

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

No . 85781-4

JASON and LAURA JONGEWARD, husband and wife;
and GORDON and JEANNIE JONGEWARD, husband and
wife and as Trustees of the Jongeward Family Trust,

PLAINTIFFS,

v.

BNSF RAILWAY COMPANY, commonly known as
THE BURLINGTON NORTHERN SANTA FE RAILWAY,
a Delaware corporation doing business in the
State of Washington,

DEFENDANT.

CERTIFICATION QUESTIONS FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
HONORABLE ROSANNA MALOUF PETERSON,
CHIEF DISTRICT JUDGE

OPENING BRIEF OF PLAINTIFFS



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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. CERTIFIED QUESTIONS PRESENTED FOR REVIEW	2
III. STATEMENT OF THE CASE	3
IV. STANDARD OF REVIEW	4
V. ARGUMENT	4
A. RCW 64.12.030 Generally	4
B. Rules of Statutory Construction	6
VI. QUESTION NO. 1: CAN A PLAINTIFF RECOVER DAMAGES UNDER RCW 64.12.030 FOR TREES DAMAGED OR DESTROYED BY A DEFENDANT WHO NEVER HAS BEEN PHYSICALLY PRESENT ON PLAINTIFFS' PROPERTY?	9
A. Summary of the Argument	10
B. A Trespass Under RCW 64.12.030 Exists When the Specific Acts Enumerated Therein Are Precipitated "Without Lawful Authority"	10
C. The Plain Words of RCW 64.12.030 Do Not Require BNSF's Physical Presence On Plaintiffs' Property	13
D. Common Law Trespass is Present Here, But Is Not Required Under RCW 64.12.030	15

	Page
<p>VII. QUESTION NO. 2: DOES A DEFENDANT WHO NEGLIGENTLY CAUSES A FIRE THAT SPREADS ONTO PLAINTIFFS' PROPERTY, AND DAMAGES OR DESTROYS PLAINTIFFS' TREES, "OTHERWISE INJURE" TREES, TIMBER OR SHRUBS FOR PURPOSES OF RCW 64.12.030?</p>	19
A. Introduction	20
B. Summary of the Argument	20
C. Under the Plain and Unambiguous Language of RCW 64.12.030 the Phrase "Or Otherwise Injure" Was Intended by the Legislature to Encompass Destruction of Trees by Fire	21
D. RCW 64.12.030 is Concerned with Damages for Injury to Trees and Shrubs, and Should be so Interpreted	22
E. The 2009 Legislative Changes Make Clear the Phrase "Or Otherwise Injure" is a Distinct Category of Wrongful Action, Encompassing Destruction of Trees by Fire	23
F. The Doctrine of <i>Ejusdem Generis</i> is not Applicable to the Interpretation of RCW 64.12.030	25
G. The <i>Seal</i> Decision Is Distinguishable	28
VIII. QUESTION NO 3: MUST DAMAGES AWARDED UNDER RCW 64.12.030 BE REASONABLE IN RELATION TO THE VALUE OF THE UNDERLYING PROPERTY?	30

	Page
A. Summary of the Argument	30
B. Section 929 Restatement (Second) Torts	30
IX. CONCLUSION	37

TABLE OF AUTHORITIES

Cases	Page
<i>Allyn v. Boe</i> , 87 Wn. App 722, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020, 958 P.2d 315 (1998)	31-33
<i>American Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1, 802 P.2d 784 (1991)	8
<i>Benton City v. Adrian</i> , 50 Wn. App. 330, 748 P.2d 679 (1988)	29
<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992)	8
<i>Birchler v. Costello Land Co., Inc.</i> , 81 Wn. App. at 603, 915 P.2d 564 (1996), <i>aff'd</i> 133 Wn.2d 106, 942 P.2d 968 (1997)	5, 31, 36
<i>Board of Trade of City of Seattle v. Hayden</i> , 4 Wash. 263, 30 P. 87 (1892)	7
<i>Bradley v. American Smelting and Refining Co.</i> , 104 Wn.2d 677, 709 P.2d 782 (1985)	17-19
<i>Broughton Lumber Co., v. BNSF Railway Co.</i> , 2010 U.S. Dist. Lexis 11972 (2010)	26
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005)	8
<i>City of Seattle v. State Dept. of Labor and Industries</i> , 136 Wn.2d 693, 965 P.2d 619 (1998)	9
<i>Cockle v. Dept. of Labor and Industries</i> , 142 Wn.2d 801, 16 P.3d 583 (2001)	9, 27

<i>Cowiche Canyon Consevancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992)	7
<i>Davis v. Dept. of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999)	14
<i>Elton v. Anheuser-Bush Beverage Group, Inc.</i> , 58 Cal. Rptr. 2d 303 (Cal. Ct. App. 1996)	19
<i>G & A Contractors, Inc. v. Alaska Greenhouses, Inc.</i> , 517 P.2d 1379 (Alaska 1974)	32
<i>Harold v. Toomey</i> , 92 Wash. 297, 158 P. 986 (1916)	5
<i>Heninger v. Dunn</i> , 162 Cal. Rptr. 104 (Cal. Ct. 1980)	32
<i>Hill v. Cox</i> , 110 Wn. App. 394, 41 P.3d 495, review denied, 147 Wn.2d 1024, 60 P. 2d 92 (2002)	34, 36
<i>Holland v. Columbia Irrig. Dist.</i> , 75 Wn.2d 302, 450 P.2d 488 (1969)	29
<i>Howlett v. Cheatum</i> , 17 Wash. 626, 50 P. 522 (1897)	7
<i>JDFJ Corp. v. International Raceway, Inc.</i> , 97 Wn. App. 1, 970 P.2d 343 (1999)	12, 15
<i>Jordan v. Wyatt</i> , 45 Va. (4 Gratt.) 151, 47 Am. Dec. 720 (1847)	17
<i>Kelly v. CB & I Constructors, Inc.</i> , 102 Cal. Rptr. 3 rd 32, (Cal. Ct. App. 2009)	19
<i>Kock v. Sachman-Phillips Inv. Co.</i> , 9 Wash. 405, 37 P. 703 (1894)	31

<i>Koos v. Roth</i> , 652 P.2d 1255, 1267-68 (Or. 1982)	19
<i>Longmire v. Yelm Irrigation Dist.</i> , 114 Wash. 619, 195 P. 1014 (1921)	29
<i>Longview Co. v. Lynn</i> , 6 Wn.2d 507, 108 P.2d 365 (1940)	8
<i>Martin v. Union Pac. R. Co.</i> , 474 P.2d 739 (Or. 1970)	19
<i>Mullally v. Parks</i> , 29 Wn.2d 899, 190 P.2d 107 (1948)	5
<i>North Coast Air Services, Ltd. V. Grumman Corp.</i> , 111 Wn.2d 315, 759 P.2d 405 (1988)	7
<i>Nystrand v. O'Malley</i> , 60 Wn.2d 792, 375 P.2d 863 (1962)	21
<i>Overton v. Economic Assistance Auth.</i> , 96 Wn.2d 552, 637 P.2d 652 (1981)	8
<i>Parkhurst v. City of Everett</i> , 51 Wn.2d 292, 318 P.2d 327 (1957)	6
<i>Pearce v. G. R. Kirk Co.</i> , 92 Wn.2d 869, 602 P.2d 357 (1979)	23
<i>Pluntz v. Farmington Ford-Mercury, Inc.</i> , 470 N.W.2d 709 (Minn. App. 1991)	15
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 217 P.3d 1179 (2009)	4
<i>Rayonier, Inc. v. Polson</i> , 400 F.2d 909 (9 th Cir. 1968)	11, 15

<i>Rivard v. State</i> , 168 Wn.2d 775, 231 P.3d 186 (2010)	9
<i>Sampson Constr. Co. v. Brusowankin</i> , 147 A.2d 430, (Md. 1958)	32
<i>Seal v. Naches-Selah Irrigation District</i> , 51 Wn. App. 1, 751 P.2d 873, review denied 110 Wn.2d 1041 (1988)	28-29
<i>Sherrell v. Selfors</i> , 73 Wn. App. 596, 871 P.2d 168, review denied 125 Wn. 2d 1002, 886 P.2d 1134 (1994)	31, 34, 36
<i>Simmons v. Wilson</i> , 61 Wash. 574, 112 P. 653 (1911)	11, 12
<i>Skamania Boom Co. v. Youmans</i> , 64 Wash. 94, 116 P. 645 (1911)	5
<i>Snow's Mobile Homes, Inc. v. Morgan</i> , 80 Wn.2d 283, 494 P.2d 216 (1972)	6
<i>State v. Chapman</i> , 140 Wn.2d 436, 998 P.2d 282 (2000)	24
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)	14
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010)	7-9
<i>State v. Hock</i> , 32 Wn.2d 681, 203 P.2d 693 (1949)	7
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005)	7
<i>State v. Johnson</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992)	6

<i>State v. Rathbun</i> , 22 Wash. 651, 62 P. 85 (1900)	7
<i>State v. Stannard</i> , 109 Wn.2d 29, 742 P.2d 1244 (1987)	8
<i>State v. Wilson</i> , 125 Wn.2d 212, 883 P.2d 320 (1994)	6
<i>Sunburst School District No. 2 v. Texaco, Inc.</i> , 165 P.3d 1079 (Mont. 2007)	32, 34-37
<i>Thompson v. King Feed & Nutrition Service, Inc.</i> 153 Wn.2d 447, 105 P.3d 378 (2005)	31
<i>Tronsrud v. Puget Sound Traction Light & Power Co.</i> , 91 Wash. 660, 158 P. 348 (1916)	22
<i>United States v. Hoffman</i> , 154 Wn.2d 730, 116 P.3d 999 (2005)	4
<i>Ventoza v. Anderson</i> , 14 Wn. App. 882, 545 P.2d 1219 (1976) review denied, 87 Wn.2d 1007 (1976)	23
<i>Weld County Bd. of County Comm'rs v. Slovek</i> , 723 P.2d 1309 (Colo. 1986)	32
<i>Wheeler v. Port Blakely Mill Co.</i> , 2 Wash. Terr. 71, 3 P. 635 (1881)	7
<i>Zimmer v. B.M. Stephenson</i> , 66 Wn.2d 477, 403 P.2d 343 (1965)	16-19
Rules & Statutes	
RAP 16.16	4
RAP 16.16(a)	4

RCW 4.24.630	14
RCW 64.12.030	1-5, 10-17, 19-25, 27-31
RCW 64.12.030 (2007)	4
RCW 64.12.030 (2011)	5
RCW 64.12.040	1, 3, 17, 20, 24, 30
RCW 76.48.020	5
Other	
2A Sutherland Statutory Construction §47:18 (7 th ed. 2010)	26
16 David K. DeWolf & Keller W. Allen, <i>Washington Practice: Tort Law and Practice</i> §5.2 (2d ed. 2000)	31
Black's Law Dictionary 517 (6 th ed. 1990)	9, 27
Black's Law Dictionary 1674 (4 th ed. 1951)	11
Restatement (Second) of Torts §158 (1965)	17-18
Restatement (Second) of Torts §929 (1965)	30, 32-35
Restatement (Second) of Torts §931 (1965)	35
Webster's New Third International Dictionary 1164 (1986)	20
Webster's New Third International Dictionary 1598 (1986)	26
W. Rodgers, <i>Environmental Law</i> §2.13 (1977)	18

I. INTRODUCTION

This case presents the Court with occasion to consider the proper construction of Washington’s “Injury to Trees Statute,” RCW 64.12.030, in the context of three certified questions from the United States District Court for the Eastern District of Washington. For purposes of resolving the certified questions, the parties have stipulated to the facts set forth below. The District Court has already determined, as a matter of law, that defendant BNSF Railway Company (“BNSF”) tortiously caused fires that burned over plaintiffs’ land and destroyed thousands of their trees. This Court is asked to declare that such fires, when caused by the tortious acts of a defendant, can constitute a trespass under the terms of RCW 64.12.030 regardless of whether the defendant was physically on the burned property. This Court is also invited to determine whether the trespass victims’ ability to restore their land should be restricted in proportion to market value.

RCW 64.12.030 and its companion, RCW 64.12.040, together allow for treble damages when a statutory trespass has been committed, which the fact finder determines was not “casual” or “involuntary.” Under the plain language of RCW 64.12.030, a trespass has been committed when a person—without lawful authority—“shall cut down, girdle, or

otherwise injure, or carry off any tree, timber or shrub on the land of another person” RCW 64.12.030.

The pure questions of law before this Court are narrow in scope. Plaintiffs wish to make clear that this Court is not asked to determine whether in this case BNSF’s conduct was “casual or involuntary” under RCW 64.12.040. That aspect of the underlying case involves questions of fact to be resolved at trial. The central issue here is whether a tortiously caused fire that “otherwise injures” or destroys trees should rightly be among the harms protected against by RCW 64.12.030. The answer appears on the face of the statute. Plaintiffs may seek the remedy of RCW 64.12.030. And, to ensure injured parties are placed in as good a condition as they were in before the tortious act, this Court should refuse to restrict reasonable awards of restoration damages.

II. CERTIFIED QUESTIONS PRESENTED FOR REVIEW

1. Can a Plaintiff recover damages under RCW 64.12.030 for trees damaged or destroyed by a Defendant who never has been physically present on Plaintiff’s property?

2. Does a Defendant who negligently causes a fire that spreads onto Plaintiff’s property, and damages or destroys Plaintiff’s trees,

“otherwise injure” trees, timber or shrubs for purposes of RCW 64.12.030?

3. Must damages awarded under RCW 64.12.030 be reasonable in relation to the value of the underlying real property?

III. STATEMENT OF THE CASE

The parties have stipulated to the following facts that shall constitute the “record” pursuant to RCW 2.60.010(4):

This is a civil case brought by plaintiffs Jason and Laura Jongeward and Gordon and Jeannie Jongeward against BNSF.

On August 11, 2007, a fire broke out at several points along the railroad right-of-way as a BNSF train passed through the Marshall area southwest of Spokane, Washington. Plaintiffs own property located nearby but not adjoining the railroad right-of-way. The fire spread to plaintiffs’ property and destroyed about 4,000 trees on the property. No employee or agent of BNSF was physically on plaintiffs’ property at any time relevant to the start or spread of the fire or the damage to plaintiffs’ trees. The United States District Court for the Eastern District of Washington has determined that BNSF negligently caused the fire that destroyed plaintiffs’ trees.

Plaintiffs have asserted a claim for damages under RCW 64.12.030.

IV. STANDARD OF REVIEW

“RAP 16.16 allows this court to determine questions of law certified by a federal court if the question is one of state law that has ‘not been clearly determined and does not involve a question determined by reference to the United States Constitution.’” *United States v. Hoffman*, 154 Wn.2d 730, 736, 116 P.3d 999 (2005) (quoting RAP 16.16(a)). “Statutory interpretation is a question of law that this court reviews *de novo*.” *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

V. ARGUMENT

A. RCW 64.12.030 Generally

At issue is the proper construction of RCW 64.12.030. When the subject fires destroyed plaintiffs’ trees in 2007, this statute provided:

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

RCW 64.12.030 (2007).

“RCW 64.12.030 creates a punitive damages remedy” *Birchler v. Costello Land Co., Inc.*, 133 Wn.2d 106, 110, 942 P.2d 968 (1997). Its purpose is to “punish trespassers, to prevent careless or intentional removal of trees and vegetation from the property, and to roughly compensate landowners for their losses.” *Id.*, 133 Wn.2d at 111. Although RCW 64.12.030 requires strict construction, *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 96-97, 116 P. 645 (1911), the Court must remain mindful of the purposes of the provision when engaging in such construction. *See Mullally v. Parks*, 29 Wn.2d 899, 909, 190 P.2d 107 (1948) (quoting *Harold v. Toomey*, 92 Wash. 297, 298, 158 P. 986 (1916)).

In 2009, the Legislature amended the statute. It now reads:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

RCW 64.12.030 (2011).

Several noteworthy changes resulted from the 2009 amendment. Most obviously, the Legislature incorporated language bringing Christmas

trees within the purview of the statute. Most pertinent to the certified questions, however, the Legislature inserted a comma between the word “girdle” and the phrase “or otherwise injure,” making clear the distinction between the two categories of proscribed acts. Also of note, though making no meaningful difference to the statute’s interpretation, the Legislature replaced the words “such trespasses” with “the trespasses.”

B. Rules of Statutory Construction

On matters of statutory interpretation, ultimate authority resides in the Supreme Court. *State v. Wilson*, 125 Wn.2d 212, 216, 883 P.2d 320 (1994). In exercising this authority, the Court’s paramount duty is to ascertain and give effect to the intent of the Legislature. *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). Only statutes of doubtful meaning are subject to the process of interpretation. Thus, the Court has stated, “[i]f the words employed in the declaring part of a statute be plain, unambiguous, and well understood according to their natural and ordinary sense and meaning, the statute furnishes a rule of construction beyond which a court cannot go.” *Parkhurst v. City of Everett*, 51 Wn.2d 292, 294, 318 P.2d 327 (1957); *Snow’s Mobile Homes, Inc. v. Morgan*, 80

Wn.2d 283, 288, 494 P.2d 216 (1972) (“where a statute is plain, unambiguous and clear on its face, there is no room for construction.”).¹

Clear language must be given effect. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992). “The words and phrases used in statutes are interpreted in accordance with their common meaning, and this regardless of the policy of enacting it, or the seeming confusion that may follow its enforcement.” *State v. Hock*, 32 Wn.2d 681, 685, 203 P.2d 693 (1949); *North Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 321, 759 P.2d 405 (1988) (“Intent, if ascertainable, may be of assistance, but cannot override an otherwise discernible, plain meaning.”).

When considering the plain meaning of a provision, a court will “look to the text of the statutory provision in question, as well as ‘the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Further, “courts may resort to the applicable

¹ In Washington, the plain meaning rule has been in place since territorial days. *See, e.g., Wheeler v. Port Blakely Mill Co.*, 2 Wash. Terr. 71, 74, 3 P. 635 (1881); *See also Board of Trade of the City of Seattle v. Hayden*, 4 Wash. 263, 280, 30 P. 87 (1892); *Howlett v. Cheatum*, 17 Wash. 626, 629-30, 50 P. 522 (1897); *State v. Rathbun*, 22 Wash. 651, 653, 62 P. 85 (1900). In *Board of Trade Justice Dunbar*—a delegate to the constitutional convention—averred its observance is a matter of fundamental public policy and constitutional significance. *Board of Trade, supra*, 4 Wash at 280-84 (dissenting).

dictionary definition to determine a word's plain and ordinary meaning" *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991).

It is important to remember that a statute is ambiguous "only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). "In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results." *Id.*, 153 Wn.2d at 423 (quoting *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)). If a statute can be given more than one reasonable interpretation, the court may "resort to extrinsic aids, such as legislative history[,]” pertinent case law, and canons of construction. *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992); *State v. Ervin*, 169 Wn.2d 815, 820-23, 239 P.3d 354 (2010).

When statutory ambiguity exists, this Court may consider the provisions of a later amendment in order to ascertain the legislative intent of the original enactment. *Longview Co. v. Lynn*, 6 Wn.2d 507, 521, 108 P.2d 365 (1940) ("subsequent legislation may be considered, at least to some extent, in interpreting prior laws"). In *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981), this Court

declared, “where this court has not previously interpreted the statute to mean something different and where the original enactment was ambiguous such to generate dispute as to what the legislature intended, the subsequent amendment shall be effective from the date of the original act, even in the absence of a provision for retroactivity.”

In addition to examining legislative history, courts look to canons of statutory construction. “One such canon of construction is that ‘[courts] interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.’” *Ervin*, 169 Wn.2d at 823 (quoting *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010)). “*Ejusdem generis*” is another canon:

In the construction of laws, wills, and other instruments, the ‘ejusdem generis rule’ is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Cockle v. Dept. of Labor and Industries, 142 Wn.2d 801, 808, 16 P.3d 583 (2001) (quoting Black’s Law Dictionary 517 (6th ed. 1990)); *see also City of Seattle v. State Dept. of Labor and Industries*, 136 Wn.2d 693, 699, 965 P.2d 619 (1998) (discussing the *ejusdem generis* canon).

VI. QUESTION NO. 1: CAN A PLAINTIFF RECOVER DAMAGES UNDER RCW 64.12.030 FOR TREES DAMAGED OR DESTROYED BY A DEFENDANT

**WHO NEVER HAS BEEN PHYSICALLY PRESENT
ON PLAINTIFF’S PROPERTY?**

A. Summary of the Argument

The injury to tree statute, RCW 64.12.030, by its terms does not require a defendant’s physical presence on real property where the injury occurs. The statute as written is a clear expression of what it covers. It is not ambiguous and is amenable to but one reasonable construction, one that focuses on damages to trees and shrubs, not the location of the party causing the damage. Accordingly, the answer to this certified question is “yes.”

B. A Trespass Under RCW 64.12.030 Exists when the Specific Acts Enumerated Therein are Precipitated “Without Lawful Authority”

The first certified question asks whether RCW 64.12.030 requires the wrongdoer to be physically present on plaintiff’s land. It does not. As plainly expressed by the statutory text, the remedy created by RCW 64.12.030 is available in an action “against the person committing *such trespasses . . .*” RCW 64.12.030 (emphasis added). Accordingly, proper analysis must begin by asking what is required to establish a trespass under RCW 64.12.030.

Plaintiffs submit that four general elements must be shown to establish a trespass under the provision. A plaintiff must show:

- (1) Defendant acted to:
 - (a) cut down,
 - (b) girdle,
 - (c) otherwise injure, or
 - (d) carry off
- (2) any tree, timber or shrub
- (3) located on plaintiff's land, and
- (4) defendant acted without lawful authority.

If a plaintiff can demonstrate these elements, a statutory trespass is present and the remedy created by RCW 64.12.030 may be pursued. Here, there is no dispute the second and third elements are satisfied. They are clearly demonstrated by the stipulated facts and the certified questions do not require their consideration. At issue are the above first and fourth elements.

In *Rayonier, Inc. v. Polson*, 400 F.2d 909 (9th Cir. 1968), the Ninth Circuit examined the nature of the trespass required by RCW 64.12.030. There, it noted the "use of the phrase 'such trespasses' in the statute is coupled directly with and in fact merely refers to the specific acts which are precisely described in the statute." *Id.*, 400 F.2d at 919, n.11 (citing *Simmons v. Wilson*, 61 Wash. 574, 575, 112 P. 653 (1911)). For this reason, the court concluded the term

‘such trespasses’ in the statute was used merely in the more general sense of trespass – i.e., ‘doing of an unlawful act or of a lawful act in an unlawful manner to injury of another person or property’ [Black’s Law Dictionary 1674 (4th ed. 1951)] – and the unlawful acts which are contemplated by the statute are specifically delineated therein.

Id.

In *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999), Division One of the Washington State Court of Appeals agreed with the interpretation given by the Ninth Circuit. It stated, “the statute’s use of the phrase ‘such trespasses’ is in reference to the unlawful acts defined by the statute, cutting down, girdling or otherwise injuring, or carrying off a tree, timber or shrub. Those acts are deemed trespasses.” *Id.*, 97 Wn. App. at 6, n.4. The Court of Appeals is correct. A “trespass” under the provision requires only that the specific acts listed therein be performed “without lawful authority.” RCW 64.12.030. Under this definition, a defendant’s physical presence on the land of another is neither required nor material to a violation of the statute. A defendant can “otherwise injure” a tree of another without being physically present on the land where the tree is located. So long as the act is done “without lawful authority,” a statutory trespass has been committed.

Though the amended statute now reads “*the* trespasses” instead of “*such* trespasses,” (emphasis added), such a difference in syntax makes no meaningful difference in its interpretation. “Such” and “the,” when coupled with another word, both press upon the mind a correlation and reference to something expressed before. In other words, the phrases “such trespasses” and “the trespasses” both refer to the specific acts previously described in the statute. A person who, without lawful authority, commits one of the statute’s enumerated acts is a trespasser under the terms of the statute, against whom the remedy of RCW 64.12.030 may be pursued.

Here, it is clear BNSF had no lawful authority to destroy trees located on plaintiffs’ property. BNSF’s actions were done without lawful authority because the District Court properly ruled as a matter of law that BNSF was at the very least negligent in causing the fire which destroyed plaintiffs’ trees.

C. The Plain Words of RCW 64.12.030 do not Require BNSF’s Physical Presence on Plaintiffs’ Property

There is nothing in the language of RCW 64.12.030 that limits its scope to situations where the defendant is physically present on the land

where the injury occurs.² To restrict RCW 64.12.030 in such a way would lead to absurd results. For example, a person who stands at his or her fence line and intentionally sprays herbicide on a neighbor's trees for the purpose of killing them would not be liable under the statute if physical presence on the victim's land was required. Yet, if that same tortfeasor simply took one more step on to the victim's land, then the statute would apply. Such a distinction thwarts the clear purposes of the statute.

The Court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Rather, it must "assume the legislature 'means exactly what it says.'" *Id.* (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)). The express language of RCW 64.12.030 says nothing of physical presence. If the Legislature so chose, it could have added this additional substantive requirement. It did not. And, the Court should not.

A defendant's physical presence on the land is neither a requirement for a common law trespass nor a requirement of a statutory

² In contrast, RCW 4.24.630, a statute enacted in 1999 to address damages to real property not including, *inter alia*, situations covered by RCW 64.12.030, begins with: "Every person who goes onto the land of another" While this Court has not addressed the question whether this language requires actual physical presence or may apply where one causes a force like a fire which invades another's property, it is telling that the Legislature did not change the language of RCW 64.12.030 when it amended that statute in 2009.

trespass under RCW 64.12.030. That in most trespass cases the defendant is physically present on the plaintiff's property is not sufficient reason for the Court to add a "physical presence" requirement. Such a construction would be a strained construction, impermissible under the Court's precedent.

D. Common Law Trespass is Present Here, But is not Required Under RCW 64.12.030

Both *Rayonier* and *International Raceway* explicitly rejected the notion that the statute contemplates only acts constituting a common law trespass. *Rayonier, Inc., supra*, 400 F.2d at 919, n.11; *International Raceway, Inc., supra*, 97 Wn. App. at 6. These courts gave broader definition to the statutory trespass, i.e., *unlawfully* cutting down, girdling or otherwise injuring, or carrying off any tree of another. "The trespasses" enumerated in RCW 64.12.030 are not common law trespasses to property but are those akin to trespasses to chattel. Specifically, the trespass is to the tree, not the land upon which it grows. *See Pluntz v. Farmington Ford-Mercury, Inc.*, 470 N.W.2d 709, 711 (Minn. App. 1991) ("First, 'trespass' as used in [the timber trespass statute] refers to a trespass to chattels, namely, trees, and not a trespass to land Second, . . . the injury to the trees on respondent's property was "without lawful authority," the controlling phrase in [the statute]."). Though a common

law trespass is not a condition precedent to invoking RCW 64.12.030, it is an act committed “without lawful authority.”

There is no dispute here that a fire caused by BNSF destroyed plaintiffs’ trees. Similarly, there should be no question this fire was a common law trespass. In *Zimmer v. B.M. Stephenson*, 66 Wn.2d 477, 403 P.2d 343 (1965), this Court recognized that an action in trespass will lie when a defendant wrongfully causes a fire to damage the property of another. In that case, Mr. Zimmer sought recovery for substantial crop loss after his wheat field caught fire. *Id.*, 66 Wn.2d at 478. He alleged, “in essence, that the fire was caused by a spark or piece of burning carbon cast onto his property from the exhaust stack of defendant’s [tractor], and that such would not have occurred had the [tractor] been properly equipped with a spark arrester or had defendant otherwise observed suitable safety precautions.” *Id.* This Court observed that “[i]f plaintiff’s allegations be true, defendant’s action was as wrongful and direct as though he had stood in his field and thrown a burning coal into plaintiff’s field” *Id.*, 66 Wn.2d at 480-81. This Court further recognized:

He who gives a mischievous impulse to matter is the actor, by whatever instrument or agent he acts, and whether he uses muscular strength or mechanical force, or even moral power, as if he commands or procures another to do the act; or whether he excites or inflames into action some dormant quality or property of a substance, natural or artificial, animate or inanimate

Id., 66 Wn.2d at 481 (quoting *Jordan v. Wyatt*, 45 Va. (4 Gratt.) 151, 156, 47 Am. Dec. 720 (1847)).

That BNSF's actions here, in causing this fire and destroying plaintiffs' trees, are properly characterized as a trespass is underscored by the striking parallels between *Zimmer* and this case. Both cases deal with fires caused by machinery situated away from the victim's property. *Zimmer* simply makes clear that the common law of this state recognizes trespasses by fire. The damages caused thereby, when trees are involved, bring those damages squarely within the purview of RCW 64.12.030.

The inescapable conclusion that the fires started by BNSF constitute a common law trespass also finds support in *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985). In *Bradley*, this Court held that an intentional deposit of microscopic particles, undetectable to the human eye, could provide the basis for an action in trespass. *Id.*, 104 Wn.2d at 683-84.³ This Court favorably cited Restatement (Second) of Torts §158 (1965):

³ Although mindful that the "intent" of BNSF is not before the Court here as that comes into play when RCW 64.12.040 is triggered, giving BNSF the right to prove mitigating circumstances and thus avoid treble damages under RCW 64.12.030, it should be remembered that "intent to trespass may also include an act that the actor undertakes realizing that there is a high probability of injury to others yet the actor behaves with disregard of those likely consequences. *Bradley, supra*, 104 Wn.2d at 683-84.

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.

The Court also cited the comment on clause (a) of §158, at 278,

where it is stated:

i. *Causing entry of a thing.* The actor, *without himself entering the land*, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it *In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.*

Id., 104 Wn.2d at 682 (emphasis added).

As this Court recognized, “in trespass cases defendant’s conduct typically results in an encroachment by ‘something’ upon plaintiff’s exclusive rights of possession.” *Id.*, 104 Wn.2d at 685 (quoting W. Rodgers, *Environmental Law* §2.13, at 154-57 (1977)).

Zimmer and Bradley demonstrate that the fire caused by BNSF was a trespass under common law. They are in accord with decisions from

other jurisdictions. See *Kelly v. CB & I Constructors, Inc.*, 102 Cal. Rptr. 3d 32, 46 (Cal. Ct. App. 2009) (“it is now established that the spread of a negligently set fire to the land of another constitutes a trespass”); *Koos v. Roth*, 652 P.2d 1255, 1267-68 (Or. 1982) (“The spread of the fire from defendant’s field to plaintiffs’ land therefore was a trespass”); *Martin v. Union Pac. R. Co.*, 474 P.2d 739, 740 (Or. 1970) (spread of fire from railroads’ right-of-way onto plaintiff’s land was an intrusion of a character sufficient to constitute a trespass); *Elton v. Anheuser-Busch Beverage Group, Inc.*, 58 Cal. Rptr. 2d 303, 306-07 (Cal. Ct. App. 1996) (citing several cases, including *Zimmer*, and holding that an invasion by fire constitutes a trespass and the unlawful interference “need not take the form of a personal entry onto the property by the wrongdoer”). *Zimmer* and *Bradley* further demonstrate that a defendant’s physical presence on the harmed property is unnecessary to establish a trespass under common law. Though RCW 64.12.030 is not limited to trespass at common law, BNSF acted “without lawful authority” by committing such a trespass, thus coming within this statute’s purview.

VII. QUESTION NO. 2: DOES A DEFENDANT WHO NEGLIGENTLY CAUSES A FIRE THAT SPREADS ONTO PLAINTIFF’S PROPERTY AND DAMAGES OR DESTROYS PLAINTIFF’S TREES, “OTHERWISE INJURE” TREES, TIMBER OR SHRUBS FOR PURPOSES OF RCW 64.12.030?

A. Introduction

The first and second certified questions are related. Both ask this Court to determine the nature of a trespass under RCW 64.12.030, and thus to decide when the remedy is made available. Because of this, plaintiffs' preceding arguments for why the physical whereabouts of the defendant is immaterial to a violation of RCW 64.12.030 are equally applicable to the broader question of whether the language "otherwise injure" embraces destruction of trees by a fire that spreads onto a plaintiff's property. Because the first certified question parses out the issue of physical presence, Plaintiffs will treat the second certified question as not embracing this issue and proceed by focusing on the particular injury which occurred here – damage and destruction of trees by fire.

B. Summary of the Argument

The answer to this question is no different than the first. RCW 64.12.030 is simply and broadly written. The phrase "or otherwise injure" is clear on its face and should be applied to any injury to trees that a plaintiff is able to prove. To the extent that this question may be interpreted to limit its provisions to certain types of injuries to trees, any such argument should be rejected. Where that "injury" is caused by a fire of known origin, the statute must apply, subject to the right of defendants

to avoid a trebling of damages by establishing their actions were “casual and involuntary” under RCW 64.12.040.

C. **Under the Plain and Unambiguous Language of RCW 64.12.030, the Phrase “Or Otherwise Injure” was Intended by the Legislature to Encompass Destruction of Trees by Fire**

The intention of the Legislature is apparent from the face of the statute. There is no room for construction. RCW 64.12.030 provides a remedy when “any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person.” The common meaning of “injure” is “to harm” or “to impair the soundness of” or “to inflict material damage or loss on.” Webster’s New Third International Dictionary 1164 (1986). Destruction by fire patently falls within this ordinary and usual meaning. A trespasser acts to “otherwise injure” the trees of another when the trespasser harms them. No more is required.

As the Supreme Court has itself stated, the statute applies “to damages resulting from the cutting or *destruction* of trees, timber, or shrubs.” *Nystrand v. O’Malley*, 60 Wn.2d 792, 796, 375 P.2d 863 (1962) (emphasis added). Here, the trees were destroyed and plaintiffs suffered loss of their ornamental value. Such loss is of the ilk encompassed by the statute. The Court has made clear, “[t]his statute in terms applies to lawns

and gardens as well as forests. It grants compensation both for timber carried off from the one and for defacement suffered or ornament lost to the other.” *Tronsrud v. Puget Sound Traction Light & Power Co.*, 91 Wash. 660, 661, 158 P. 348 (1916). The statute’s plain and unambiguous language allows recovery when plaintiffs’ trees are destroyed by fire, willfully and wrongfully caused by another. Its clear language must be given effect.

D. RCW 64.12.030 is Concerned with Damages for Injury to Trees and Shrubs, and Should be so Interpreted

The principal evil RCW 64.12.030 was designed to address is not the method by which one unlawfully inflicts injury on the trees of another, but rather the injury itself. The Legislature intended to protect landowners from persons who inflict injury upon or carry off the trees of the landowner. It makes little sense to punish a person who wrongfully cuts down the trees of another and not punish a person who wrongfully inflicts the exact same harm by causing a fire to invade the landowners’ property. In both circumstances, the harm is identical: the plaintiff has been deprived of the benefit of his or her trees. And in both circumstances, the legislative purpose underlying RCW 64.12.030 is served by allowing recovery under the statute.

The statute thus seeks to punish those who wrongfully injure the trees of another. As the Court of Appeals has stated, “(t)he statutory purpose is to protect the right of the owner to use or preserve his trees as he sees fit, and not force compensation upon him when undamaged, growing trees were what he would have possessed but for the willful intrusion of the trespasser.” *Ventoza v. Anderson*, 14 Wn. App. 882, 892, 545 P.2d 1219, review denied, 87 Wn.2d 1007 (1976). The statutory purpose is “not to limit [the landowner’s] right of recovery.” *Pearce v. G. R. Kirk Co.*, 92 Wn.2d 869, 973, 602 P.2d 357 (1979). Legislative intent must not be thwarted by reading substantive requirements into the statute the Legislature itself chose not to include.

E. **The 2009 Legislative Changes Make Clear the Phrase “Or Otherwise Injure” is a Distinct Category of Wrongful Action, Encompassing Destruction of Trees by Fire**

The punctuation changes made to the statute in 2009 indicate that “otherwise injure” means exactly what it purports to mean and is not limited by the specific words “cut down” and “girdle.” By placing a comma after the word “girdle,” the Legislature made plain that the phrase “or otherwise injure” is to be understood as wholly divorced from the word “girdle,” an action which also kills a tree. By placing the comma

where it did, the Legislature intended the phrase “or otherwise injure” to be its own separate and distinct category of wrongful action.

This Court must interpret RCW 64.12.030 to give effect to all its language. No portion may be rendered meaningless. The Court should not emasculate the phrase “or otherwise injure” to include only injury-causing acts that occur incidental to cutting or girdling. Such a ruling would strip all common sense meaning from the phrase.

The Court has instructed that statutes *in pari materia* should be read together. *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000). Reading RCW 64.12.030 and RCW 64.12.040 together, there is no *indicium* whatsoever that the Legislature did not intend the “otherwise injure” language of the provision to include destruction by fire.⁴ RCW 64.12.040 simply refers back to RCW 64.12.030 by using the words “the trespass.” Its language contains no implication that would foreclose the possibility that destruction of trees by fire was intended by the Legislature to fall within the purview of RCW 64.12.030.

⁴ RCW 64.12.040 states:

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.

The conclusion that destruction by fire is consistent with legislative intent is neither absurd nor strained. In its wisdom, the Legislature thought to write the statute in such a manner as to embrace various ways a landowner's trees could be injured by the wrongful acts of another. Even the most far-sighted legislatures cannot anticipate all future circumstances. Knowing this, the Legislature chose to write the statute using broad terms suitable to affect its purpose. The purpose of the statute is to punish trespassers who injure or carry off a property owner's trees. This purpose is expressed in its clear language. The phrase "otherwise injure" was intended by the Legislature to encompass destruction of trees by fire.

F. **The Doctrine of *Ejusdem Generis* is not Applicable to the Interpretation of RCW 64.12.030**

Plaintiffs anticipate that BNSF will contend that the "*ejusdem generis* doctrine" should be applied to the interpretation of RCW 64.12.030. BNSF is mistaken. The "doctrine applies when the following conditions exist: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader

meaning than the doctrine requires.” 2A Sutherland Statutory Construction §47:18 (7th ed. 2010).

Even if this Court were to consider the words “cut down” and “girdle” as constituting a class, and perceive that the class “refers to cutting down trees, usually during lumber operations, which requires physical presence on the property to take the trees with tools[,]” *Broughton Lumber Co. v. BNSF Railway Co.*, 2010 U.S. Dist. LEXIS 119721, 6 (2010), there is a clearly manifested intent that the general term, “otherwise injure,” be given a broader meaning than the doctrine requires. The Legislature clearly demonstrated its intent by choosing to use the word “otherwise.” “Otherwise” means “1: in a different way or manner: DIFFERENTLY 2: in different circumstances: under other conditions . . .” Webster’s New Third International Dictionary 1598 (1986). The Legislature’s intent could not be clearer. It did not mean to restrict the class to cutting down trees and it did not mean to require physical presence. The inclusion of the word “otherwise” effectively destroys any conception that the class should be restricted to the type of actions articulated before the words “or otherwise injure.”

In addition, the Legislature used the disjunctive “or,” indicating clear intent that the phrase “otherwise injure” is not restricted by the preceding words, “cut down” and “girdle.” Simply put, the Legislature

intended RCW 64.12.030 to apply to a broad class of activity. Such intent is manifest upon considering not only the enumeration of the specific words “cut down” and “girdle,” but also the words “carry off.” Together, these categories of wrongful action suggest the following class: actions that deprive a tree owner of his full rights in the tree. Too strained an interpretation of the statute would result if this Court applied the *ejusdem generis* rule to restrict the class further by requiring the physical presence of a tool-bearing defendant. The rule operates so that general words are held as applying only to “things of the same *general* kind or class as those specifically mentioned.” *Cockle, supra*, 142 Wn.2d at 808 (quoting Black’s Law Dictionary 517 (6th ed. 1990)) (emphasis added). The rule cannot operate to create an absurdly narrow class. It was the Legislature’s intent to protect the rights of the property owner in his trees, not discriminate as to the method a tortfeasor may employ in achieving this injury.

Further, the punctuation changes made to the statute in 2009 highlight the Legislature’s clear intent that the general term, “otherwise injure,” be given a broader meaning than the *ejusdem generis* doctrine would otherwise require. By placing a comma after the word “girdle,” the Legislature made plain that the general phrase must be understood as separate from the word “girdle.” By placing the comma where it did, the

Legislature intended the phrase “or otherwise injure” to encompass all other injuries to trees, whether by fire, herbicide or some other cause. The doctrine of *eiusdem generis* is not applicable here.

G. The Seal Decision is Distinguishable

Plaintiffs also anticipate that BNSF will place heavy reliance on a Court of Appeals decision from Division Three, *Seal v. Naches-Selah Irrigation District*, 51 Wn. App. 1, 751 P.2d 873, review denied, 110 Wn.2d 1041 (1988). In *Seal*, the plaintiffs alleged that seepage from defendant’s irrigation canal – which ran across plaintiffs’ property – damaged their cherry orchard. *Id.*, 51 Wn. App. at 2. The evidence indicated that both parties took various measures to correct the seepage problem. *Id.* at 2-3. Though their claim was grounded in several theories, “[o]nly the negligence theory was presented to the jury.” *Id.* at 2. In the Court of Appeals, plaintiffs argued the trial court erred in refusing to give their proposed trespass instructions, which they based on RCW 64.12.030 and the common law. *Id.* at 3-4. The appellate court sustained the trial court’s decision. *Id.* at 4.

The Court of Appeals gave four reasons for its conclusion. First, it pointed to the purposes of RCW 64.12.030 and concluded, without explanation, that “[t]hese purposes do not contemplate an award of damages for canal seepage.” *Id.* at 4. Second, the court noted that “no

authority has been cited for application of the statute to tree damage resulting from canal seepage.” *Id.* at 5. Third, it observed that defendant could not be liable for intentional trespass under the common law because defendant did not have the requisite intent “to allow water to seep into the orchard.” *Id.* at 6. Lastly, the court noted that Washington courts “have adopted a rule of negligence with regard to damage resulting from the maintenance, construction or operation of irrigation ditches.” *Id.*

The Court in *Seal* was evidently troubled by the novelty of the theory that the plaintiffs’ trees were slowly damaged by canal seepage occurring over a long period of time. Here, there is no such novelty or uncertainty. A fire caused by BNSF suddenly destroyed the plaintiffs’ trees. As set forth above, the clear language of RCW 64.12.030 compels the opposite result here. Moreover, the cases cited in *Seal* stand for the proposition that operators of irrigation works cannot be held strictly liable and that some showing of negligence is required. They do not stand for the proposition that a negligence action is the *only* available cause of action against them. See *Holland v. Columbia Irrig. Dist.*, 75 Wn.2d 302, 305, 450 P.2d 488 (1969); *Longmire v. Yelm Irrigation Dist.*, 114 Wash. 619, 195 P. 1014 (1921); *Benton City v. Adrian*, 50 Wn. App. 330, 335, 748 P.2d 679 (1988). In any event, *Seal* can be distinguished on the ground that unlike cases dealing with irrigation seepage, fire damage cases

are not limited by “a rule of negligence.” But more importantly, the *Seal* court refused to apply the remedy contained in RCW 64.12.030 because it improvidently found that the defendant did not possess a sufficiently culpable mental state for purposes of RCW 64.12.030 and intentional trespass under the common law. Such issues are not before the Court here. As mentioned above, whether BNSF can demonstrate its actions were casual or involuntary, pursuant to RCW 64.12.040, is a factual issue to be determined at trial.

VIII. QUESTION NO. 3: MUST DAMAGES AWARDED UNDER RCW 64.12.030 BE REASONABLE IN RELATION TO THE VALUE OF THE UNDERLYING PROPERTY?

A. Summary of the Argument

This Court should adopt Restatement (Second) Torts §929 to govern the award of damages under RCW 64.12.030. In so doing, this Court would confirm its long expressed purpose of awarding damages sufficient to return the injured parties as nearly as possible to the position they would have been in had the damages not been incurred.

B. Section 929 Restatement (Second) Torts

The Supreme Court has not addressed the issue of the measure of damages under RCW 64.12.030. Yet, this Court has ruled that “[t]he purpose of awarding damages in cases involving injury to real property is

to return the injured party as nearly as possible to the position he would have been in had the wrongful act not occurred.” *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005) (quoting 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* §5.2, at 126 (2d ed. 2000)). This purpose has long guided the Court’s selection of the proper measure of damages. *See Kock v. Sackman-Phillips Inv. Co.*, 9 Wash. 405, 411, 37 P. 703 (1894) (recognizing that justice requires application of a measure of damages that places injured parties in as good a condition as they were in before the tort).

Under RCW 64.12.030, the appropriate measure of damages for the loss of ornamental trees is the cost of restoring the trees lost. *Birchler v. Costello Land Co., Inc.*, 81 Wn. App. at 603, 607, 915 P.2d 564 (1996) *aff’d*, 133 Wn.2d 106, 942 P.2d 968 (1997); *Sherrell v. Selfors*, 73 Wn. App. 596, 603, 871 P.2d 168, review denied 125 Wn.2d 1002, 886 P.2d 1134 (1994).

In *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020, 958 P.2d 315 (1998), Division Two, in a 2-1 decision, limited the amount of damages a plaintiff may recover under RCW 64.12.030. It held “that although timber trespass damages may exceed the value of the underlying property in the proper case, the

damages must still be reasonable in relation to the value of the property.” *Id.* 87 Wn. App. at 735. The court grounded its reasoning in Restatement (Second) of Torts §929 and four cases from other jurisdictions. *Id.* at 733-35 (citing *Heninger v. Dunn*, 162 Cal. Rptr. 104 (Ct. App. 1980); *Sampson Constr. Co. v. Brusowankin*, 147 A.2d 430 (Md. 1958); *Weld County Bd. of County Comm’rs v. Slovek*, 723 P.2d 1309 (Colo. 1986); *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379 (Alaska 1974)). Judge Houghton, however, dissented to any such limitation stating:

I would also decline to limit timber trespass damages as the majority has. In concluding that timber trespass damages are not limited by the value of the land, the majority concedes that trees have value beyond that of a mere commodity. But the rule adopted here arbitrarily limits timber trespass damages by requiring that they be reasonably related to the fair market value of the land.

Allyn, 87 Wn. App. at 739-40. Plaintiffs submit that Judge Houghton’s view is the more enlightened one and is consistent with how Restatement (Second) Torts §929 has been applied by the Supreme Court of Montana in *Sunburst School District No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007), discussed *infra*.

As noted by the *Allyn* court, Restatement (Second) of Torts §929 “permits the recovery of restoration costs in excess of a property’s value if ‘there is a reason personal to the owner for restoring the original

condition.” *Allyn*, 87 Wn. App. at 733 (quoting Restatement (Second) of Torts §929 cmt. b (1965)). Section 929 provides:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as an occupant.

(2) If a thing attached to the land but severable from it is damaged, he may at his election recover the loss in value to the thing instead of the damage to the land as a whole.

Comment b to this Section states:

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

On the other hand, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premises has not been decreased by the defendant's invasion.

Plaintiffs submit that Restatement (Second) of Torts §929 should be adopted as the measure of damages for tree loss in the State of Washington. Washington courts have recognized the intrinsic value of trees, not only for their beauty as living things, but also for the amenities they provide such as providing a buffer against noise and dust and providing a visual barrier. *Sherrell v. Selfors*, *supra*, 73 Wn. App. at 603; *Hill v. Cox*, 110 Wn. App. 394, 405, 41 P.3d 495, review denied, 147 Wn.2d 1024, 60 P. 3d 92 (2002).

Moreover, this Court should adopt the analysis of the Montana Supreme Court in *Sunburst*, *supra*, and allow recovery of the entire cost of restoration for the trees destroyed by BNSF.

Sunburst involved a suit brought by various property owners against Texaco for a plume of gasoline that leaked from Texaco's pipes and migrated under plaintiffs' properties. *Sunburst*, 163 P.3d at 1083. This gasoline contained benzene, a known carcinogen. *Id.* The jury in *Sunburst* awarded \$15 million in restoration damages, which the Montana

Supreme Court affirmed even though the underlying values of the real properties were \$2 million. *Id.* at 1085, 1090.

The *Sunburst* Court's thoughtful analysis of the damage claims before it bear a strong comparison to the issue presented by this certified question. The court first opined that the question of whether damages for restoration could exceed the underlying value of the property's market value was a question of law. *Id.* at 1086. The court also recognized that, like the law in Washington, the primary objective of awarding damages was to place the injured person in as he or she would have been in had the tort not occurred, citing Restatement (Second) Torts §931.

In this context, the Court noted:

If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation.

Id. at 1087.

Accordingly, the *Sunburst* Court adopted:

The flexible guidelines of the Restatement (Second) of Torts, §929, and comment b, for the calculation of damages to real property to ensure that plaintiffs receives a proper remedy for their injuries.

Id. at 1088.

The reasons for adopting Restatement (Second) of Torts §929 are grounded in the fundamental concept that to truly compensate a party for

their injuries, in this case the destruction of trees, replacement or restoration of the trees lost should be allowed as damages. *See Birchler, supra*, 133 Wn.2d at 112; *Sherrell v. Selfors, supra*, 73 Wn. App. at 603; *Hill v. Cox, supra*, 110 Wn. App. at 405. To do otherwise rewards the wrongdoer and penalizes the victim.

The *Sunburst* Court also considered the question of whether an award of restoration costs more than seven times the value of the underlying real property constituted a windfall. *Id.*, 163 P.3d at 1088-89. The *Sunburst* Court concluded, as should this Court, that where there is evidence that the damage award will be used for restoration, an award of restoration costs in excess of the property value should stand. *Id.* at 1089.

Finally, the *Sunburst* Court looked at the amount of the restoration cost compared to the value of the property. *Id.* In upholding the award, the court grounded its decision on public policy concerns, concerns that pertain here as well. *Id.* at 1089-90. Comparing a cap on damages to a private right of eminent domain, the court noted that:

[A] potential tortfeasor, armed with a power akin to a private right of eminent domain, could undertake any dangerous activity content with the knowledge that the damages from any harm that it may cause to neighboring property, regardless of the cost of remediating the harm, would be limited to the market value of the neighboring property.

Injured property owners, by contrast, would face a 'take it or leave it' proposition: Sell the homes they do not want to leave or continue to live under an increased threat to toxic chemicals. Injured property owners in Montana should not be forced into such a Hobson's choice.

Id. at 1090.

In the same way, plaintiffs here, without full restoration damages, will be forced to live on damaged lands, ever reminded of the loss they suffered. They should not have to make that choice to the great benefit of the wrongdoer, BNSF.

IX. CONCLUSION

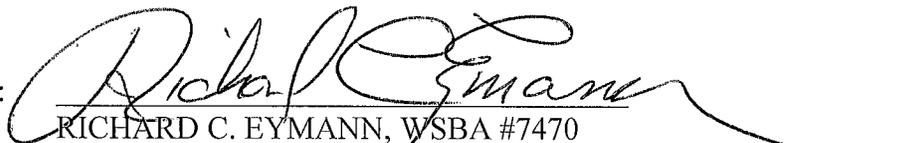
For the foregoing reasons, this Court should answer Certified Questions 1 and 2 in the affirmative, and further rule that full restoration costs should be awarded without regard to the underlying value of the land.

DATED this 25th day of April, 2011.

Respectfully submitted,

EYMANN ALLISON HUNTER JONES PS.

By:



RICHARD C. EYMANN, WSBA #7470

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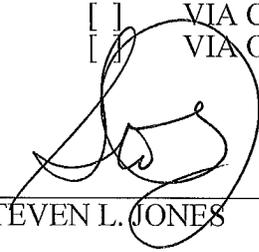
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 25th day of April, 2011, I caused to be served a true and correct copy of the *Opening Brief of Plaintiffs*, addressed to the following in the manner described below:

Julie A. Owens	<input type="checkbox"/>	VIA E-MAIL
Ausey H. Robnett III	<input type="checkbox"/>	VIA HAND DELIVERY
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