No. 101050-8
COA No. 54541-1-II

Supreme Court of the State of Washington

Lisa Lavington,

Respondent,

v.

James T. Hillier and **Wanda L. Hillier,**

Petitioners,

Ray Parson Construction, LLC,

Defendant.

Answer to Petition for Review

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Cases

1. Identity of Respondent

Lisa Lavington, Plaintiff in the trial court and Appellant at the Court of Appeals, Answers Hillier's Petition for Review. Lavington requests this Court deny Hillier's petition. But if the Court grants the petition, Lavington requests the Court also grant review of the additional issue presented in this Answer.

2. Additional Issues Presented for Review

1. Unjust enrichment requires that the defendant received a benefit at plaintiff's expense, not that the plaintiff willingly gave the benefit. The trial court dismissed Lavington's unjust enrichment claim because Lavington did not willingly give the benefit. **Did the trial court err in dismissing the unjust enrichment claim?**

3. Statement of the Case

The trial court unjustly stripped Lavington of any meaningful redress for Hillier's blatant violation of her property rights when he appropriated to himself the use of her driveway for heavy construction traffic, saving some $80,000 in construction costs, knowing he had no right to do so. The Court of Appeals correctly held that such a violation is remediable as a trespass. This Court should deny review.

3.1 After being denied an easement to use Lavington's driveway, Hiller instructed Parsons to direct heavy construction traffic over the driveway anyway, saving Hillier some $80,000 in construction costs.

"The Hilliers owned property adjacent to Lavington's property. James Hillier and Lavington are cousins, and their properties once were part of the same plat of land owned by James's and Lavington's grandfather. Historically, the Hilliers used a driveway on Lavington's property to access their property. However, the Hilliers also had a second access to their

property on the other end of their lot." ***Lavington v. Hillier***, 22 Wn. App. 2d 134, 138, 510 P.3d 373 (2022).

Lavington's parents had allowed the Hillier family's use prior to Lavington's ownership. 9 RP 463; CP 436. In about 1996, Lavington's parents installed a new septic drainfield and in the process changed the grade of the driveway near the property line, blocking any further use of the driveway to access the Hillier property. 8 RP 353, 398; 9 RP 455-59; CP 285, 436; *see* 8 RP 408. Native vegetation filled in the space, creating a visual screen between the properties. 8 RP 348-49.

"In 2013 or 2014, the Hilliers were considering building a house on their property. James asked Lavington if she would grant him a formal easement of her driveway. Lavington denied the request." ***Lavington***, 22 Wn. App. 2d at 138. Hillier had expressly tied his request for an easement with the upcoming construction project. 8 RP 345, 394, 408-09; 9 RP 478-79; CP 282, 437; Ex. 46.

"In November 2014, the Hilliers began construction of a house on their property and hired Parsons as their general contractor. James told Parsons to use Lavington's driveway as needed for access in order to save money on construction costs." *Lavington*, 22 Wn. App. 2d at 139. Parsons' crew and subcontractors flattened out the break in grade, removed vegetation, widened the road from eight feet to ten, and laid crushed rock over the driveway. 8 RP 348-49, 355; 9 RP 461; CP 437.

Making use of the driveway saved Hillier time and labor costs. 9 RP 450; CP 430-31, 434. Lavington's expert, Scott Babbit, estimated this cost savings to be about $80,000. CP 434.

"When Lavington discovered that Parsons was using her driveway, she spoke to the foreman of the construction crew and told him that they did not have permission to use her property. Parsons stopped using

Lavington's driveway." ***Lavington***, 22 Wn. App. 2d at 139.

3.2 The trial court dismissed Lavington's unjust enrichment claim at summary judgment and excluded her evidence of trespass damages at trial.

Lavington filed a complaint against Hilliers and Parsons for trespass and unjust enrichment, among other things. CP 1-8.

"The Hilliers and Parsons jointly moved for partial summary judgment dismissal of Lavington's unjust enrichment claim." ***Lavington***, 22 Wn. App. 2d at 139. "The trial [dismissed] Lavington's unjust enrichment claim with prejudice. The trial court stated that it could not find that Lavington actually gave anything to the Hilliers." ***Lavington***, 22 Wn. App. 2d at 140.

"Parsons moved in limine to limit the measure of Lavington's [trespass] damages to the lesser of the cost of restoring any damage to the property or the

diminution in value the trespass caused. Similarly, the Hilliers moved in limine to exclude testimony from Lavington's expert, who was prepared to testify regarding his opinion of the rental value the Hilliers should have paid to use Lavington's driveway. The trial court granted the motion regarding the measure of damages, and excluded the expert's testimony because it did not relate to either restoration costs or diminution in value." ***Lavington***, 22 Wn. App. 2d at 141-42.

"After Lavington presented her case in chief, the Hilliers and Parsons jointly moved for dismissal… The trial court granted the motion for dismissal… [reasoning that] Lavington did not prove that she suffered actual and substantial damages from the trespass." ***Lavington***, 22 Wn. App. 2d at 142.

3.3 The Court of Appeals affirmed dismissal of the unjust enrichment claim but reversed the trial court's decisions on trespass, holding that "actual and substantial damages" includes more than just physical injury to land.

The Court of Appeals affirmed dismissal of the unjust enrichment claim, agreeing with the trial court that the first element requires proof that the plaintiff willingly conferred the benefit on the defendant. *Lavington*, 22 Wn. App. 2d at 144. The court held,

> Lavington argues that the Hilliers received a benefit because they saved on construction costs by using her driveway. However, it is undisputed that Lavington did not confer any benefit on the Hilliers or on Parsons. They simply took the benefit. Therefore, as a matter of law Lavington could not satisfy the first element of unjust enrichment.

Id.

The Court of Appeals reversed the trial court's decisions relating to trespass, holding that the element of "actual and substantial damages" is not limited to only physical damage to land:

> [W]e conclude based on *Bradley* and the *Restatement (Second) of Torts* that the fourth element of an intentional trespass claim is actual and substantial *damages*, not some physical damage to the plaintiff's property.

Lavington, 22 Wn. App. 2d at 150 (italics in original).

The court pointed out the distinction between "damages," plural, used broadly in *Bradley*, and "damage to property," used in *Bradley* only in the specific context of the facts of that case—a continuing trespass by particulate pollution:

> The court in *Bradley* stated four times that actual and substantial *damages* was an element of trespass and only referenced damage to property in the context of a continuing trespass while again referring to damages. *Bradley*, 104 Wash.2d at 692-93, 709 P.2d 782. Almost all the cases since *Bradley*, including *Wallace*, *Grundy* and *Crystal Lotus Enterprises*, have stated that the fourth element of trespass is actual and substantial *damages*.

Lavington, 22 Wn. App. 2d at 150 (italics in original).

The court emphasized that *Bradley* quoted approvingly from the Restatement as the baseline rule for ordinary trespass, in which there can be liability without physical damage to land:

> In addition, as stated above, *Bradley* quoted § 158 of the *Restatement (Second) of Torts*, which states that liability exists for an intentional entry into land in the possession of another "irrespective of whether he thereby causes harm to any legally protected interest of the other." *Bradley*, 104 Wash.2d at 681, 709 P.2d 782.

Lavington, 22 Wn. App. 2d at 151.

The court recognized that the *Bradley* element of "actual and substantial damages" was meant to bar claims for nominal damages, not to limit trespass to only physical damage to land:

> The one limitation, as noted above, is that the plaintiff must prove actual and substantial damages. *Bradley*, 104 Wash.2d at 693, 709 P.2d 782. Therefore, nominal damages generally are not allowed for an intentional trespass claim. *Id.* at 691-92, 709 P.2d 782.

Lavington, 22 Wn. App. 2d at 153.

Accordingly, the Court of Appeals held that "actual and substantial damages" could include other things besides physical damage to land:

> The rule that an injured person is entitled to recover the lesser of the cost of restoration or the diminution in value applies to physical damage to personal or real property. However, no case states that this is the *only* measure of damages allowed for an intentional trespass onto another's property. Physical damage to property is only one aspect of a trespass.

Lavington, 22 Wn. App. 2d at 152-53 (italics in original; citations omitted).

> Because trespass liability can exist without some physical damage to the property, there is no reason that emotional distress cannot constitute actual and substantial damages.

Lavington, 22 Wn. App. 2d at 151-52.

> [P]roperty owners are entitled to compensation for the loss of their right to exclusive use and possession of their property. For example, trespass plaintiffs

> may be able to recover loss of use damages for a temporary invasion of their property.

Lavington, 22 Wn. App. 2d at 153.

The Court of Appeals reversed the trial court's exclusion of Lavington's evidence of rental value damages. *Lavington*, 22 Wn. App. 2d at 154. The court also reversed the trial court's dismissal of Lavington's trespass claim. *Id.* at 154-55.

4. Argument

Under RAP 13.4(b), this Court will only accept a petition for review if the decision of the Court of Appeals is in conflict with other published decisions or if it otherwise involves an issue of substantial public interest. On the issues that Hillier raises in his petition, the Court of Appeals decided correctly and in complete harmony with prior published opinions. This Court should deny Hillier's petition for review. In the event the Court grants Hillier's petition, the Court

should also accept review of the additional issues presented in this Answer.

4.1 The Court should deny Hillier's Petition for Review.

4.1.1 The Court of Appeals Opinion is consistent with the applicable prior decisions of this Court.

Hillier's petition, in focusing on *Bradley*, misses the boat. *Bradley*, by its own terms, applies only to claims of intentional trespass by particulate pollution, where the line between trespass and nuisance is blurred. Because this is not a pollution case, *Bradley* does not apply and therefore is not a source of conflict. Although the Court of Appeals discusses *Bradley* extensively, in doing so it reaches a result that is consistent with the applicable precedent of this Court: that Lavington's damages for Hillier's ordinary trespass are not limited to physical damage to land.

4.1.1.1 Bradley is not a source of conflict because it only applies to trespass by particulate pollution.

In ***Bradley v. Am. Smelting and Refining Co.***, 104 Wn.2d 677, 709 P.2d 782 (1985), this Court answered a set of questions certified from the federal court for the Western District of Washington. ***Id.*** at 679. In certified question cases, the Court answers only the discrete question that is certified and lacks jurisdiction to go beyond the narrow question and record before it. ***Ruiz-Guzman v. Amvac Chemical Corp.***, 141 Wn.2d 493, 508, 7 P.3d 795 (2000); ***Kitsap County v. Allstate Ins. Co.***, 136 Wn.2d 567, 577, 964 P.2d 1173 (1998).

The question certified in *Bradley* specifically asked whether Washington law recognized a cause of action for intentional trespass through the "deposit of microscopic particulates, undetectable by the human senses," and if so, what intent was required and did it require proof of actual damages. ***Bradley***, 104 Wn.2d at 679. Nowhere in the *Bradley* opinion did the Court

attempt to go beyond the narrow question of particulate pollution. Because of the narrow jurisdiction of the Court in answering the certified question, the *Bradley* court could not have altered Washington's law of ordinary trespass applicable to a case like this one. The *Bradley* opinion can only apply to cases of particulate pollution.

The *Bradley* court recognized that this was a limited question and framed it as such:

> The issues present the conflict in an industrial society between the need of all for the production of goods and the desire of the landowner near the manufacturing plant producing those goods that his use and enjoyment of his land not be diminished by the unpleasant side effects of the manufacturing process. A reconciliation must be found between the interest of the many who are unaffected by the possible poisoning and the few who may be affected.

Bradley, 104 Wn.2d at 681.

To answer these specific questions, the *Bradley* court began with a review of Washington's law of

ordinary trespass, set forth in the Restatement (Second) of Torts:

> The Restatement (Second) of Torts § 158 (1965) states:
>
> > One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
> >
> > (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
> >
> > (b) remains on the land, or
> >
> > (c) fails to remove from the land a thing which he is under a duty to remove.

Bradley, 104 Wn.2d at 681-82.

The *Bradley* court then turned to the conundrum of pollution: "The courts have been groping for a reconciliation of the doctrines of trespass and nuisance over a long period of time and, to a great extent, have concluded that little of substance remains to any distinction between the two when air pollution is

involved." ***Bradley***, 104 Wn.2d at 684. The court once again turned to the Restatement for a baseline discussion of ordinary trespass, noting that, unlike nuisance, in ordinary trespass, "there is liability without harm" because "an intentional invasion of the plaintiff's possession is of itself a tort, and liability follows unless the defendant can show a privilege." ***Id.*** at 689 (quoting Restatement (Second) of Torts § 821D, comment d).

The *Bradley* court adopted "the elements of trespass by airborne pollutants" set forth in *Borland*:

> 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the *res*.

Bradley, 104 Wn.2d at 691 (quoting ***Borland v. Sanders Lead Co.***, 369 So.2d 523, 529 (Ala. 1979)). The *Borland* court had established these elements specifically to

deal with pollution and other formerly "indirect" trespasses. ***Id.*** The *Bradley* court was even more specific in its adoption of the elements, holding that these would be the elements in Washington law for "trespass by airborne pollutants." ***Id.***

The *Bradley* court explained that the element of "actual and substantial damages" was necessary *specifically in pollution cases:*

> While at common law any trespass entitled a landowner to recover nominal or punitive damages for the invasion of his property, such a rule is not appropriate *under the circumstances before us*. No useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant.

Bradley, 104 Wn.2d at 691-92 (emphasis added).

The court concluded its careful limitation of its holding when it restated its answers to the certified question:

> In conclusion, we answer the certified questions as follows:

> 1. The defendant had the requisite intent to commit intentional trespass.
>
> 2. An intentional deposit *of microscopic particulates, undetectable by the human senses*, gives rise to a cause of action for trespass as well as a claim of nuisance.
>
> 3. A cause of action *under such circumstances* requires proof of actual and substantial damages.

Bradley, 104 Wn.2d at 695 (emphasis added).

Because *Bradley*, by its terms, was limited to claims of trespass by airborne particulate pollution, it does not apply to this case of ordinary trespass, where Hillier, without authority or privilege, commanded Parsons to drive heavy construction traffic over Lavington's driveway. The Court of Appeals correctly decided that Lavington's damages for ordinary trespass are not limited to physical injury to the land. That decision cannot conflict with *Bradley* because *Bradley* only applies to pollution cases, which this is not.

4.1.1.2 Even if Bradley does apply, it does not limit "actual and substantial damages" to only physical damage to land.

Even if *Bradley* does apply in cases of ordinary trespass, the Court of Appeals correctly discerned that the *Bradley* court did not intend to limit "actual and substantial damages" to only physical damage to land. Although the *Bradley* court stated that it adopted the *Borland* element of "substantial damage to the *res*," the rest of the *Bradley* opinion changed the formulation to "actual and substantial damages," without stating that it was limited to physical damage to the land. *See* ***Bradley***, 104 Wn.2d at 692-93. The court explained that the purpose of the "actual and substantial damages" requirement was to disallow nominal damage claims. ***Id.*** at 691-92. Surely the *Bradley* court, concerned with the "possible poisoning" of pollution, *see* ***id.*** at 681, would not have rejected a claim that involved bodily injury rather than property damage. It is significant that the *Bradley* court never once

repeated "damage to the *res*" after quoting it from *Borland*, and instead changed it to "actual and substantial damages." ***Id.*** at 692-93. The Court of Appeals is correct that "damages" is a much broader term than "physical damage". The Court of Appeals decision is consistent with *Bradley*. There is no need for this Court to accept review.

4.1.1.3 The Court of Appeals decision is consistent with this Court's applicable precedent.

Where *Bradley* does not apply, the question is whether the Court of Appeals decision is consistent with this Court's precedent in ordinary trespass cases. Because the answer is "yes," there is no need for this Court to accept review.

Prior to *Bradley*, intentional trespass in Washington was defined by the common law. This Court has described it as "an entry on another man's ground without a lawful authority, and doing some

damage, however inconsiderable, to his real property." *Welch v. Seattle & M. R. Co.*, 56 Wash. 97, 99, 105 P. 166 (1909). A successful plaintiff could recover "money damages for an injury done to his person, property or his rights" by the trespass; the law's regard for a person's property rights was so great that nominal damages were presumed. *Miles v. F. E. R. M. Enterprises, Inc.*, 29 Wn. App. 61, 65, 627 P.2d 564 (1981) (citing *Zimmer v. Stephenson*, 66 Wn.2d 477, 479-80, 403 P.2d 343 (1965)). A trespasser was liable for any specific damage proved to have been caused by his conduct. *Haase v. Helgeson*, 57 Wn.2d 863, 867, 360 P.2d 339 (1961). The common law also recognized a cause of action for "trespass for mesne profits," referring to the value of use and occupation of land, in which a plaintiff could recover the value of the use the trespasser made of the property. *Columbia & P.S.R. Co. v. Histogenetic Medicine Co.*, 14 Wash. 475, 479-81, 45 P. 29 (1896).

These early cases are largely consistent with the definitions of trespass given in the Restatement (Second) of Torts. Indeed, this Court expressly adopted Restatement (Second) of Torts § 165, dealing with negligent trespass, in ***Zimmer v. Stephenson***, 66 Wn.2d 477, 483, 403 P.2d 343 (1965). The *Zimmer* court also cited favorably to Restatement (Second) of Torts § 158, dealing with intentional trespass. ***Zimmer***, 66 Wn.2d at 482. *Bradley*'s reliance on § 158 solidifies the inescapable conclusion that by the time of *Bradley*, Washington's law of intentional trespass followed the Restatement. *See* ***Bradley***, 104 Wn.2d at 681-82.

The same remained true after *Bradley*. In the relatively recent case of ***Brutsche v. City of Kent***, 164 Wn.2d 664, 193 P.3d 110 (2008), the plaintiff sued the city alleging that police officers had exceeded the scope of their lawful entry, resulting in a trespass. This Court cited to *Bradley*, not for the four elements of a pollution trespass, but for the Restatement's formulation of

ordinary trespass. ***Brutsche***, 164 Wn.2d at 673-74. The *Brutsche* court then expressly adopted Restatement (Second) of Torts § 214, dealing with trespass by exceeding a privilege to enter land. ***Id.*** at 674.

Where this Court has consistently relied on the Restatement to define Washington's law of ordinary trespass, the Court of Appeals decision in this case—which relied heavily on the Restatement—is consistent with this Court's precedent. The Court of Appeals decision was correct and does not need to be reviewed. This Court should deny Hillier's petition.

4.1.2 The Court of Appeals Opinion does not conflict with other published opinions of the Court of Appeals.

Hillier argues that the Court of Appeals decision in this case conflicts with ***Grundy v. Brack Family Trust***, 151 Wn. App. 557, 213 P.3d 619 (2009). However, the *Grundy* court only applied the four-part *Bradley* test because it found the trespass by splashing sea

water was the type of invasion that *Bradley* was intended to govern:

> Wallace cites to *Bradley*, which case seems to imply that this four part test only applies if the intentional trespass was indirect. *See Bradley*, 104 Wash.2d at 691–93, 709 P.2d 782. …
>
> Even if the four part test applies only to indirect trespass, we hold that any trespass in this case was indirect. Indirect trespass occurs where the trespass would have previously only been actionable as a nuisance. *Bradley*, 104 Wash.2d at 691, 709 P.2d 782. …
>
> Here, the Bracks did not directly enter Grundy's property nor did they directly cause water to enter Grundy's property. Therefore, any water splashing on Grundy's property from storm or sea wave action against the Bracks' raised bulkhead constituted an indirect invasion and we would apply the Wallace four part test.

Grundy, 151 Wn. App. at 567 n.8. Because *Grundy* dealt with a pollution-type trespass and not an ordinary trespass, *Grundy* does not apply here. The Court of Appeals decision in this ordinary trespass case

does not conflict with *Grundy*, a pollution trespass case.

Hillier argues that the Court of Appeals decision conflicts with ***Crystal Lotus Enterprises Ltd. v. City of Shoreline***, 167 Wn. App. 501, 274 P.3d 1054 (2012). But the *Crystal Lotus* court only applied the *Bradley* four-part test because Crystal Lotus had alleged a continuing trespass, as opposed to a "permanent," or ordinary, trespass. ***Crystal Lotus***, 167 Wn. App. at 506. While it is questionable whether the *Crystal Lotus* court was justified in applying *Bradley* to a case of stormwater infiltration, the fact remains that this is not a continuing trespass case, so *Crystal Lotus* does not apply. Moreover, *Crystal Lotus* did not deal with the issue of whether "actual and substantial damages" could include damages other than physical damage to land. In *Crystal Lotus*, there was no evidence of *any kind* of damages. ***Id.*** at 506. Because *Crystal Lotus* did not hold that physical damage to land was the only

cognizable type of damage, there is no conflict with the Court of Appeals decision here.

Hillier argues that the Court of Appeals decision conflicts with ***Wallace v. Lewis County***, 134 Wn. App. 1, 137 P.3d 101 (2006). But *Wallace*, like *Crystal Lotus*, was a continuing trespass case. ***Id.*** at 15. Furthermore, the *Wallace* court held that the invading substances—rodents and mosquitoes—were not a trespass at all because they were "transitory" under *Bradley* and therefore could only be a nuisance, not a trespass. ***Id.*** at 16. Thus, *Wallace* is not authority for the premise that only physical damage to land will suffice.

To the contrary, it appears that the *Wallace* court understood that "actual and substantial damages" are *not limited* to only physical damage to land. In stating that the plaintiffs had failed to show "any actionable damage resulting from intentional continuing trespass," the court observed, "Although the Wallaces contend they suffered personal injury, such as

emotional distress," they only alleged such damages in connection with their nuisance claim, not their trespass claim. ***Wallace***, 134 Wn. App. at 17 n.11. The implication of the footnote is that if Wallaces *had* alleged personal injury resulting from trespass, that could have been "actionable damage" under the four-part test. Far from conflicting, this appears to agree with the Court of Appeals decision here.

Finally, Hillier argues that the Court of Appeals decision conflicts with ***Ofuasia v. Smurr***, 198 Wn. App. 133, 392 P.3d 1148 (2017). But the *Ofuasia* court cited the *Bradley* four-part test without offering any reasoning for why that test was appropriate. ***Id.*** at 149. The court reversed dismissal of the Ofuasias trespass claim because there was, among other things, evidence of substantial damage through the removal of a fence and multiple trees. ***Id.*** at 149-50. But the *Ofuasia* court did not say that such physical damage to land was the *only* cognizable type of damage to support the "actual

and substantial damages" element of the *Bradley* test. Because the *Ofuasia* court did not address the issue, there is no conflict with the Court of Appeals decision here.

Hillier has failed to point to a single prior published decision of the Court of Appeals that has held that physical injury to land is the only type of damage that will satisfy "actual and substantial damages" under the *Bradley* test. The Court of Appeals decision in this case appears to be the first that has addressed that specific question, correctly answering it in the negative. Because there is no conflict, this Court should deny Hillier's petition.

4.1.3 The Court of Appeals Opinion does not implicate substantial public interests.

Hillier's fear of compounding litigation is unfounded. The Court of Appeals decision here maintains *Bradley*'s limitation against nominal damage cases:

> The one limitation, as noted above, is that the plaintiff must prove actual and substantial damages. *Bradley*, 104 Wash.2d at 693, 709 P.2d 782. *Therefore, nominal damages generally are not allowed* for an intentional trespass claim. *Id.* at 691-92, 709 P.2d 782.

Lavington, 22 Wn. App. 2d at 153 (emphasis added).

The Court of Appeals decision still requires Lavington—or any other plaintiff—to prove "actual and substantial damages":

> [T]he trial court erroneously precluded Lavington from presenting evidence regarding her alleged emotional distress and any damages apart from physical injury to her property. Therefore, until Lavington is allowed to present such evidence, it is unknown whether she will be able to show actual and substantial damages.

Lavington, 22 Wn. App. 2d at 154. On remand, Lavington will still be required to prove actual damages, whether they be emotional distress, use value, or physical damage. The Court of Appeals decision will not enable litigation over "usual,

transitory, and trivial use of the property of another," which would only support nominal damages.

Hillier's invocation of "usual, transitory, and trivial use of the property of another" is also disingenuous, as his use of Lavington's property was anything but usual, transitory, or trivial. Hillier did not accidentally hit a ball the wrong way or step over the property line to clean up his dog's excrement. Hillier asked for permission to use Lavington's driveway for his heavy construction traffic; was denied that permission; and then knowingly instructed Parsons to use it anyway. Hillier saved himself $80,000 in construction costs by taking by force the use that Lavington had denied. It was not a "trivial" trespass.

The Court of Appeals' distinction between "damages" and "physical damage to property" does not risk confusion in the trial courts. "Damages" is well understood to refer broadly to the compensation the law provides for many different possible types of harm.

"Damage to property" is narrow, referring to one of those possible types of harm: physical harm to the land. The Court of Appeals correctly concluded from the totality of the *Bradley* opinion and from the Restatement, which is still the standard for Washington's law of ordinary trespass, that the "actual and substantial damages" requirement allows broadly for many different possible types of harm to be proven, so long as they are not nominal.

Because the Court of Appeals decision does not raise any issues of substantial public interest, this Court should deny Hillier's petition.

4.2 If the Court grants Hillier's petition, the Court should also grant review of the dismissal of Lavington's unjust enrichment claim.

The Court of Appeals decision affirming dismissal of Lavington's unjust enrichment claim conflicts with this Court's opinion in ***Young v. Young***, 164 Wn.2d 477, 191 P.3d 1258 (2008). The Court of Appeals reasoned

that a plaintiff must willingly confer the benefit on the defendant for an implied contract to arise. ***Lavington***, 22 Wn. App. at 144. But that reasoning, according to *Young*, would place Lavington's claim in the realm of "quantum meruit," which is based on conduct showing a mutual intent, just without an actual contract. *See* ***Young***, 164 Wn.2d at 485.

By contrast, *Young* explains that "unjust enrichment" is the method of recovery for the value of a benefit retained by a defendant, "because notions of fairness and justice require it." ***Id.*** at 484. Although it uses the term "confer," nothing in *Young* requires that the conferral of the benefit must be voluntary. To the contrary, *Young* states that where a defendant retains a benefit under circumstances that would create an obligation, "from the ties of natural justice," to pay for the benefit, the law implies a debt, under the action of "unjust enrichment." ***Id.*** Regardless of whether the defendant is a deadbeat (not paying for a benefit given

to them) or a thief (stealing a benefit from an unwilling victim), unjust enrichment should apply under *Young*.

By requiring Lavington to have given the benefit willingly, the Court of Appeals decision conflicts with *Young*. If the Court grants Hillier's petition, it should also accept review of this issue.

5. Conclusion

The Court of Appeals decision in this case does not conflict with any published precedent and does not raise any issues of substantial public interest. This Court should deny Hillier's petition.

However, if the Court grants the petition, it should also accept review of the trial court's dismissal of Lavington's unjust enrichment claim.

I certify that this document contains 4,967 words.

Submitted this 7th day of September, 2022.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on September 7, 2022, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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