000 windfall.

acknowledgment of the plaintiff's subjective valuation of his land is appropriate, the burden placed on plaintiffs to convince juries that they possess an exceptional reason requiring the grant of restoration damages is unsatisfying: it creates the possibility that many plaintiffs who *do* wish to restore their properties but may not have enough evidence of their intention will fail to be made "whole" by a fair market value damages award.

There are two understandable reasons for courts' reluctance to award disproportionate restoration damages: (1) the desire to prevent economic waste and (2) the desire to prevent windfalls for plaintiffs who will not restore their properties.<sup>148</sup> The problem with a focus on preventing economic waste is the presumption that any damages award larger than the diminution of a property's fair market value is wasteful. But the assumption that the market provides the best estimate of a property's value is often false—especially in the context of residences or land kept for reasons besides investment.<sup>149</sup> That the landowner could sell the land without trees for a similar price should not obfuscate the fact that the landowner can no longer use their property to enjoy the trees—the purpose for which the landowner purchased the property. These landowners acknowledge an intrinsic value to trees that the market does not capture. Thus, without a damages award to restore the trees' intrinsic value, defendants' timber trespass leads to a complete loss of that value—itsself a great waste.

In *Wiersum*, the court believed that the large restoration award was wasteful, even though it was within the three experts' spectrum of estimated restoration costs. But wasteful to whom? To the plaintiff in *Wiersum*, the damages award was not wasteful at all—it was the amount necessary to return the land to the condition in which it was useful to him as a nature retreat. Thus, "economic waste" is an inappropriate focus for courts because the major purpose of damages awards is to make the injured plaintiff "whole," which requires an orientation toward the individual plaintiff's valuation of their property.<sup>150</sup> What renders the plaintiff "whole" varies from case to case; therefore, diminution in fair market value of land does not always serve as a sufficient proxy for how much the plaintiff has lost.

The second great concern of courts surrounding disproportionate

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148. *Id.* at 706.

149. *See id.* at 702-03 (noting when courts diverge from fair market value in coming to the "best" estimate of a property's value).

150. *See United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958) ("The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.").

restoration damages is the potential windfall to plaintiffs who will not use the award to actually restore their properties. Undoubtedly, courts should be concerned with preventing windfalls to landowners with no intention of restoring trees on their land. But requiring landowners to prove that they have a sufficient "reason personal" and that the restoration damages will be used to restore the land is an even greater problem because it creates a greater obstacle for plaintiffs to be made "whole." What evidence could a landowner present to prove that their attachment to his property ensures he will restore the land? In *Wiersum*, the plaintiff's long ownership and visitation of the property was a significant factor, yet his "contract" was ruled inadmissible on appeal. And the trial court in *Chung* refused to credit the plaintiff's testimony that she loved to use her property as a nature retreat and was saddened by the loss of trees.

Even if the plaintiff is able to convince the court or jury about his intentions to restore the property, the court may still reject a restoration damages award as unreasonable because the award is disproportionately large compared to either the land's diminution of fair market value or the property's pre-trespass value. Such ceilings on restoration damages awards, like the ceiling based on the property's pre-trespass value suggested by Justice Fabe in *Wiersum*, are not ideal solutions to the problems of "economic waste" and potential windfalls. Some jurisdictions have adopted similar damages ceilings that cap a restoration damages recovery to the amount of the property's diminution in value, limiting the plaintiff's ability to restore their property even more than the ceiling suggested by Chief Justice Fabe.<sup>151</sup>

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151. James R. Cox, *Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts*, 20 PACE ENVTL. L. REV. 777, 789 (2003).

Other courts have noted the negative ramifications of damages ceilings:

Such ceilings on recovery not only seem unduly mechanical but also seem wrong from the point of view of reasonable compensation. If the plaintiff wishes to use the damaged property, not sell it, repair or restoration at the expense of the defendant is the only remedy that affords full compensation . . . . [Also,] [t]o hold that appellant is without remedy merely because the value of the land has not been diminished, would be to decide that by the wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his property, or else perform the work of restoration at his own expense.<sup>152</sup>

Thus, in a jurisdiction with a diminution in fair market value damages ceiling, even a defendant who intentionally cut down a plaintiff's trees to better his own view against the plaintiff's will would only have to pay the plaintiff nominal damages if the destruction of trees does not lower the property's fair market value. Such a defendant would be unjustly enriched by his enhanced view while the plaintiff would have to use his own money to replant any trees. This result is a windfall for the defendant, and is economically wasteful because it forces the plaintiff to absorb costs that never would have been realized if not for the defendant's wrongful conduct. If there must be a risk of a windfall or "economic waste" in determining damages awards, should not the defendant bear that risk?

#### **IV. PROPOSED CHANGE TO DAMAGES DETERMINATIONS**

##### **A. Allow Plaintiffs to Choose the Method for Damages Calculations**

Because landowners often purchase properties based on the land's subjective desirability, which may include the privacy or immersion in nature that forested land provides, restoration damages are often a better measure of the injury suffered by landowners when their trees are destroyed. Moreover, a system that grants restoration damages can still avoid the dangers of windfalls to landowners who do not intend to restore their property.

This Note proposes to allow plaintiffs to recover restoration damages, even if they are disproportionate to the diminution of the

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152. Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Servicing Co., 618 So. 2d 874, 877 (La. 1993) (internal quotations omitted).

land's fair market value, if they agree to use the damages award to actually restore the property. The landowners could sign an agreement stipulating that he will actually restore his land with restoration damages, like the one made by the plaintiff in *Wiersum*. But rather than using this agreement to influence the fact finder as to the plaintiff's sincerity, the agreement would be legally enforceable as an actual contract with either the court or the defendant.<sup>153</sup>

Admittedly, this suggestion would create some administrative difficulties. The courts would have to track how plaintiffs who chose restoration damages spend the award to ensure compliance with the restoration agreement. One option would be to keep the funds in a constructive trust or an escrow account so that the dispersal of funds could be monitored.<sup>154</sup> This approach would have the added benefit of potentially minimizing the restoration damages that are paid out—any funds left over in the account after a reasonable restoration of the property has been made could be returned to the defendants.<sup>155</sup> If the courts did not have the duty of checking on plaintiffs' restoration of the land, then perhaps that burden could fall to the defendant, just as one member of a contract must bring a breach of contract claim against the other.

Additionally, an exception to the statutorily mandated treble damages could be made for restoration damages. Thus, a landowner could choose to recover three times the diminution in his land's fair market value *or* the amount required to restore the lost trees on the land. Under this scheme, a landowner who lacks the motivation to restore the land would be more likely to choose the treble damages award. Only landowners who do have personal reasons to restore their land would forego the treble damages award in order to restore their trees.

Moreover, by abolishing treble damages for restoration damage awards, there would be a significant reduction in potential "economic

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153. Others have suggested that the award of restoration damages should be predicated upon one's use to restore the land. In the mineral rights context, for instance, "[t]o ensure [the land's restoration], the landowner should be required to use the monetary award for actual costs of restoration." Brian Pollock, Note, *Pillaging the Land: Consideration of Judicial Control of Damage Awards to Prevent Windfalls at the Expense of the Environment*, 48 U. LOUISVILLE L. REV. 419, 421 (2009).

154. See Cox, *supra* note 151, at 802-03 (noting that, in the environmental contamination context, courts that award restoration damages may need to create constructive trusts to ensure that the plaintiff actually restores the property).

155. "Court supervision of this award will also allow for a more accurate award of the actual cost of restoring the property to its pre-injury status." Pollock, *supra* note 153, at 421.

waste.” For example, in the *Wiersum* case, plaintiff was awarded \$161,000 in restoration damages, which would come to a total of \$483,000 after trebling. If the Alaska Supreme Court had embraced Justice Fabe’s proposed ceiling based on the land’s pre-trespass value, then plaintiff’s total recovery would have been \$120,000—treble the \$40,000 value of the property estimated by defendants’ real estate expert. When comparing the proposed \$120,000 damages award’s ceiling to a \$161,000 restoration, non-treble damages award, the damages are close enough in value to avoid the appearance of significant “waste.”

## B. Public Policy Benefits of Restoration Damages

As discussed earlier,<sup>156</sup> the Pacific Northwest benefits significantly from its swaths of old-growth forests. People who purchase highly forested land, especially those who build residences on that land, value these trees—the plaintiffs in both *Wiersum* and *Chung* testified that the beauty of the trees and natural surroundings motivated their property purchases. Thus, maintaining a timber trespass statute that lessens the burden on plaintiffs who are trying to restore the natural beauty of their property is good public policy for Alaska because it best enables its citizens to be made whole following injurious trespasses. Alaskan forests possess great aesthetic and environmental value that is not always best quantified by the land’s market price.<sup>157</sup>

Of course, maintaining economic efficiency is also a concern of the state, but a more liberal system of restoration damages is not antithetical to that interest. Removing the statutory multiplier where plaintiffs request restoration damages and requiring plaintiff landowners to use their restoration damages to actually replace lost trees would keep damages awards lower and ensure that those funds are put to the best use—restoring the natural beauty of Alaska and giving landowners back the aesthetic enjoyment that was unlawfully taken from them. By letting plaintiffs pursue either restoration or diminution in fair market value damages, Alaskan courts would be taking into account the significant aesthetic and emotional attachment that many of the state’s citizens have for their properties.

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156. *Supra* Section I.C.

157. “Economic value, while useful and relatively easy to calculate, does not adequately capture a forest’s worth.” Charles Riordan, Note, *Calming the Fire: How a Negligence Standard and Broad Cost-Recovery Can Help Restore National Forests After Wildfires*, 41 B.C. ENVTL. AFF. L. REV. 233, 264 (2014).

## CONCLUSION

Timber trespass cases like *Wiersum v. Harder* and *Chung v. Park* exemplify the difficulty of crafting appropriate remedies where damage to real property has occurred. These cases reveal the inherent tension between the legal system's dual imperatives to make plaintiffs "whole," even taking the landowners' idiosyncrasies into account, but also to prevent unduly punitive damages awards that could undermine citizens' trust in the legal system and may burden defendants disproportionately to their fault.

While harm to defendants is concerning, the current method by which Alaskan courts approach restoration damages treats plaintiffs with too much suspicion regarding their desire for restoration and too much doubt regarding the reasonableness of restoration damages, even when numerous experts have testified to the restoration costs. This Note suggests that plaintiffs should have the option of pursuing either restoration damages, with which they will be legally bound to restore the property and which will not receive a statutory multiplier, or damages based on the diminution in the fair market value of the property, which may be trebled. Plaintiffs who do possess a genuine "reason personal" to restore the land will opt for the stricter restoration damages while plaintiffs less attached to their properties will accept the fair market value damages. Thus, the court will not place the burden of proof on plaintiffs to convince judges and juries how much they love their properties; but, rather, allow plaintiffs to sort themselves appropriately based on their priorities.