Addendum

The October 2005 Kentucky Mineral Law Conference marked the 30th year this venerable program has been presented in Lexington, Kentucky. Drawing attorneys not only from Kentucky, but from surrounding mineral-rich states which share similar issues, the conference has become an annual get-together for practitioners and landmen that is enhanced by the co-siting of this conference with the annual meeting of the Kentucky Coal Association. Originally developed by the Mineral Law Center at the University of Kentucky, the Energy & Mineral Law Foundation assumed responsibility for this program in 1996, and is pleased to include in its Annual Institute publication a collection of articles written for the 2005 Mineral Law Conference. Authored by Wayne Collier of Lexington, Kentucky, Tim Gresham and Cameron Bell of Abingdon, Virginia, and the late Charles Surber of Charleston, West Virginia, we are pleased to provide the collection of articles from their panel presentation on “Timber Trespass: Tips for the Uninformed.”

~ Sharon J. Daniels, Editor

Timber Trespass in West Virginia

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Paul Bunyan had no idea what was in store when he innocently hooked Babe, the Blue Ox, to the wagon, took out his axe, and began clearing space for [the Mine, the Pipeline, the Well Site]. He knew his property ran down to the Big Sandy. Who cared that his neighbor disagreed? Besides, [the Mine, the Pipeline, the Well Site] had to go in now. After cutting and marketing the timber, Paul receives his neighbor’s demand for payment for the timber his neighbor claims belonged to him. Is Paul liable to John? What are the damages?\(^1\)

Mr. Bunyan [for the sake of informality, we’ll refer to him in the remainder of this paper as Paul] has serious problems in West Virginia. In fact,

\(^1\) This passage has been plagiarized in its entirety from Timothy W. Gresham of Penn, Stuart & Eskridge who created this scenario for a panel discussion of timber trespass statutes. The author sincerely apologizes to Mr. Gresham for this trespass.
under West Virginia law, Paul may be civilly liable to John for a panoply of damages, and may be criminally liable, subjecting him to fines and incarceration as well. As the following discussion shows, timber trespass is not treated lightly in West Virginia.

Civil Liability.

Under the scenario as set forth above, if Paul has actually removed timber from John’s property without John’s express written permission, he will be liable to John not only for the removed timber, but for other damages as well. West Virginia law jealously guards the rights of timber owners and specifically provides that:

It is unlawful for any person to enter upon the lands or premises of another without written permission of the owner of the lands or premises, in order to break, cut, take or carry away or in any manner to damage or cause to be broken, cut, taken or carried away or in any manner damaged, any trees or timber on the land.\(^2\)

The statute creates strict liability for the removal of timber without written permission. Paul’s erroneous belief that he was timbering his own property will be no defense to a civil lawsuit brought by John. Indeed, Paul’s good faith belief that he was not trespassing on John’s property will avail him nothing in that lawsuit.

Furthermore, the West Virginia timber trespass statute prohibits the possession or transportation of timber taken from the property of another without express written permission:

It is unlawful for any person willfully or knowingly to have in his possession, or to haul along any public road in this state, any trees, shrubbery or flowers . . . unless the person so having in his possession or hauling the trees shrubbery or flowers . . .

has permission in writing so to do from the owner or tenant of the land from which they have been taken.\(^3\)

In our scenario, even if Paul had John’s express written permission to remove timber from John’s property, he potentially may still be liable to John. Such was the situation in *Larew v. Monongahela Power Company and Asplundh Tree Expert Company.*\(^4\) In 1975, Monongahela Power Company obtained a written easement from the Larews, under which the power company had the right to trim, cut, or remove trees in order to maintain electric service. Furthermore, that easement granted the power company the sole right to determine what was necessary to maintain its electric service lines. Monongahela Power Company operated under this easement without incident until 1994. At that time, the power company hired Asplundh Tree Expert Company to conduct tree trimming, and contacted the Larews to inform them that tree trimming would be conducted as provided under the easement. The dispute arose when, according to the Larews, a 300-year-old white oak tree was severely cut.

Based upon the terms of the easement, the trial court granted summary judgment to both Monongahela Power Company and Asplundh Tree Expert Company. The West Virginia Supreme Court, however, reversed the decision and remanded the case for trial. The Supreme Court held that the sole discretion vested in the power company under the easement did not abrogate its obligation to follow the “rule of reasonableness.” The court ruled that the power company’s “right is limited to the removal of that which endangers the safety, or interferes with the use of the power company’s lines on the right-of-way and any removal must be done ‘in a reasonable manner, with due regard to the rights of all the parties.’”\(^5\) Since the issue of whether the tree trimming was done in a reasonable manner was a question of fact for the jury, the case was remanded for trial.

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\(^3\) W. Va. Code § 61-3-48(c).


Civil Damages.

The starting point for calculating the damages that Paul owes to John is, of course, the value of the timber wrongfully taken. West Virginia courts have long held that for the cutting of timber having no more than commercial value, “a proper measure of damages is the market value on the stump.” If the timber is partially destroyed or injured, then the measure of damage will be the difference between its market value immediately before and after the partial destruction or injury occurs.

How is the value of the timber to be determined? While the property owner himself is competent to testify about the value of his taken timber or destroyed property, the approach preferred by courts requires proof of the average dimensions of trees and potential marketability.

Additionally, a property owner wrongfully deprived of his timber may also be awarded damages for annoyance and inconvenience. If there has been damage to the property occasioned by the wrongful taking of the timber, Paul will be liable to John for those damages as well.

Once John has established the value of the timber taken by Paul, he is automatically entitled to three times that value as damages. Again, West Virginia law specifically provides that:

Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, logs, posts, fruit, nuts, growing

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9 Leach, supra.
plant or product of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.\textsuperscript{12}

These damages are automatic, and evidence of bad intent on the part of Paul is not a prerequisite to the imposition of treble damages. The West Virginia Supreme Court dispelled this notion in \textit{Chesser by Hadley v. Hathaway},\textsuperscript{13} where the court ruled that:

\begin{quote}
We reiterate the fact that whether the appellees acted intentionally is irrelevant because the damages are imputed due to the appellees’ violation of \textit{W.Va. Code}, 61-3-48a (\textit{i.e.}, their failure to acquire written permission to enter and cut timber upon the land).\textsuperscript{14}
\end{quote}

In fact, the treble damages provision applies in cases where the wrongdoer actually acted in good faith, and erroneously believed that he was timbering property where he had express written permission.\textsuperscript{15}

Under West Virginia law, John had a duty to mitigate his damages. In \textit{Chesser, supra}, the court recognized this well-established principle in a timber trespass case, ruling that:

\begin{quote}
As a general rule a person whose property is endangered or injured must use reasonable care to mitigate the damages; but such person is only required to protect himself from the injurious consequence of the wrongful act by the exercise of ordinary effort and care and moderate expense.\textsuperscript{16}
\end{quote}

However, if John objected to Paul’s continuing timbering of the property once he became aware of the situation, and particularly if John sought an

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\textsuperscript{12} \textit{W. Va. Code} § 61-3-48a. (emphasis added).
\textsuperscript{14} \textit{Id.} at 463-64.
\textsuperscript{15} \textit{Bullman, supra} at 775, n.5.
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injunction against the trespass, the courts will deem his mitigation obliga-
tion satisfied. John certainly would not be required to allow Paul to remove
the cut timber and sell it in order to mitigate his damages, as urged by the
defendant in *Chesser, supra*.

If John can establish that Paul’s actions in removing his timber were
willful, wanton, or malicious, he will be entitled to punitive damages in
addition to the damages discussed above. Punitive damages are sums of
money that are awarded in addition to actual damages, and are imposed for
the purposes of punishing the wrongdoer, deterring others from engaging
in similar conduct, and providing additional compensation for the injured
party.

In *Bullman, supra*, the lumber company argued that the land owner
should not be permitted to seek treble damages under W. Va. Code Sec-
tion 61-348a and punitive damages because the landowner would receive
a double recovery for the same injury. The lumber company urged that the
treble damages provision of the statute is in and of itself punitive, and there-
fore precludes an additional punitives damages award. The West Virginia
Supreme Court, however, saw things quite differently.

The court rejected the lumber company’s argument, and ruled that a land
owner could properly obtain treble damages and punitive damages. The court
reasoned that W. Va. Code Section 61-3-48a provides only compensatory
damages to owners of the removed timber:

By allowing such increase of recovery from the market value
of the timber removed, the Legislature provided a remedy that
would more adequately compensate landowners. In adopting
this legislation, the Legislature must have recognized that many
times it would not be cost effective to bring a claim for damaged
or removed trees or fruit when considering the market value of
the item compared with the cost of litigation. In other words,
the Legislature may have been persuaded to make provision

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17 *Chesser, supra; Bullman, supra.*
for the recovery of the enhanced amount by a belief that if a victim is granted judgment for nothing more than her actual damages, she would have nothing left for herself after she paid attorney’s fees. Thus, the statute gives the victim an incentive, through treble damages, to assert her rights and provides her with the means of doing so.\textsuperscript{18}

The court opined that, since the treble damages provision had nothing to do with punishing the wrongdoer, punitive damages are also available. Moreover, the court found that because the statute itself provides that treble damages are available “in addition to and notwithstanding any other penalties by law provided,”\textsuperscript{19} the clear language of the statute does not foreclose recovery of punitive damages \textit{and} treble damages.\textsuperscript{20}

\textbf{Criminal Liability.}

As if the civil liability and attendant damages aren’t enough, Paul also may be subject to criminal prosecution. If convicted, Paul may be fined and imprisoned. West Virginia law provides that:

Any person who willfully and maliciously and with intent to do harm unlawfully enters upon the lands of another, cuts down, injures, removes or destroys any timber, without the permission of the owner or his or her representative is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than three times the value of timber injured, removed or destroyed, or confined in the county or regional jail for thirty days, or both: Provided, That if the timber is valued at one thousand dollars or less, the fine shall be no more than one thousand dollars: Provided, however, That a person convicted of a second or subsequent violation of the provisions of this section shall be guilty of a felony and, upon conviction thereof,

\begin{footnotes}
\item[18] Bullman at 776.
\item[20] Bullman at 777.
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shall be confined in a correctional facility for not less than one nor more than three years, or fined not more than three times the value of the timber injured, removed or destroyed, or both fined and confined.\textsuperscript{21}

Malice and intent to do harm are, of course, essential elements to be proved by the state in prosecuting the crime of timber trespass. Without this proof, criminal prosecution will fail. \textit{State v. Williams}.\textsuperscript{22} If the essential elements of the crime are established beyond a reasonable doubt, Paul may be fined up to one thousand dollars and imprisoned for up to 30 days, if this is his first offense. If, however, this is Paul’s second conviction, he may be imprisoned from one to three years and fined three times the value of the timber.

It is important to note that the criminal fines and jail sentences have nothing to do with the civil damages that Paul will owe John. Rather, the law provides that:

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No fine or imprisonment imposed pursuant to this section shall be construed to limit any cause of action by a landowner for recover of damages otherwise allowed by law.\textsuperscript{23}
\end{verbatim}

\textbf{Conclusion.}

As the foregoing discussion demonstrates, West Virginia law is designed to amply compensate a landowner whose timber has been wrongfully taken, and to severely punish the wrongdoer. Clearly, West Virginia law answers the following question in the affirmative: “if a tree is cut in the forest and there’s no one there to see it, will anyone be held liable?”

\textsuperscript{21} W. Va. Code § 61-3-52(a).
\textsuperscript{22} State v. Williams, 542 S.E.2d 306 (W. Va. 2000).
\textsuperscript{23} W. Va. Code § 61-3-52(d).
Timber Trespass in Virginia

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Under Virginia law, the unlawful cutting of timber is treated as a trespass and is an injury to real estate. If the owner of the trees is also the owner of the real property, he or she may treat the trespass as damage to the real estate itself and sue for the diminution in market value or for the market value of the standing trees. If the owner owns only the trees, damages are limited to the market value of the trees.

The measure of damages depends on the nature of the trespass. “Every trespass is prima facie willful, and, the trespass being conceded or proven, the burden of proof is on the defendant, unless it appears from the evidence of the plaintiff, to show the trespass was not willful.” A trespass is not willful if it is done under a bona fide claim of right or title and not through the gross negligence of the trespasser in either determining the correct location of the property or identifying the true owner of the property. But if the trespasser has no bona fide claim of right or was at least grossly negligent in failing to determine the location or owner of the property, the trespass is willful. Any negligence by the trespasser below the level of gross negligence does not convert an otherwise innocent trespass to a willful trespass.

If the trespass was not willful, the owner is limited to compensatory damages, measured as the value of the trees before cutting, or its “stumpage” value. If the trespass is willful, then the measure of damages is the value of

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2 Associate, Penn, Stuart & Eskridge; B.S., University of Virginia, 1995; J.D., University of Tennessee, 2001.
3 Wood v. Weaver, 121 Va. 250, 258, 92 S.E. 1001, 1003 (1917).
4 Id.
5 Id. at 260.
6 Id. at 262.
the trees before cutting, plus any value added to the cut timber as a result of the labor of the trespasser or its “manufactured” value. This enhanced value is based, not on the same principle as punitive or exemplary damages, but because the trespasser through his wrongdoing relinquishes the right to interpose the defense of mitigation of damages.7

In the Code of 1950, the Virginia General Assembly adopted a procedure where, in addition to other remedies afforded by law, the owner of timber cut and removed by another, without color of title or claim of right, was given a summary remedy and procedure for recovery of damages resulting from the cutting.8 This procedure has been amended several times, but essentially retains the same elements.9

Under the procedure, the owner of the timber must within 30 days from discovery of the trespass and of the identity of the trespasser notify the trespasser.10 During that same period, the owner must select an “experienced timber estimator” to calculate the amount of damage caused by the trespass, based on the “stumpage” value of the timber. The alleged trespasser within 30 days of receiving the notice from the owner and of the identity of the owner’s estimator, if he does not deny the trespass, shall appoint his own estimator. The two estimators together determine the damage estimates. If they cannot agree, then they select an experienced and disinterested third party. Like many commercial arbitration clauses, the three estimators reach a decision. That decision, according to the statute, is final and conclusive and is not subject to appeal.

The final estimation must be done and the statement of damages rendered within 30 days from the owner’s receipt of the appointment of the trespasser’s estimator. If the alleged trespasser does not appoint an estimator within the time allowed or fails to notify the owner that the fact of trespass is disputed, then the owner’s estimator may proceed to make the estimate

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7 Id. at 259-260.
and any collection or recovery is based on that estimate.\textsuperscript{11} This procedure, while undergoing some minor amendments over the years, has remained essentially the same since 1950. What has changed over the years is the measure of damages and under what circumstances the heightened measure of damages may be collected.

Initially, the statute allowed the owner to recover double damages as well as certain costs. In 1952, the statute was amended to include treble damages. However, in 1968, the statute was again amended. First, the measure of damages was moved to another section and, apparently went back to double damages. Another section was amended by adding a provision that if the trespasser did not admit the trespass, declined to appoint an estimator and notified the owner of that, the owner was free to proceed to an appropriate court and could recover treble damages.

In 1977, the General Assembly recodified these provisions under Title 55. Section 55-333, which set out the damages that could be collected under the summary procedure, still allowed only double damages. However, it added a provision that if the trespasser claimed his trespass was prudent and under claim of right, he or she could tender the stump value as determined and the allowable expenses within 30 days of the statement of damages being rendered and then defend against any other damages. In other words, if the owner sued for treble damages, the trespasser upon proof of acting prudently and under claim of right would not be subjected to treble damages. However, if the trespasser did not pay the stump value and allowable expenses within the time allowed, the defense of acting prudently and under claim of right would be lost.

The discount the trespasser received for participating in the summary procedure and avoiding suit continued in the Code until 2004. At that time, the General Assembly amended Section 55-332 by adding a subsection (B) and by deleting Section 55-333. This eliminated the double damage provision, if the trespasser agreed to the trespass and paid the final damage statement. In the 2004 amendment, any person who severs and removes timber without

\textsuperscript{11} Id.
legal right or permission or authorizes or directs the severing or removal must pay the owner of the timber three times the stumpage value.\textsuperscript{12} The trespasser must also pay the property owner the cost of reforestation up to $450.00 per acre. Additionally, the trespasser must pay the costs of ascertaining the value of the timber. While this was an element of damages throughout the various versions of this statute, before the 2004 amendments, the amount was capped at $200.00 per day. Finally, the trespasser must pay the “directly associated legal costs” incurred by the timber owner as a result of the trespass.\textsuperscript{13}

While the previous versions of the statute gave the trespasser some incentive to participate in the process and pay early, the 2004 amendment removed most of those incentives. Obviously, by participating in the summary procedure, the trespasser can have his own estimator participate in the calculation of the stumpage value. Since the measure of damages will be three times that estimate, the trespasser has a strong incentive to participate.

Generally, by avoiding court, the trespasser would save on legal costs he may owe the owner should the matter proceed to litigation. However, that may not be that important. In Virginia, the taxing of litigation costs is purely a creature of statute.\textsuperscript{14} While trial courts have discretion to determine what litigation costs should be taxed, that discretion, unless otherwise specified by statute, “is limited only to those costs essential for prosecution of the suit, such as filing fees or charges for service of process.”\textsuperscript{15} As Section 55-332(B) is limited to “directly associated legal costs,” it is likely a court could only award costs, such as filing fees and service of process.

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\textsuperscript{12} There is some difference in language in the Virginia statute. In § 55-331, the owner has the right to the summary remedy against any person who cuts timber, “except when acting prudently and under \textit{bona fide} claim of right.” That still is the language. However, § 55-332(B) added in 2004 states any person who “severs or removes any timber from the land of another \textit{without legal right or permission}” is liable to the owner for three times the stumpage value. (Emphasis added). While it is assumed a person acting prudently and under \textit{bona fide} claim of right has either “legal right or permission,” there are no cases yet addressing whether the phrases mean the same.
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\textsuperscript{13} Va. Code Ann. § 55-332(B).
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\textsuperscript{14} Ryan v. Davis, 201 Va. 79, 85, 109 S.E.2d. 409, 414 (1959).
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Although many states have similar provisions for timber trespass, Virginia’s statutory scheme is *sui generis* in Virginia law. There are no similar provisions for other natural resources or for other types of property. By contrast, these timber statutes provide an encapsulated measure of damages and procedure that allows timber owners to avoid lengthy delays associated with litigation.

The timber owner must strictly follow the statutory requirements to trigger the summary mechanism. If the owner does so, though, the trespasser must deny the trespass or allege a bona fide claim of right within 30 days of notification of the trespass or be bound by treble damages assessed by the owner’s estimator.

The initial statutory provision clearly specifies the unique procedure passed by the legislature.

If any person, firm or corporation, encroaches and cuts timber, except when acting prudently and under bona fide claim of right, the owner thereof shall, in addition to all other remedies afforded by law, have the benefit of a right to, and a *summary remedy* for recovery of, damages in an amount as hereinafter specified and recovered as hereinafter provided.\(^\text{16}\)

Virginia Code Sections 55-332 and 55-334 reinforce the measure of damages and the summary remedy available to the owner. Under Section 55-332, if the trespasser fails to deny the trespass and fails to appoint an estimator, “the estimator appointed by the injured party may make an estimate, and *collection or recovery may be had accordingly.*”\(^\text{17}\) Under Section 55-334, if the amount specified in Section 55-332(B) is not paid within 30 days, “the person upon whose land the trespass occurred may proceed for judgment in the amount of payment as specified in Section 55-332.”\(^\text{18}\)

The statutes do not state specifically what type of notice the owner must give to the trespasser. As a practical matter, the owner should send a

\(^{16}\) Va. Code Ann. § 55-331 (emphasis added).


letter by certified mail that specifically informs the trespasser of the time of the discovery of the trespass and/or the discovery of the trespasser, the estimator appointed, and should quote liberally from the statutory language to make clear the trespasser’s obligations and risks associated with failure to respond. For purposes of the statute, notice must be given within 30 days of the discovery of the trespass or the trespasser. If the owner does not give timely notice, then the statutory protections are lost.

Similarly, the statute does not delineate the means by which an alleged trespasser should “deny” the trespass. Under the statute, it is certainly conceivable that a trespasser can avoid the statutory scheme by a telephone call stating he did not trespass.

As a practical matter, someone who receives any type of notice of an alleged trespass should respond by certified mail denying the trespass, where applicable. Under the statutory scheme, if the respondent denies the trespass, he or she has no need to appoint an estimator. However, a more protective approach would be for the respondent to appoint his or her own estimator to protect against any chance of being bound by the other party’s estimator. If the alleged trespasser believes he or she acted under claim of right, then the letter should state that right. Even if a trespass occurred, the trespasser, by responding, has the benefit of appointing its own estimator to participate in the valuation process. So, the party should appoint its estimator and notify the other party within 30 days.

In many instances, timber trespass cases proceed to a default judgment. As a result, the owner receives a judgment for the amount alleged and courts have not had to examine the function of the summary remedy of the trespass statutes.

Recently, however, a timber owner has received judgments for treble damages, estimation costs and attorney’s fees from the Circuit Courts of Wise County and Dickenson County in Virginia by pre-trial motions. The trespasser was the same in both cases. The owner gave timely notice of the trespass and appointed an estimator in compliance with the statutes. The trespasser did not respond to deny the trespass or appoint an estimator. When the trespasser did not pay the amount due, the owner filed suit. In both cases, the trespasser filed an answer and demanded strict proof of the trespass. In
At the hearing on the motions, the defendant argued the motion was premature, as the owner had to prove the defendant trespassed. The trespasser conceded the estimate would bind him, but argued the statutes did not relieve the owner of the obligation of proving ownership and the fact of the trespass. The defendant further argued that being bound to a substantial judgment for failing to respond to a letter violated due process.

In both cases, the judges disagreed with the defendant’s position. The courts held that when an owner gives proper notice under the statutes and the trespasser fails to deny the trespass and to appoint an estimator, the trespasser is bound. A trespasser receives notice and a fair opportunity to deny the trespass. The statute makes clear that once the statutory procedure is triggered, the defendant must meet his obligations. If not, the owner is entitled to judgment. The judges of both courts then entered judgment for the owner.19

However, besides provisions that allow the owner to proceed into court, the statute does not require the parties to use the procedure. The statute does not preclude any compromise or agreed settlement the parties may enter nor does it bar any other remedy provided for by law.20 This was one of the original features of the statute. In Barnes v. Moore,21 the plaintiff brought a trespass action against the defendant, who had conducted timbering operations on several tracts, including the plaintiff’s. The plaintiff sought and was awarded the manufactured value of the timber, as the court found the defendant, while asserting a bona fide claim of title, was grossly negligent in determining his rights on the plaintiff’s tract. The statute, which had been in force at least four years at the time the timber was cut, was never mentioned by the court.

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19 As of this writing, the defendant has filed a notice of appeal to the Supreme Court of Virginia in the Wise County case.
At least two Virginia circuit court decisions have allowed timber trespass cases to proceed where resort to the statutory procedure was not made. In *Phillips v. Munson*, the court in 1982 awarded the stumpage value as damages for a nonwillful trespass, without mentioning the statute. In *Goldson v. Corpora*, the circuit court in a pretrial ruling refused to reconsider an earlier ruling denying the plaintiff’s claim treble damages under the statute, as the plaintiff failed to comply with the statutory procedures. Clearly, the owner may elect between directly suing for trespass or proceeding under the statute. However, strict compliance with the statutory procedure is required if the owner wishes to claim statutory damages in court.

In *Kostal v. Davis*, a case brought under the statute, the circuit court held the plaintiff was entitled under the statute to damages, the estimator’s expenses up to $200 per day and costs. Additionally, the court found the plaintiff entitled to damages for the diminution in market value as a result of the trespass. The court cited Va. Code Ann. Section 55-335, which does not bar “any other remedy provided by law.” In awarding the diminution value, the court subtracted the stumpage value of the timber removed from the total. This case was decided before the 2004 amendments, which added as an element of damages to the owner of the real estate, reforestation costs not to exceed $450.00 per acre. It might be argued that the addition of these costs would eliminate a claim for diminution in value, at least up to $450.00 per acre.

Under Section 55-335, would an owner be able to seek treble damages under the statute, and punitive damages? The statute does not specifically rule out seeking punitive damages. However, courts in Virginia have noted both punitive damages and statutory treble damages are “in the nature of a penalty and, therefore, are not favored.” In support of this, the Virginia

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25 The court, relying on *Advanced Marine Enter. v. P.R.C., Inc.*, *supra*, only awarded filing fees. 66 Va. Cir. 489, 491.
26 *Id.* at 492.
Supreme Court cited *Bowers v. Westvaco Corp.*,28 a case dealing with punitive damages, not treble damages. There, the court stated “an award of punitive damages is not favored generally because punitive damages are in the nature of a penalty and should be awarded only in cases involving the most egregious conduct.”29 It appears receipt of treble damages under the statute would preclude an award of punitive damages. Additionally, an award of punitive damages on top of a treble damage award is a double recovery. Under Virginia law, the plaintiff “is entitled to full and fair compensation, but not duplicative compensation.”30 There the court found no need to determine whether enhanced damages under a statutory claim are duplicative of punitive damages, as the plaintiff conceded he was entitled to only one award of compensatory damages and one award of exemplary damages. In *Advanced Marine Enterprises, Inc. v. P.R.C., Inc.*, supra, the court allowed an award of punitive damages and treble damages where the awards “were based on separate claims involving different legal duties and injuries.”31

Therefore, it appears that in Virginia, a claim brought under the statute would not support a treble damage award and an award of punitive damages. The rule in West Virginia appears to be contrary.32 While both the Virginia and West Virginia statutes do not preclude other remedies provided by law, the nature of the wrong to be remedied by these statutes justifies different results regarding punitive damages. In *Bullman*, the West Virginia Supreme Court held the West Virginia statute permits treble damages against any person who, among other things, cuts and carries away timber without the written permission of the owner.33 On the other hand, the Virginia statute provides treble damages against any person who cuts timber, “except when

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29  *Id.* at 150.
31  *Advanced Marine Enterprises, Inc. v. P.R.C., Inc.*, 256 Va. at 124. Apparently, if the plaintiff had pled another claim with different duties and injuries from the statutory claim, then punitive damages might be available.
acting prudently and under *bona fide* claim of right.”\(^{34}\) Obviously, a person can act prudently and under a claim of right without written permission from the owner.

Finally, the 2004 amendments added a criminal provision: “Any person who knowingly and willfully takes, steals, and removes from the lands of another any timber growing, standing or lying on the lands shall be guilty of larceny.”\(^{35}\) Besides imprisonment and fines associated with the crime of larceny, the section also requires restitution calculated according to Section 55-332. *Prima facie* evidence of the intent to steal exists if the owner has marked the boundary of the land with paint marks on trees or posts not more than 100 feet apart with the paint marks being at least two inches wide and eight inches long with the center no less than three feet or no more than six feet above the normal ground or water surface.

\(^{34}\) Va. Code Ann. § 55-331.

Timber Trespass in Kentucky
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Introduction.

If the number of decisions rendered by the Kentucky Court of Appeals concerning timber trespass in the past three years is an accurate barometer of activity in the circuit courts, then timber trespass, boundary disputes and quiet title actions are quite the rage. Certainly, the boom correlates to and follows the upswing in the timber industry during the last decade, yet it owes its impetus to a statute that was amended in 1994, Ky. Rev. Stat. Ann. Section 364.130, which has only recently been employed as a cudgel against anyone who allegedly cuts timber without adequate permission.

To properly understand the meaning of the statute and some of the issues that surround its application, a bit of history is in order. Furthermore, this presentation concerns only civil liability for timber trespass and not other civil claims relating to coal, etc., 1 claims for waste by a cotenant, joint tenant, reversioner, coparcener, seller under contract, remainderman or by the tenant thereof, 2 claims by or against the Commonwealth or its subdivisions, 3 or criminal liability, 4 despite the fact that Ky. Rev. Stat. Ann. Section

1 See, e.g., Ky. Rev. Stat. Ann. § 150.092 Consent Requirement for Entry Upon Lands of Another Person; Private Lands Incentive Programs; Arrest And Citation Authority.
446.070\textsuperscript{5} might be used to transform violations of these statutes into a claim
that would afford the plaintiff relief similar to that which is recoverable in
a trespass action.

This paper offers a brief synopsis of pertinent Kentucky statutes and
cases relating to timber trespass and its application to situations where trees
are damaged or felled in connection with the extraction of coal, oil, gas or
other minerals.

A Brief History of Timber Trespass

trespass cases were governed by the common law (which depended, in part,
on the laws of Virginia and England that were adopted on June 1, 1792, Ky.
Ann. Section 454.040.\textsuperscript{9} These statutes were deemed to have incorporated
the common law. Aside from practice considerations relating to title and
boundaries, “any person who enters or goes upon the real estate of another

\textsuperscript{5} “A person injured by the violation of any statute may recover from the offender such
damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed
for such violation,” K. R. S. § 446.070.

\textsuperscript{6} Johnson v. Commonwealth ex rel. Meredith, 291 Ky. 829, 165 S.W.2d 820 (Ky.
1942)(Virginia statutes); Wilson v. Com., 290 Ky. 223, 160 S.W.2d 649 (Ky. 1942)(Virginia
common law); Commonwealth v. Donoghue, 250 Ky. 343, 63 S.W.2d 3 (Ky. 1933) (common
law as it was in England prior to March 24, 1607).

\textsuperscript{7} “The owner of land may maintain the appropriate action to recover damages for any
trespass or injury committed thereon, or to prevent or restrain any trespasses or other injury
thereto or thereon, notwithstanding the owner may not have the actual possession of the
land at the time of the commission of the trespass.” Formerly K.S. § 2361.

\textsuperscript{8} “(1) A trespasser means any person who enters or goes upon the real estate of another
without any right, lawful authority or invitation, either expressed or implied, but does not
include persons who come within the scope of the ‘attractive nuisance’ doctrine.
(2) An owner of real estate means any person who possesses any interest in real estate or

\textsuperscript{9} “In actions of trespass the jury may assess joint or several damages against the
defendants. When the jury finds several damages, the judgment shall be in favor of the
without any right, lawful authority or invitation, either expressed or implied . . ."\textsuperscript{10} is a trespasser. Once the trespass was proven, the plaintiff’s measure of damages and his or her right to recover punitive damages depended upon whether the trespass was innocent or willful.

The Kentucky Supreme Court has held that “the difference between a willful and an innocent trespasser is the one knows he is wrong, and the other believes he is right.”\textsuperscript{11} If the trespass was innocent, then “the measure of damages is the reasonable market value of the timber on the stump . . .” whereas, if it was willful, “the measure of damages is the gross sale price at the point of delivery.”\textsuperscript{12} Willful conduct included that which was done knowingly,\textsuperscript{13} or in wanton and willful disregard of the plaintiffs’ rights.\textsuperscript{14} If the trespass were proven to be willful, then punitive damages could also be recovered.\textsuperscript{15} However, if the plaintiff recovered a statutory penalty, such as doubling the actual or consequential damages, it was deemed penal in nature, which barred the recovery of punitive damages since it, too, is considered penal.\textsuperscript{16}


\textbf{Prior to the 1994 Amendment.}

The Legislature saw fit to enact a new statute pertaining to timber trespass in 1956 that was amended in 1980, Ky. Rev. Stat. Ann. Section 364.130, subsection 1 of which provided:

plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include a joint judgment for the costs.” Formerly K.S. § 12.

\textsuperscript{10} \textit{Id}. n.8.

\textsuperscript{11} D. B. Frampton & Co. v. Saulsberry, 268 S.W.2d 25, 27 (Ky. 1954).

\textsuperscript{12} \textit{Id}. at 27-28.

\textsuperscript{13} Kentucky Stave Co. v. Page, 125 S.W. 170 (Ky. 1910).

\textsuperscript{14} Louisville Builders Supply Co. of St. Matthews, Inc. v. City of Richlawn, 392 S.W.2d 438 (Ky.1965).

\textsuperscript{15} \textit{Id}.

\textsuperscript{16} Stovall v. Smith, 43 Ky. (4 B. Mon.) 378 (1844)(construing the double damages provision of the 1789 trespass statute). This is in accord with the Kentucky Court of Appeals’ recent decision, \textbf{King v. Grecco}, 111 S.W.3d 877, 880-882 (Ky. App. 2003), which is discussed elsewhere in this paper.
Any person who *unlawfully* enters upon and cuts or saws down, or causes to be cut or sawed down, timber growing upon the land of another *and* without color of title in himself to the timber, or to the land upon which the timber was growing, shall be liable to the rightful owner of the timber in punitive damages.17

Cases decided under this statute did not seem to vary much as to remedies from those that were decided beforehand.18 Rather, the chief distinction seems to be in the language required in the instructions to make them conform to the statute.19 Everything changed in 1994, but it took several years before the impact was felt.


It does not take nearly as long to steal a few trees as it does to “wildcat” coal or drill a well and take someone else’s oil or gas, and the problem must have escalated because Ky. Rev. Stat. Ann. Section 364.130 was amended again to further define “trespass,” to allow for the recovery of onerous treble damages and “legal costs” and to create a procedure whereby liability for the more serious consequences could be avoided.

**As Amended Effective July 15, 1994**

Because the changes were profound, the entire section is reproduced here:

K.R.S. Section 364.130 LIABILITY OF PERSON ENTERING UPON AND CUTTING TIMBER GROWING UPON LAND OF ANOTHER; MEASURE OF DAMAGES

(1) Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to

18 *Id.*
19 *Id.*; West v. Keckley, 474 S.W.2d 87 (Ky. 1971).
the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

(2)(a) If a defendant can certify that prior to cutting:
1. A signed statement was obtained from the person whom the defendant believed to be the owner of all trees scheduled to be cut that:
   a. All of the trees to be cut were on his property and that none were on the property of another; and
   b. He has given his permission, in writing, for the trees on his property to be cut; and
2. Either:
   a. A written agreement was made with owners of the land adjacent to the cut that the trees to be cut were not on their property; or
   b. Owners of the land adjacent to the cut were notified in writing, delivered by certified mail, restricted delivery, and return receipt requested, of the pending cut and they raised no objection, the court may render a judgment for no more than the reasonable value of the timber, actual damages caused to the property, and any legal costs incurred by the owner of the timber.

(b) With respect to subsection (2)(a)2.b. of this section, if no written objection was received from the persons notified within seven (7) days from the date of signed receipt of mail, it shall be presumed, for the purposes of setting penalties only, that the notified owner had no objection to the proposed cut.

(3) This section shall not be construed as repealing any of the provisions of K.R.S. Section 514.030 of the Kentucky Revised Statutes and any penalties provided by this chapter shall be considered as additional thereto.

Plaintiffs can now recover: (i) three times the stumpage value of the timber that is cut; (ii) three times the cost of any damages to the property; and (iii) any legal costs that they incur. Not only that, one can be held liable
for these enormous costs by simply intending to cut (and cutting) timber that is ultimately adjudged to be owned by another. It is axiomatic that if one intends to cut timber and does so that they also intend to convert it to their own use. The only defenses under the statute appear to be establishing that the offending party had color of title, that the plaintiff’s title is inferior or that the defendant complied with the requirements of Ky. Rev. Stat. Ann. Section 364.130(2).

Cutting with permission has always been a defense and the letter writing merely codifies a defense founded upon estoppel. Of course, anyone who has practiced law or been involved in any extractive industry in Eastern Kentucky knows that removing natural resources causes many people to assert unwarranted claims. Asking for permission will likely be viewed as a sign of weakness and many will exploit the advantage and try and profit from the circumstances. The statute nearly guarantees this by granting an adjoining landowner the right to veto cutting by simply claiming to own the land or timber. While this might subject such claimants to liability for slandering someone’s title, the fact that legal costs cannot be recovered in such an action is significant.

Conversely, Ky. Rev. Stat. Ann. Section 364.130 allows the plaintiff (and not the defendant) to recover legal costs under almost any outcome. If this term includes legal fees, then that provision becomes the most significant modification to the statute because legal fees in timber trespass cases almost always exceed the value of the timber, even if it is trebled! The decisions interpreting this law should cause anyone who intends to cut a single tree to treble their level of caution.

Finally, letters written pursuant to this statute on behalf of one who is about to cut one or more trees should address the issues specified in subsections 1 and 2, describe the property with reasonable certainty and, if you dare, provide their source of title, and send it to all adjoining landowners, including those who might claim an interest in the client’s property or in the adjoining property. This could prove to be a boon for abstractors and attorneys. Unfortunately, the cost of such precautions may, in some instances, exceed the value of the timber or the profit to be derived therefrom.
Judicial Interpretation.

Many cases involving Ky. Rev. Stat. Ann. Section 364.130 have been decided by the court of appeals in the last three years, but only one has been reported.


The King case is a typical timber trespass case where an adjoining landowner cut about $3,000.00 worth of timber from his neighbor’s land and caused another $3,000.00 in damages to the land. Trebling and the allowance of “legal costs” added another $20,039.66 to the actual damages:

At trial, a jury awarded the Greccos $3,000.00 in damages resulting from lost timber and $3,000.00 in damage to the land itself. This combined $6,000.00 damage figure was trebled by the circuit court as required by K.R.S. 364.130. The jury also assessed $2,000.00 in punitive damages against King. Finally, the circuit court assessed against King the Greccos’ costs, composed of $1,370.00 for surveying fees, $375.00 for timber expert services and $6,666.66 for attorney’s fees.

King v. Grecco, 111 S.W.3d 877, 880 (Ky. App. 2003). The trespasser raised four significant issues on appeal about the damage awards:

• Did the circuit court err in assessing punitive damages against King, having already awarded statutory treble damages under Kentucky Revised Statutes (Ky. Rev. Stat. Ann. ) 364.130?

• Should the circuit court have instructed the jury regarding the trebling of damages under Ky. Rev. Stat. Ann. 364.130, rather than instructing it simply to find actual damages and then trebling the award?

• Should the circuit court have submitted the issue of attorney’s fees to the jury?

• Even if the court was correct in deciding the issue of attorney’s fees, was the amount awarded excessive?
Before answering those questions, the Court of Appeals confirmed that the statute requires the trial court to assess “legal costs” once the jury has decided that a trespass has occurred:

The only issues of fact for a jury to decide under that statute are whether one party (here, King) wrongfully cut the timber of another (here, the Greccos), and the damages caused by the wrongful entering upon the other’s land and the cutting of his timber. Once those issues have been resolved by the jury, it is for the court to award legal costs to the damaged party, which, under the statute, include a reasonable attorney’s fee. Attorney’s fees are mandated by the statute’s use of the term “shall,” as opposed to the permissive “may.” Once the jury found that King violated KRS 364.130(1), the court was required as a matter of law to award the Greccos’ attorney’s fees.20

As under the common law, the court agreed “that punitive damages may not be awarded in addition to statutory treble damages for the wrongful cutting of trees.”21 The court did not distinguish between the right of having a jury assess punitive damages, while denying a litigant the right to have a jury determine the amount of the corresponding statutory penalty, “legal costs.” The same argument might be made about the other component of the statutory penalty, automatically trebling damages. Nothing was said about the award of expert fees.

Trespass cases almost always involve title and boundary disputes, which means that the cost of trying a relatively simple case can exceed $20,000.00, not to mention the cost of a surveyor and a timber valuation expert. Often, the value of the timber will be insignificant in relation to the other damages. Taken to its logical extreme, if a neighbor cut and appropriated one tree from an adjoining landowner’s property without color of title or permission, then the statute authorizes the landowner to spend whatever it takes to prevail because they know that they will be able to recover those sums from the trespasser.

21 Id. at 882.
Subsequent Unreported Decisions.

Before discussing several points in a few of the unpublished decisions that have followed *King v. Grecco*, a word of caution is in order. The Kentucky courts have a policy of releasing all appellate decisions to the public, but decide which are “to be published” and have precedential value and which are “not to be published.” C.R. 76.28(4). This distinction is critical because the latter “shall not be cited or used as authority in any other case in any court of this state.” C.R. 76.28(4). In fact, citing an unpublished decision “could result, upon proper motion, in the striking of the offending brief without leave to refile.” *Jones v. Commonwealth*, 593 S.W.2d 869, 871 (Ky. App. 1979). Failing to review them, however, is not prohibited, and one must surmise that the court of appeals consults them as well, as that is not prohibited by the Civil Rules. That said, here they are, with brief comments, as appropriate.

*Johnson v. Mattingly*, 2003 WL 22462653 (Ky. App. Oct. 31, 2003)(No. 2002-CA-000053-MR, 2002-CA-000088-MR): The jury found that the instruments under which the defendants claimed did not describe the property from which the timber had been cut, but the trial court determined that the defendants still had color of title and refused to treble the damages or award any legal costs. The court of appeals affirmed because the deed appeared regular on its face and because the defendants acted under the advice of a surveyor. What the court of appeals failed to recognize, but applied in *Applegate v. Cropper*, infra, was that a deed must actually describe the property in question. The jury found that it did not. Were the Kentucky courts to recognize an exception based upon a surveyor’s advice, almost no case would ever be tried under the statute because surveyors, like other experts, are known to disagree.


Warren v. Johnson, 2005 WL 32808 (Ky. App. Jan. 07, 2005)(No. 2003-CA-000032-MR): In this appeal, the landowner tried to claim that the statute did not apply to her because (a) she did not actually cut the timber; or (b) because she did not cause or authorize anyone to do so. The court of appeals interpreted that portion of the statute as follows:

The appellant clearly “caused” the timber to be cut down by misrepresenting she owned the timber and then selling the timber under a contract. It does not matter that she, herself, did not physically cut the timber because the statute specifically provides for instances such as this where a person contracts with someone else to do the cutting. Appellant’s argument that she did not convert the timber to her own use is also meritless. Although she did not take the timber, she sold the timber. By selling the timber, she converted the timber into money, which she used for her own use. Since the statute clearly applies to the appellant, we affirm the trial court’s award of everything accept the attorney’s fees, discussed below.

The court of appeals also stated that, in awarding attorney’s fees, the trial court must make findings regarding the reasonableness of the fees.

Meenach v. Denlinger, 2005 WL 1994070 (Ky. App. Aug. 19, 2005)(No. 2004-CA-000012-MR): Here, one of the appellants, the landowner who engaged an independent contractor to cut the timber, argued that the trial court had improperly determined that he was vicariously liable under the theories of respondeat superior and Ky. Rev. Stat. Ann. Section 364.130(1) for the
contractor, Hall’s, trespass on the land and timber of an adjoining landowner. In reversing and declaring that Meenach was not liable, the court of appeals concluded that Meenach lacked the intent required by the statute:

Likewise, there is no evidence that Meenach caused “to be cut down with intent to convert to his own use timber growing upon the land of another” as required by the statute. The court did not address the question of intent required under the statute, instead finding that Meenach had a duty to do more to ensure that Hall knew where the boundary with Denlinger’s property was, and that Meenach “knew Mr. Hall was reckless”, apparently referring to Hall’s reputation in the community. We hold that the court did not properly apply the statute, and that from the evidence before it, the court could not have made the determination that Meenach caused to be cut down timber growing on the land of another with intent to convert it to his own use. Hall negligently cut timber over the boundary, and he did so while under an agreement to log on Meenach’s property, but there is no evidence of intentional conversion on Meenach’s part, and so liability under the above statute does not attach to Meenach.

This is interesting because it raises the possibility that a defendant may now be able to raise the good faith defense to willful trespass that existed at common law. Everyone who cuts timber intends to convert it to their own use, thus satisfying the statute, but how many people only intend to cut what they think they own. Many an attorney has heard their client say “I only want what’s mine.” Thus, it is no longer a matter for the court, but for the jury.


Litigation has only just begun to plumb the application of this statute. Here are some thoughts about the statute.

- Ky. Rev. Stat. Ann. Section 364.130 is unconstitutional to the extent that it deprives a citizen of jural rights
The Kentucky Supreme Court has written often about “jural rights,” which are fundamental rights that existed when the Kentucky Constitution was last amended in 1891. As such, they cannot be abridged, although the Legislature has tried, perhaps unwittingly, on several occasions. See, e.g., Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 816 (Ky. 1991); Ky. Const. Section 14. This applies to “rights”, or claims, and to defenses, Hawkins v. Sunmark Industries, Inc., 727 S.W.2d 397, 399 (Ky. 1986)(Fireman’s Rule), and probably applies to trespass actions, which predate the Kentucky Constitution. Ky. Rev. Stat. Ann. Section 364.130 changed many aspects of the traditional trespass to timber claim, making it easier for plaintiffs to prove their cases and to recover damages, not to mention allowing for the recovery of attorneys fees, expert fees and other costs that could not be recovered at common law. In the bargain, the statute also removed some of the common law defenses, unbalancing the playing field even further.

- The statute impermissibly removed the good faith defense to punitive damages

One who trespassed in good faith at common law was only subject to the payment of the stumpage value and costs. Swiss Oil Corporation v. Hupp, 253 Ky. 552, 69 S.W.2d 1037 (1934). Ky. Rev. Stat. Ann. Section 364.130 makes no mention of the “good faith” defense with regard to trebling and the award of “legal costs,” which is deemed the equivalent of punitive damages in King v. Grecco, 111 S.W.3d 877, 882 (Ky.App. 2003). Such is still the law in Kentucky:

We are of opinion also that the instruction providing for punitive damages was not authorized by the evidence. An abstract distinction between a willful and an innocent trespasser is that the one knows he is wrong and the other believes he is right. Swiss Oil Corporation v. Hupp, 253 Ky. 552, 69 S.W.(2d) 1037.

United Co-op. Realty Co. v. Morrison, 262 Ky. 65, 89 S.W.2d 331, 332 (1935). Most people who cut timber genuinely believe that they own the land. See discussion under Meenach v. Denlinger, supra.
- Damages could not be trebled against a trespasser at common law. Heretofore, one could only recover treble damages from a cotenant or joint tenant for waste, but not from a stranger. See Ky. Rev. Stat. Ann. Sections 381.350-.420. They are now mandatory, or automatically awarded, under Ky. Rev. Stat. Ann. Section 364.130, with certain limited exceptions as to a writing or estoppel for failure to reply to the writing. At common law, punitive damages could not be recovered if the cutting was done with the oral permission of the complaining party or an adjoining landowner or where acts constituting an estoppel, acquiescence or waiver (as at common law) would bar the plaintiff’s claims, rather than mandating that only a writing will suffice, as in Ky. Rev. Stat. Ann. Section 364.130(2)(a)(2). Likewise, one’s good faith operated to bar the imposition of punitive damages, but the statute does not recognize that either.

- A plaintiff should not be able to decide whether a potential defendant will be able to exercise his or her jural rights. King v. Grecco held that a plaintiff could elect between pursuing a common law trespass claim or one under the statute as the rationale for denying the recovery of punitive damages under the statute. To the extent that Ky. Rev. Stat. Ann. Section 364.130 eliminates common law defenses and rights, then it impermissibly allows a plaintiff to deny them to a prospective defendant.

The term “legal costs” is impermissibly vague and arbitrary, does not include attorneys fees or expert fees, nor does it provide for an award to a deserving defendant or allow a credit for any success that the defendant has in his or her defense. This deprives defendants of the right to “defend their lives and liberties”, the “right of acquiring and protecting property”, the right “of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition address or remonstrance”, the right to be free of “absolute and arbitrary power” and for the courts to be open so that “right and justice can be administered in violation of Sections 1, 2, 3 and 14 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.
King v. Grecco interpreted the term “legal costs” to include expert and attorneys fees, which expands the remedies available for common law trespass. The grant is one-sided, though, and provides no such relief to a defendant who prevails in whole or in part. Additionally, it is vague because it fails to set forth criteria to guide the court as to how to apportion fees when the outcome favors both sides, as here.

For instance, how should a trial court decide what constitutes reasonable attorney’s fees and experts fees if the plaintiff only recovers 10 percent of the timber or other damages to the property for which it introduces evidence? To automatically award plaintiffs 100 percent of their legal costs penalizes defendants for any success that they achieve and rewards plaintiffs who pursue claims that fail. This impermissibly impairs one’s right to defend him or herself (due process, equal protection, access to the courts, trial by jury, etc.), which is guaranteed by Sections 1, 2, 3 and 14 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, not to mention the statutes and rules that allow litigants to file answers and defend themselves.

Conclusion.

Ky. Rev. Stat. Ann. Section 364.130 wrought great change where timber trespass is concerned. It added a new claim for prospective plaintiffs, created a process to avoid treble damages and, in general, complicated the entire process for anyone who wants to cut down a tree. It applies not only to those who cut timber commercially or from their own property, but applies to homeowners and their neighbors and to coal companies and oil and gas firms that routinely clear trees from property in connection with their operations.

Those who are unfortunate enough to find themselves defending claims under Ky. Rev. Stat. Ann. Section 364.130 are immediately faced with a Hobson’s choice—they can either defend and risk paying all of the plaintiffs’ costs and fees if the plaintiff prevails in any respect or they can pay whatever it takes to settle. There is no such downside for the plaintiff, rendering the right to defend oneself hollow indeed.

Good luck.