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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CERTIFICATION FROM  
UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
No. 09-1110-KI

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BROUGHTON LUMBER CO., a Washington corporation,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware corporation; and  
HARSCO CORPORATION, a Delaware corporation,

Defendants.

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**PLAINTIFF'S REPLY BRIEF ON CERTIFIED QUESTION**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ARGUMENT..... 2

    A. Whether Defendants Had the Requisite Intent for Treble Damages Under RCW 64.12.030 is a Jury Question..... 2

    B. The "Injury to or Removing Trees" Statute Applies Because Defendants "otherwise injure[d]" Trees, Timber and Shrubs without lawful authority..... 5

        1. RCW 64.12.030 does not require that a defendant be present on the land or direct its action toward the plaintiff's trees.....5

        2. "Otherwise injures" must not be rendered meaningless.....10

        3. Defendants improperly limit the scope of RCW 64.12.030 to theft of timber.....14

        4. The Fire Act was not intended to apply to the conduct that occurred in this case.....16

C. Defendants Misconstrue Broughton's Reference to Common Law Trespass Decisions.....19

D. Defendants Attempt to Artificially Narrow the Out-of-State Case Law that Supports Plaintiff's Interpretation of RCW 64.12.030..... 21

III. CONCLUSION..... 25

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<u>Birchler v. Costello Land Co., Inc.</u> , 133 Wash. 2d 106, 942 P.2d 968 (1997).....	18, 19
<u>Bradley v. Am. Smelting and Refining Co.</u> , 104 Wash. 2d 677, 709 P.2d 782 (1985).....	19, 21
<u>Burnett v. Newcomb</u> , 126 Wash. 192, 217 P. 1017 (1923).....	17
<u>Chase v. Henderson</u> , 265 Or. 431, 509 P.2d 1188 (1973).....	23
<u>Gibson v. Thisius</u> , 16 Wash.2d 693, 134 P.2d 713 (1943).....	4
<u>Gould v. Madonna</u> , 5 Cal.App.3d 404, 85 Cal. Rptr. 457 (1970).....	24
<u>Grays Harbor County v. Bay City Lumber, Co.</u> , 47 Wash. 2d 879, 289 P.2d 975 (1955).....	13
<u>Hill v. Cox</u> , 110 Wash. App. 394, 41 P.3d 495, <u>rev. denied</u> , 147 Wash.2d 1024, 60 P.3d 92 (2002) .....	3, 15, 16
<u>Int'l Raceway, Inc. v. JDFJ Corp.</u> , 97 Wash. App. 1, 970 P.2d 343 (1999) .....	19, 20
<u>Jordan v. Forestry Services, Inc.</u> , 430 So. 2d 806 (La. App. 1983) .....	24

<u>Jordan v. Welch,</u> 61 Wash. 569, 112 P. 656 (1911) .....	1, 18
<u>Kelly v. CB &amp; I Contractors,</u> 179 Cal. App. 4th 442, 102 Cal. Rptr. 3d 32 (2009) .....	24
<u>Luedinghaus v. Pederson,</u> 100 Wash. 580, 171 P. 530 (1918) .....	3, 4
<u>McMurray v. Sec. Bank of Lynnwood,</u> 64 Wash. 2d 708, 393 P.2d 960 (1964) .....	10, 11, 12
<u>Meyer v. Harvey Aluminum,</u> 263 Or. 487, 501 P.2d 795 (1972) .....	23, 24
<u>Mich. Millers Mut. Fire Ins. Co. v. Oregon-Washington R.R. &amp; Navigation Co. et al.,</u> 32 Wash. 2d 256, 201 P.2d 207 (1948) .....	17
<u>Osborne v. Hurst,</u> 947 P.2d 1356 (Ak. 1997) .....	24
<u>Rayonier, Inc. v. Polson,</u> 400 F.2d 909 (9th Cir. 1968) .....	20
<u>Residents Opposed to Kittias Turbines v. State Energy Facility,</u> 165 Wash. 2d 275 197 P.3d 1153 (2008) .....	12
<u>Seal v. Naches-Selah Irrigation Dist.,</u> 51 Wash. App. 1, 751 P.2d 873, <u>rev. denied,</u> 110 Wash.2d (1988) .....	8, 9

<u>Seibly v. Sunnyside,</u> 178 Wash. 632, 35 P.2d 56 (1934) .....	17
<u>Silverstreak, Inc. v. Dep't of Labor and Indust.,</u> 159 Wash. 2d 868, 154 P.3d 891 (2007) .....	10, 11, 12
<u>State ex rel. Hagan v. Chinook Hotel, Inc.,</u> 65 Wash. 2d 573, 399 P.2d 8 (1965) .....	6
<u>Svendsen v. Stock,</u> 143 Wash. 2d 546, 23 P.3d 455 (2001) .....	12, 15
<u>United Parcel Serv., Inc. v. Dep't of Revenue,</u> 102 Wash. 2d 355, 687 P.2d 186 (1984) .....	7, 16
<u>Worman v. Columbia County,</u> 223 Or. App. 223, 195 P.3d 414 (2008) .....	23, 24
<u>Zimmer v. Stephenson,</u> 66 Wash. 2d 477, 403 P.2d 343 (1965) .....	19, 21
<b>STATUTES</b>	
Alaska Stat. § 09.45.730 .....	22
Cal. Civ. Code § 3346 .....	22, 24
La. Stat. § 56:1478.1(B) .....	22, 24
O.R.S. 105.810 .....	22, 23
RCW 4.24.040 .....	17, 18
RCW 4.24.630 .....	7, 16

RCW 6.24.030 .....passim

RCW 64.12.040 .....4

**OTHER AUTHORITIES**

Webster's Third New Int'l Dictionary (unabridged  
ed. 1986) .....15

I. INTRODUCTION.

The deterrent effect of Washington's timber trespass statute – rooted in the risk of treble damages where willful or reckless conduct is proven – should not be circumscribed in the manner urged by defendants. Importing a physical entry requirement into RCW 6.24.030 is inconsistent with the plain language of the statute that applies to "any person" who cuts down, girdles or "otherwise injures" trees. The express reference in the statute to "such trespasses" rules out defendants' attempt to create a new prima facie element of trespass unique to this statute and inconsistent with Washington's common law. Further, defendants' newly discovered Fire Act argument is devastated by this Court's holding in Jordan v. Welch, 61 Wash. 569, 573, 112 P. 656 (1911) that a spark-caused fire on railroad property is not an intentionally kindled fire within the meaning of that statute.

## II. ARGUMENT.

### A. Whether Defendants Had the Requisite Intent for Treble Damages Under RCW 64.12.030 is a Jury Question.

Defendants take great effort to focus this Court's attention on whether plaintiff is entitled to treble damages. That trebling question, however, is not certified to this Court and ultimately will be decided by a jury following a full evidentiary presentation of defendants' willful and reckless conduct. The certified question asks: "Can a plaintiff recover *damages* under RCW 64.12.030 for trees damaged by fire that spreads from a defendant's neighboring parcel, where the alleged acts or omissions of the defendant did not occur on plaintiff's property, and were not directed at plaintiff's trees?" Certification from United States District Court, District of Oregon, No. CV-09-1110-KI, at 2-3 (emphasis added).

The certified question raises two issues: Whether RCW 64.12.030 requires that a defendant's acts or omissions (1) occur on the plaintiff's property; and (2) be directed at the plaintiff's

trees or property. This Court's analysis and resolution of those legal issues will guide the district court in determining whether Broughton may recover damages under RCW 64.12.030, regardless of whether they are ultimately single or trebled.

Contrary to defendants' position, a finding of willfulness or recklessness is not a prerequisite to a cause of action under the statute. Instead, whether the wrongdoer's act is willful affects only whether the damages as proved at trial will be single or trebled. There is "*but one measure of damages* – the actual and compensatory – which shall be trebled as against the willful wrongdoer and allowed singly as against the casual or involuntary trespasser." Luedinghaus v. Pederson, 100 Wash. 580, 583, 171 P. 530 (1918) (emphasis added); see also Hill v. Cox, 110 Wash. App. 394, 405, 41 P.3d 495, rev. denied, 147 Wash. 2d 1024, 60 P.3d 92 (2002) (first determining the proper measure of damages and *then* considering whether those damages should be trebled). That is why this Court has allowed recovery of damages under RCW 64.12.030 when the

defendant's conduct was not willful or intentional, but limited those damages to single damages pursuant to RCW 64.12.040. See, e.g. Luedinghaus, 100 Wash. at 580.

Whether defendants are willful wrongdoers is a question of fact for the jury. See Gibson v. Thisius, 16 Wash. 2d 693, 695, 134 P.2d 713 (1943). Defendants' admission that they were negligent in failing to prevent the spread of the fire does not preclude Broughton from presenting evidence at trial that defendants' conduct was sufficiently willful or reckless to sustain treble damages under the statute. Broughton has not conceded that defendants' failure to prevent the spread of the fire – or its conduct that started the fire – was merely negligent as defendants imply.

Plaintiff attempted to supplement this record to include references and details about the many acts and omissions of defendants that constitute reckless and willful behavior. Appellant's Motion to Supplement the Record at 2-4. Plaintiff acknowledges that it is bound by the more limited record

certified by the District Court. See Letter Order Denying Appellant's Motion to Supplement the Record (explaining that the record is limited to that certified by the federal court). Notwithstanding the limited record here, Broughton has the right to present evidence at trial that defendants' conduct was willful or reckless. Thus, until a jury has determined that ultimate issue of fact, this Court should not address the imposition of treble or single damages in determining the certified question.

**B. The "Injury to or Removing Trees" Statute Applies Because Defendants "otherwise injure[d]" Trees, Timber and Shrubs "without lawful authority."**

**1. RCW 64.12.030 does not require that a defendant be present on the land or direct its action toward the plaintiff's trees.**

Despite their clever arguments, defendants cannot overcome a critical flaw in their proposed construction of the statute. Nowhere in RCW 64.12.030 is there language requiring a defendant's physical presence on the plaintiff's land,

or that a defendant direct its actions toward the plaintiff's trees. Neither of those proposed elements are in the statute, and the best defendants can do is insist that such requirements should be implied. Such an interpretation is repugnant to Washington's rules of interpretation. This Court should require no more than an injured plaintiff prove the express language in the statute.

As a rule of statutory interpretation, Washington courts will not insert any words or ideas that have been left out of the statute, nor disregard any words included in the statute. State ex rel. Hagan v. Chinook Hotel, Inc., 65 Wash. 2d 573, 578, 399 P.2d 8, 12 (1965). It does not matter if it appears that the words were inadvertently included or excluded. Id. The Court will look only to the plain words of the statute, unless there is some ambiguity that requires further investigation. Id. at 579.

Further, the plain language of RCW 64.12.030 applies to "any person" who cuts down, girdles, or otherwise injures trees, and does not limit its scope to persons who go onto the land of the plaintiff to cause the harm. Washington's waste statute, in

contrast, expressly requires physical entry onto the plaintiff's property:

Every person *who goes onto the land of another* and who removes timber, crops, mineral, or other similar valuable property from the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.

RCW 4.24.630 (emphases added).

That statute's express requirement of physical entry is not present under RCW 64.12.030. If the legislature intended to include a physical entry requirement in RCW 64.12.030, it could have done so in the same manner as it did in RCW 4.24.630. United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wash. 2d 355, 362, 687 P.2d 186 (1984) ("where the legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent"). Because the legislature expressly included a physical entry requirement in RCW 4.24.630 but not under RCW 6.24.030, it follows that the legislature did not intend to include a physical

entry requirement under the timber trespass statute.

Finally, defendants cite no authority holding that a defendant's physical presence on the land of the plaintiff is required, or that a defendant must "direct its action toward the plaintiff's trees." Instead, RCW 64.12.030 specifically requires that the plaintiff prove something else – that the defendant has committed a trespass by cutting down, girdling, or otherwise injuring, or carrying off a tree, timber, or shrubs on the land of the plaintiff without lawful authority.

Defendants heavily rely on Seal v. Naches-Selah Irrigation Dist., 51 Wash. App. 1, 751 P.2d 873, rev. denied, 110 Wash. 2d (1988), for the proposition that a defendant's activities that occur on adjacent property, and that are not directed toward the plaintiff's trees, are not within the scope of RCW 64.12.030. Broughton has already thoroughly distinguished Seal in its Opening Brief. See Pl's. Op. Br. at 24-25. Nonetheless, defendants insist that Seal is dispositive here. Defendants are incorrect.

Defendants ignore a key distinction in Seal – the trial court in that case was determining whether plaintiffs' proposed jury instruction on trespass pursuant to RCW 64.12.030 should have been given *after* plaintiffs presented their evidence, including evidence on willfulness. Id. at 3-4. The trial court refused to give the instruction on trespass because the plaintiffs failed to prove the willfulness element required for application of RCW 64.12.030.

In that case, the defendants took various measures to correct the seepage and, thus, their actions were not "careless[]" and intentional[]." Id. at 4. Furthermore, the court of appeals had "no authority . . . cited" to it "for application of the statute to tree damage resulting from canal seepage" because the question had not yet been addressed by this Court. Id. Furthermore, the Seal decision does not engage in a thorough analysis of statutory construction by looking at the meaning of the plain text, the legislative history, or the statute in its context. Id. Not only is this case distinguishable from Seal, but this

Court is not bound by the analysis or decision.

In summary, where a plaintiff is able to prove that a defendant has engaged in "such trespasses" under RCW 64.12.030 by injuring the plaintiff's trees without lawful authority, the statute has been satisfied, and there is no need for any additional "human entry" or "directed action" requirements that are not contained in the statute. This Court's interpretation should begin and end with the statutory language.

2. **"Otherwise injures" must not be rendered meaningless.**

Defendants contend that the words "otherwise injures" in RCW 64.12.030 must refer to activities of a character similar to "cutting down," "girdling," or "carrying off." Broughton's Opening Brief cited this Court's prior decisions in Silverstreak, Inc. v. Dep't of Labor and Indust., 159 Wash. 2d 868, 154 P.3d 891 (2007), and McMurray v. Sec. Bank of Lynnwood, 64 Wash. 2d 708, 393 P.2d 960 (1964)), for the proposition that ejusdem generis does not apply where the term "or otherwise"

expands the reach of the statute. Defendants disregard both McMurray and Silverstreak, indicating that in those cases, the term "otherwise" was furthering legislative intent to encompass something more than the preceding descriptive words. Defs.' Br. at 23. Defendants urge that "Broughton has not made that showing here." Id.

To the contrary, the state legislature evidenced an intent for the statute to reach damage to trees beyond those cut down or girdled by also including a catch-all, third category of harm – those "otherwise injure[d]." That "otherwise" language falls squarely within this Court's analysis in Silverstreak and McMurray and plainly evidences a legislative intent to expand the two preceding examples of harm to include trees, timber, or shrubs that are injured in some "other" manner. Defendants inappropriately shift the burden back to Broughton to explain how the legislature has evidenced an intent to "encompass something more" where the plain language of RCW 64.12.030 evidences that very intent – to expand the reach of compensable

injuries through the use of "otherwise injures."

In addition to the above rules of interpretation, the Court will not interpret a statute in a way that renders any portion of the statute meaningless. Svendsen v. Stock, 143 Wash. 2d 546, 23 P.3d 455 (2001). If one interpretation renders portions of the statute meaningless and another allows all portions of the statute to have meaning, then the interpretation allowing meaning to the whole will be used. Residents Opposed to Kittias Turbines v. State Energy Facility, 165 Wash. 2d 275, 197 P.3d 1153 (2008).

Defendants attempt to distinguish Silverstreak and McMurray on grounds that those decisions did not interpret a law that imposes liability for punitive damages, and since this Court has recognized that penal statutes should be construed narrowly, the term "otherwise injures" cannot expand the scope of compensable injuries. Defs.' Br. at 23-24. Defendants' reason that because this case involves nothing more than negligent conduct that caused a fire on Broughton's property,

interpreting the words "otherwise injures" to include fire-damaged timber is inconsistent with the punitive nature of RCW 64.12.030. That logic, however, ignores that the certified record on review has been circumscribed to focus solely on pure legal questions.

Furthermore, Broughton's interpretation that the "otherwise injures" language was intended to expand the class of compensable injuries *is* consistent with the treble damages aspect of the statute. As noted above, Broughton has not conceded that defendants' conduct regarding this fire was merely negligent and will, at trial, present ample and compelling evidence of defendants' willful or reckless behavior. Defendants' insinuation that, at most, negligence is at issue is simply improper.

With that in mind, the Court in Grays Harbor County v. Bay City Lumber, Co., 47 Wash. 2d 879, 886, 289 P.2d 975, 980 (1955), explained that the statute was penal in nature and should be limited to situations where the defendant "acted in

*reckless disregard* of the probable consequences" of their conduct. Defendants' reasoning that the words "otherwise injures" should be limited to activities similar to "cutting down," "girdling," or "carrying off" ignores that Broughton will have to establish a higher reckless or willful standard to impose treble damages in the first place. The fact that such evidence is not part of the record currently does not justify interpreting the meaning out of the term "otherwise injures" and its intended breadth. By requiring a finding of reckless conduct to support treble damages, the proof at trial will satisfy any policy concerns about the penal nature of RCW 64.12.030.

Thus, the Court should reject defendants' interpretation that the term "otherwise injures" excludes fire-damaged timber.

**3. Defendants improperly limit the scope of RCW 64.12.030 to theft of timber.**

Defendants further contend that RCW 64.12.030 has the limited purpose of deterring and punishing the theft of a valuable resource – in particular, taking the plaintiff's timber for

profit. Defs.' Br. at 6, 18.

By its plain language, RCW 64.12.030 is not limited to the theft of timber for profit; rather, the statute specifically targets the "girdle" of trees, timber, or shrubs. "Girdle" means "to make a circular cut around (as a tree) through the outer bark and cortex in order to produce death by interrupting the circulation of water and nutrients." Webster's Third New Int'l Dictionary, 959 (unabridged ed. 1986). Producing the death of the tree does not comport with any profitable motive.

The statute also targets those who "otherwise injure" trees, timber, or shrubs. As explained above, defendants' interpretation would inappropriately render the term "otherwise injures" meaningless. Svendsen, 143 Wash. 2d at 555 (2001). And contrary to defendants' contention, the legislature intended the scope of the statute to protect not only merchantable timber, but even ornamental trees, shrubs and other vegetation that the legislature recognized has value independent of its merchantability. See, e.g., Hill, 110 Wash. App. at 405

(providing damages under RCW 64.12.030 for "ornamental" trees).

Finally, the statute's context makes clear that it was not intended to cover only the theft of timber. This is true because the legislature has focused on the theft of timber and other valuable resources under RCW 4.24.630, which provides express limitations – it applies only to those who go onto the land of another and remove timber or "other similar valuable property." Those limitations are not present under RCW 64.12.030. Thus, the legislature did not intend to limit the timber trespass statute to theft of timber for profit. United Parcel Serv., Inc., 102 Wash. 2d at 362.

**4. The Fire Act was not intended to apply to the conduct that occurred in this case.**

Defendants also contend that the existence of the Fire Act reveals the legislature's intent to impose single, not treble, damages for a plaintiff's trees that are damaged by a fire spreading from adjacent land. Defs.' Br. at 10-14. The Fire Act

does not alter the scope of RCW 64.12.030, however, because it was not intended to cover the kind of conduct at issue here.

The Fire Act applies only to persons who "for any lawful purpose kindle a fire upon his own land." RCW 4.24.040. It creates a claim for negligently permitting a *controlled burn* to spread. Burnett v. Newcomb, 126 Wash. 192, 194, 217 P. 1017 (1923). As a result, this Court has applied the Fire Act only for fires that a defendant lawfully started on his or her own land. See, e.g., Mich. Millers Mut. Fire Ins. Co. v. Oregon-Washington R.R. & Navigation Co. et. al., 32 Wash. 2d 256, 201 P.2d 207 (1948); Seibly v. Sunnyside, 178 Wash. 632, 634-35, 35 P.2d 56 (1934).

Defendants contend that because they were engaged in "lawful track maintenance" the Fire Act applies. However, it is the kindle of the fire that must be lawful. Thus, the Fire Act does not apply where, as here, the fire was not lawfully kindled on BNSF's property, but was caused by sparks from rail grinding activity. This Court has noted that when a fire is

started by sparks on a railroad's right of way, the Fire Act does *not* apply. Jordan, 61 Wash. at 573 (Fire Act did not apply to a fire started by sparks from a steam shovel operated on railroad's property). Thus, defendants' conduct was "without lawful authority" under RCW 64.12.030 as opposed to for a "lawful purpose" under RCW 4.24.040.

Finally, even if the conduct alleged by a plaintiff could fall under both RCW 64.12.030 and the Fire Act, nothing prevents the legislature from covering the same conduct under two statutes. See Birchler v. Costello Land Co., Inc., 133 Wash. 2d 106, 116, 942 P.2d 968 (1997) ("there is nothing to suggest the timber trespass statute was intended to bar other causes of action"). Because there is no cause of action under the Fire Act for fires that are not lawfully kindled on a defendant's property, the legislature could not have intended to limit a claim for damage to trees by fire to only the Fire Act.

C. Defendants Misconstrue Broughton's Reference to Common Law Trespass Decisions.

Contrary to defendants' suggestion, Broughton is not attempting to turn RCW 64.12.030 into a "common law trespass statute." Defs.' Br. at 25. Broughton's discussion of common law trespass cases is relevant because the term "trespass" is used in RCW 64.12.030, and because these common law cases that address invasions of real property do not require physical presence as an element of "trespass."

Although defendants portray Broughton as attempting to import holdings of common law trespass decisions into the statute, defendants misconstrue Broughton's point. The Court's decisions in Birchler, 133 Wash. 2d 106, Zimmer v. Stephenson, 66 Wash. 2d 477, 403 P.2d 343 (1965), and Bradley v. Am. Smelting and Refining Co., 104 Wash. 2d 677, 709 P.2d 782 (1985), and the court of appeals' decision in Int'l Raceway, Inc. v. JDFJ Corp., 97 Wash. App. 1, 3, 6-7, 970 P.2d 343 (1999), are persuasive authority. Those decisions support

the argument that because human entry onto the land of another is not a prima facie element of common law trespass to real property invasions, this Court should not impose such a "physical entry" requirement under RCW 64.12.030 for injurious "trespass" to trees under the timber trespass statute. This is particularly true where the statute itself does not contain such a requirement.

Broughton has already acknowledged that the term "trespass" in RCW 64.12.030 was described by the court in JDFJ Corp., 97 Wash. App. at 3, 6-7, as "used merely in the more general sense of trespass – i.e., 'doing of an unlawful act or lawful act in unlawful manner to injury of another person or property.'" JDFJ Corp., 97 Wash. App. at 6-7 (citing Rayonier, Inc. v. Polson, 400 F.2d 909, 919 n.11 (9th Cir. 1968)). The statute describes "such trespasses" as referring to "the unlawful acts defined by the statute, cutting down, girdling or otherwise injuring, or carrying off a tree, timber or shrub. JDFJ Corp., 97 Wash. App. at 6. "Those acts are deemed trespasses." Id.

Given the distinction in use of the term "trespass" under the statute and the development of Washington case law, defendants' insistence that human entry is required under RCW 64.12.030 is unsupportable. This is particularly true where the statute does not require physical entry under its plain language, and where, even in the context of trespass claims for invasions to real property, this Court in Zimmer and Bradley did not require human entry as a prerequisite for common law liability.

**D. Defendants Attempt to Artificially Narrow the Out-of-State Case Law that Supports Plaintiff's Interpretation of RCW 64.12.030.**

Defendants' analysis of out-of-state decisions interpreting analogous timber trespass statutes is flawed in two significant respects. First, as they do with RCW 64.12.030, defendants attempt to read the term "injures" (or its analogue) out of the other states' statutes. Defendants compound that error by selectively citing the cases to create the misimpression that they would impose liability only where a defendant is physically present on the plaintiff's property. Defendants'

misinterpretation of Oregon law typifies those errors.

First, defendants claim that the Oregon timber trespass statute is "a completely different statute" from RCW 64.12.030, quoting only that portion which prohibits "willfully injur[ing] or sever[ing] from the land of another any produce thereof." Defs.' Br. at 36. Defendants not only omit entirely the portion of ORS 105.810 that is virtually identical to RCW 64.12.030,<sup>1</sup> they also ignore the larger point that *both* statutes impose liability for the wrongful "injury" of trees or timber. As with ORS 105.810, the other states' statutes authorize liability for some type of injury to trees in addition to cutting or removal.<sup>2</sup>

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<sup>1</sup> See ORS 105.810 (imposing liability on any person who "willfully injures or severs from the land of another any produce thereof . . . or *cuts down, girdles or otherwise injures or carries off any tree, timber or shrub[.]*") (emphasis added).

<sup>2</sup> See, e.g., Alaska Stat. § 09.45.730 (imposing liability on anyone who "cuts down, girdles, or *otherwise injures* or removes a tree, timber, or a shrub") (emphasis added); Cal. Civ. Code § 3346 (imposing liability for "*wrongful injuries* to timber, trees, or underwood [.]") (emphasis added); La. Stat. § 56:1478.1(B) (making it unlawful to "cut, fell, *destroy*, or remove any trees[.]") (emphasis added).

Defendants next selectively cite the cases interpreting Oregon's timber trespass statute to create the misimpression that Oregon requires the physical presence of a defendant on the plaintiff's land. However, such an expansive interpretation of ORS 105.810 would "conflict with the plain and unambiguous language of the statute." Worman v. Columbia County, 223 Or. App. 223, 195 P.3d 414, 424 (2008).

Worman noted that the use of the term "injury" in Oregon's timber trespass statute "seems to indicate" that it applies to damage "inflicted *in ways other than cutting*." Worman, 195 P.3d at 423 (emphasis added) (quoting Meyer v. Harvey Aluminum, 263 Or. 487, 501 P.2d 795, 799 (1972)). Unlike the unintended chemical drift at issue in Meyer and Chase v. Henderson, 265 Or. 431, 509 P.2d 1188 (1973), the Worman court held that the defendant's intentional spraying from a public street of herbicide directly onto the plaintiff's trees and shrubs "is a deliberate trespass *such as involved in cutting standing timber*." 195 P.3d at 424 (citing Meyer, 501

P.2d at 497) (emphasis added). Thus, under Worman and Meyer, liability under Oregon's statute does not require the cutting of timber or the physical presence of a defendant on the plaintiff's land.

The Oregon cases are consistent with the majority of other states construing similar timber trespass statutes.<sup>3</sup> Notwithstanding defendants' attempts to muddle this body of law, these interpretations by other state courts provide compelling authority for this Court to likewise construe RCW

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<sup>3</sup> See, e.g., Kelly v. CB & I Contractors, 179 Cal. App.4th 442, 102 Cal. Rptr. 3d 32, 48 (2009) (under "any reasonable interpretation," fire damage constitutes an "injur[y] to a tree" under Cal. Civ. Code § 3346; effectively overruling Gould v. Madonna, 5 Cal. App. 3d 404, 85 Cal. Rptr. 457 (1970)); Osborne v. Hurst, 947 P.2d 1356, 1361 (Ak. 1997) (implicitly recognizing that fire started on land other than plaintiff's could be actionable; Alaska Legislature did not intend treble damages where "a party negligently or recklessly damages trees *if that party did not specifically intend to do so*") (emphasis added); Jordan v. Forestry Services, Inc., 430 So. 2d 806, 808-810 (La. App. 1983) (same implicit recognition, compare interpretation of La. Stat. § 56:1478.1, paragraph B – provision analogous to R.C.W. 64.12.030 –with ruling on narrower paragraph C).

64.12.030 to apply to this case.

**III. CONCLUSION.**

For the reasons set forth above, the Court should hold that the defendant's physical presence is not necessary to maintain an action for timber trespass, and that the defendant's conduct is not required to be directed at plaintiff's trees or property to recover damages under RCW 64.12.030.

Respectfully submitted this 28th day of July, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2011, I served the foregoing Plaintiff's Reply Brief on Certified Question, on the following:

David P. Morrison Thomas Brown Cosgrave Vergeer Kester, LLP 805 SW Broadway, 8th Floor Portland OR 97205 Attorneys for BNSF	Adam M. Shienvold Eckert Seamans Cherin & Mellott, LLC 213 Market Street, 8th Floor Harrisburg, PA 17101 Attorneys for Harsco
Seann C. Colgan Paul R. Raskin Corr Cronin Michelson Baumgardner & Preece 1001 4th Avenue, Suite 3900 Seattle, WA 98154 Attorneys for Harsco	Howard M. Goodfriend Law Offices of Smith Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101-2988 Attorneys for Harsco

by the following indicated method(s):

- by **emailing** a full, true and correct copy thereof to the foregoing attorney(ies) at the last known email address on the date set forth above.
  
- by causing a full, true and correct copy thereof to be **hand delivered** to the attorney at the last known address listed above on the date set forth above.

- by sending a full, true and correct copy thereof via **overnight mail** in a sealed, prepaid envelope, addressed to the attorney as shown above on the date set forth above.
- by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office on the date set forth above.
- by transmitting full, true and correct copies thereof to the attorneys through the court's Cm/ECF system on the date set forth above.

/s/ Shay S. Scott

Shay S. Scott