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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CERTIFICATION FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON IN

JASON AND LAURA JONGEWARD, *et al.*,  
Plaintiffs,

v.

BNSF RAILWAY COMPANY  
Defendant.

**FILED**  
MAY 27 2011  
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**BRIEF OF DEFENDANT BNSF RAILWAY COMPANY**

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PACIFICA LAW GROUP LLP

Paul J. Lawrence, WSBA #13557  
Gregory J. Wong, WSBA #39329  
Attorneys for Defendant BNSF

PACIFICA LAW GROUP LLP  
1191 Second Avenue, Suite 2100  
Seattle, WA 98101  
(206) 245-1700

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## I. INTRODUCTION

In 1869, the Territorial Legislature first enacted a “Timber Trespass Statute,” now codified at RCW 64.12.030, to punish persons who without authority enter onto another’s property and cut down, intentionally damage or carry off another’s trees, timbers or shrubs. Timber is a very valuable resource. Taking another’s timber and selling it for profit was a problem. Awarding treble damages for such an offense was the Legislature’s solution to discourage persons from committing timber trespasses on the gamble that the venture may be profitable. The Timber Trespass Statute has remained substantially unchanged since then. And the Washington courts have uniformly applied the statute as the Legislature intended: to punish persons who enter upon another’s property to cut down, intentionally damage or remove timber.

On certification, plaintiffs (the “Jongewards”) claim a right to treble damages under the Timber Trespass Statute for damage to their trees from a fire negligently started on defendant BNSF Railway Company’s (“BNSF’s”) property that spread onto their property. The Jongewards in short claim that the Timber Trespass Statute applies to any damage to trees without regard to the nature of the defendant’s action. No physical trespass by the defendant is required. No cutting or removal of

trees is required. This Court should decline to extend the Timber Trespass Statute beyond its intended purposes.

Moreover, the Jongewards seek restoration damages under the Timber Trespass Statute without a limitation based on the reasonableness of the amount claimed. This Court should reject that argument and hold that damages awarded under the Timber Trespass Statute must be reasonably related to the underlying property value. Courts, including those in Washington, have uniformly applied a reasonableness limitation in awarding restoration damages. That limitation should apply to restoration damages for trees. Assessing reasonableness in relation to the value of a plaintiff's property is appropriate and avoids the potential for plaintiffs to reap a windfall far in excess of what the plaintiff paid for the property (including trees) as appreciated. Such a limitation is particularly appropriate in cases under the Timber Trespass Statute where any damage award is trebled.

In summary, Jongeward seeks a substantial extension of the Timber Trespass Statute to cover every injury to trees and to allow trebling of unlimited restoration damages. The courts of Washington have applied the Timber Trespass Statute for 142 years without so extending the statute. There is no reason to do so now.

## **II. STATEMENT OF ISSUES**

The following questions were certified to this Court:

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 stipulated facts as certified by the District Court are as follow:

This is a civil case brought by plaintiffs Jason and Laura Jongeward and Gordon and Jeannie Jongeward against Defendant 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 4000 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. ARGUMENT

##### A. **The Timber Trespass Statute Does Not Apply to the Jongewards' Claims Against BNSF**

##### 1. **The Timber Trespass Statute and Rules of Statutory Interpretation**

The Timber Trespass Statute, as it existed at the time of the fires in question, read in pertinent part:

Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person..., without lawful authority, in an action by such person...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....

RCW 64.12.030 (2007). The Timber Trespass Statute has existed in this form substantively unchanged since its original enactment in 1869. *See* Laws 1869 p. 143 § 556; Laws 1877 p. 125 § 607; Code of 1881 § 602; Rem. Rev. Stat. § 939 (1932). Subsequent to the fire at issue, the Legislature amended the Timber Trespass Statute to specifically include

Christmas trees and to make minor changes to grammar and punctuation.  
*See* RCW 64.12.030.

This Court's objective in construing a statute is to determine the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. The statute's plain meaning, however, is derived not only from the words at issue, but also from "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11-12. If the language of the statute remains susceptible to more than one reasonable meaning after this inquiry, it is ambiguous and this Court will look to statutory construction, legislative history and relevant case law to ascertain the Legislature's intent. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Because the Timber Trespass Statute imposes treble damages it is deemed a "penal statute" that is construed "narrowly." *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 110, 942 P.2d 968 (1997). As stated in *State v. Rinke*, 49 Wn.2d 664, 667, 306 P.2d 205 (1957): "Penal statutes are to be construed strictly. ...Strict construction of a penal statute

means...that the punitive sanctions must be confined to such matters as are clearly and manifestly within the statutory terms and purposes.”

**2. The Plain Meaning of the Timber Trespass Statute Does Not Encompass a Fire that Spreads Unintentionally**

BNSF’s actions here do not fall within the legislative intent as determined by the plain meaning of the Timber Trespass Statute.

The Timber Trespass Statute essentially has four elements: it applies to persons who (1) commit a trespass on the land of another person and (2) without lawful authority (3) cuts down, girdles or otherwise injures, or carries off (4) any tree, timber or shrub. It thus penalizes specific acts (trespasses without authority) and specific means (cutting down, girdling or carrying away) that are directed at specific things (potentially valuable wood natural resources). And it imposes a treble penalty where the acts are conducted willfully.

Interpreting the statute’s terms, the courts have characterized the Legislature’s intent in enacting the Timber Trespass Statute as follows:

The purpose of this statute is threefold: (1) to punish a willful offender; (2) provide for treble damages; and (3) to discourage persons from carelessly and intentionally removing another’s shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred.

*Seal v. Naches-Selah Irrigation Dist.*, 51 Wn. App. 1, 4, 751 P.2d 873, review denied, 110 Wn.2d 1041 (1988) (citing *Guay v. Wash. Natural Gas Co.*, 62 Wn.2d 473, 476, 383 P.2d 296 (1963)); see also *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 96-97, 173 P.3d 959 (2007), review denied, 195 P.3d 87 (2008). In other words, the statute seeks to penalize persons who willfully trespass on another's land to take another's valuable natural resources and to discourage such persons from so doing on the chance they will get away with it.

A plaintiff can always bring a common law claim to recover damages for harm to trees. The Timber Trespass Statute, however, supplements the common law by awarding treble damages in cases that fit the above-quoted statutory purpose. Accordingly, this Court has stated that the treble damages provision is "a penalty intended for the wanton." *Tronsrud v. Puget Sound Traction, Light & Power Co.*, 91 Wash. 660, 661, 158 P. 348 (1916).

A fire started on a parcel of land that unintentionally spreads to neighboring parcels is not the type of injury that the Timber Trespass Statute was enacted to address. That is, such a circumstance does not satisfy either the statute's act or means elements. Indeed, the statute's justification for treble damages is absent in such a situation. Without a physical presence on plaintiff's land (the prohibited act), or actions

directed at cutting down or carrying away trees (the prohibited means), applying the Timber Trespass Statute to fires that spread unintentionally would not “discourage persons from carelessly or intentionally removing another’s merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred.” *Guay*, 62 Wn.2d at 476. Further, the statutory purpose to “punish the willful offender” for acts taken “carelessly and intentionally” is absent where there is no physical presence or intentional act. Consequently, a fire that spreads unintentionally from adjoining property does not give rise to liability within the plain meaning of the statute.

This plain meaning reading of the statute is supported by “related statutes which disclose legislative intent about the provision in question.” *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 11-12. RCW 64.12.040 is a companion statute to the Timber Trespass Statute. The statute modifies the Timber Trespass Statute to preclude treble damages where the trespass was “casual or involuntary.” RCW 64.12.040. Accordingly, this Court has stated that “[t]he rule is well established in Washington that there must be an ‘element of willfulness’ on the part of the trespasser to support treble damages.” *Blake v. Grant*, 65 Wn.2d 410, 412, 397 P.2d 843 (1964) (examining the Timber Trespass Statute and RCW 64.12.040). This limits treble damages to their intended, punitive purpose. *See Henriksen v.*

*Lyons*, 33 Wn. App. 123, 125-126, 652 P.2d 18 (1982). Thus, the statutory scheme also supports application of the Timber Trespass Statute to willful conduct, which requires intentional acts such as going onto the defendant's land to remove or damage trees, rather than damage caused by the negligence in starting a fire that spreads.

More significantly, the Legislature has otherwise enacted a statute that specifically addresses damage caused by fires that cross property lines: RCW 4.24.040. Like the Timber Trespass Statute, RCW 4.24.040 has been the law in Washington since before statehood. *See* Laws 1877 p. 300 § 3; Code of 1881 § 1226; Rem. Rev. Stat. § 5647 (1932). This statute provides a civil “[a]ction for negligently permitting fire to spread”:

If any person shall for any lawful purpose kindle a fire upon his or her own land, he or she shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful person would do, and if he or she fails so to do he or she shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage.

RCW 4.24.040. In short, more than 140 years ago, the Legislature contemplated that fires may spread unintentionally to neighboring lands and provided for damages in such cases in RCW 4.24.040. This statutory context, coupled with the purpose of the Timber Trespass Statute articulated in *Guay* and *Seal*, results in a plain meaning reading of the

Timber Trespass Statute that precludes its application to negligently set fires where the defendant was never on the plaintiff's land. The proper statutory recourse for the Jongewards is a claim under RCW 4.24.040 or the common law, not RCW 64.12.030.

### **3. Case Law Supports Limiting the Timber Trespass Statute to Its Original Purposes**

Limiting the Timber Trespass Statute's applicability to its original intent is supported by case law. Tellingly, although the Timber Trespass Statute has been the law in this State and its preceding Territory for the past 142 years, the Jongewards do not cite a single case where the Washington courts have applied the statute absent physical presence on the plaintiff's land. Nor have they cited a single case where courts have applied the statute to a fire that spreads unintentionally. Rather, this Court has applied RCW 4.24.040 to that circumstance. *See, e.g., Walters v. Mason County Logging Co.*, 139 Wash. 265, 271, 246 P. 749 (1926) (applying predecessor to RCW 4.24.040 to a fire that spreads to another's land and destroys timber).

Washington courts have also held that the Timber Trespass Statute does not apply in analogous cases. A very similar situation was addressed in *Seal*. 51 Wn. App. 1. In *Seal*, the plaintiffs sued an irrigation district for treble damages under the Timber Trespass Statute. *Id.* at 3-4.

Plaintiffs alleged that water from the irrigation district's canal on neighboring land seeped onto their land and transmitted a fungus that injured their trees. *Id.* at 2. The court rejected the statute's application in that circumstance for two reasons. First, the court held that the Timber Trespass Statute did not apply because the purposes behind the statute "do not contemplate an award of damages for canal seepage." *Id.* at 4. Second, the court rejected plaintiffs' argument that the seepage constituted an "injury" under the Timber Trespass Statute. *Id.* The court held that the plaintiffs' theory that "there should be no distinction drawn between trees damaged by the trespass of an individual with a chain saw, or by the trespass of a thing under a person's control" was without support. *Id.* This holding is in accord with the Legislature's intent that treble damages only apply in the proper case.

**4. The Jongewards' Arguments that the Timber Trespass Statute Does not Require a Physical Presence by the Defendant are Without Merit**

Here, the Jongewards assert the same arguments as rejected in *Seal*: that the Timber Trespass Statute should be expanded to include any injuries to trees regardless of the context and physical location of the defendant. But, like tree damage from canal seepage, the purposes of the Timber Trespass Statute "do not contemplate an award of damages" for fires that spread unintentionally. *See Seal*, 51 Wn. App. at 4. Nor do the

Jongewards provide any relevant support regarding extension of the statute to unintentional acts occurring off of the plaintiffs' land.

Indeed, the specific language of the Timber Trespass Statute contemplates the defendant's physical presence on another's property. Cutting down a tree requires such a physical presence. Girdling (the removal of the bark of a tree) requires such a physical presence. Carrying away a tree requires such a physical presence. The statute provides that such acts be conducted "on the land of another person" which suggests the requirement of such a physical presence. The phrase "or otherwise injure," as discussed *infra* pp. 15-23, does not alter this analysis.

The Jongewards cite two Washington cases involving the Timber Trespass Statute to support their argument that a physical presence is not required on the land. *See* Pls.' Br. at 11-12 (citing *Rayonier, Inc. v. Polson*, 400 F.2d 90 (9th Cir. 1968) and *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999)). But *Rayonier* and *JDFJ Corp.* do not support the Jongewards' argument. Both cases simply state that one need not prove common law trespass to recover under the Timber Trespass Statute. *Rayonier*, 440 F.2d at 918 n. 11; *JDFJ Corp.*, 97 Wn. App. at 6. These cases confirm the legislative intent behind the Timber Trespass Statute to define the specific acts covered: "The Washington legislature clearly had particular evils in mind when it enacted the treble

damage statute and the legislature was not satisfied to limit recovery either to a common law form of action or a common law standard of recovery.” *JDFJ Corp.*, 97 Wn. App. at 6 n. 4 (quoting *Rayonier*, 440 F.2d at 918 n. 11) (emphasis added). As discussed above, the “particular evils” related to willfully, intentionally or carelessly removing or damaging trees in a way that could result in risk-taking for profit. They include cutting, girdling and carrying off, but do not include damage to trees from fires that spread unintentionally. Moreover, *Rayonier* and *JDFJ Corp.* are inapposite because in both cases the defendant physically entered the defendant’s land, cut trees and removed them. *Rayonier*, 440 F.2d at 913; *JDFJ Corp.*, 97 Wn. App. at 4. This is precisely the type of act to which the Timber Trespass Statute applies.<sup>1</sup> The cases do not stand for the proposition that a physical presence is not required.

Further, the Jongewards’ reliance on common law trespass cases unrelated to the Timber Trespass Statute is also misplaced. The Jongewards acknowledge that the Timber Trespass Statute was targeted at “particular evils” and that the trespasses “enumerated in RCW 64.12.030 are not common law trespasses to property....” Pls.’ Br. at 15. But they

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<sup>1</sup> The issue presented in *Rayonier* and *JDFJ Corp.* was whether those acts were covered by the Timber Trespass Statute where they were committed by a co-tenant and tenant, respectively, and therefore did not constitute a common law trespass. The answer in both cases was yes.

then argue that any common law trespass that damages trees is a *per se* violation of the Timber Trespass Statute. The Jongewards attempt to conflate common law trespass with violations of the Timber Trespass Statute. The Timber Trespass Statute, however, is intended to punish specific kinds of trespass and thereby supplements the common law. Washington courts recognize that “[a] landowner suffering a timber trespass may pursue either common law remedies or statutory remedies.” *Allyn v. Boe*, 87 Wn. App. 722, 732, 943 P.2d 364 (1997) (emphasis added) (citing *Henriksen v. Lyons*, 33 Wn. App. 123, 127, 652 P.2d 18 (1982)). Here, the Jongewards suggest that they should be able to prove a common law cause of action, and then claim statutory treble damages. Accepting this argument would eviscerate the distinction between common law and statutory claims where trees are involved.

Moreover, the cases on which the Jongewards rely, *Zimmer v. B.M. Stephenson*, 66 Wn.2d 477, 403 P.2d 343 (1965) and *Bradley v. Am. Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985), have nothing to do with timber trespass. In *Zimmer*, the plaintiff alleged that a spark or piece of burning carbon was emitted from the defendant’s tractor, thereby starting a fire that destroyed crops on plaintiff’s neighboring land. 66 Wn.2d at 478. The question before this Court was “whether plaintiff’s action is one which would, in common law pleading, be characterized as

an ‘action of trespass’ or an ‘action of trespass on the case’” for purposes of applying the proper statute of limitations. *Id.* at 478-79. This Court rejected the prior distinction between the types of trespasses and held that the three-year statute of limitations for trespass on real property applied. *Id.* at 482-83.

*Bradley* is also inapposite. This Court held in *Bradley* that the intentional deposit of microscopic particles could give rise to an action for trespass. 104 Wn.2d at 688-89. The case did not relate to timber. In summary, the cases the Jongewards cite for their expansive and novel reading of the Timber Trespass Statute do not support their theory. *See Seal*, 51 Wn. App. at 5 (rejecting plaintiffs’ claim that *Zimmer* and *Bradley* apply to negligent canal seepage).

The plain meaning of the Timber Trespass Statute, as evidenced by its legislative intent, language and context within the statutory scheme, demonstrates that the statute contemplates a physical intrusion by the defendant onto another’s property.

**5. The Timber Trespass Statute’s “Otherwise Injure” Language Does Not Turn the Statute Into One That Encompasses All Acts that Damage Trees**

One question before this Court is whether a fire that spreads negligently and burns trees on neighboring land “otherwise injures” trees,

timber or shrubs for purposes of the Timber Trespass Statute. As demonstrated above, in light of the legislative purpose behind the statute and its plain meaning, the answer is no.

Even if the term “otherwise injure” is ambiguous, the answer is the same applying traditional rules of statutory construction. Two related rules of statutory construction apply.

First, “a single word in a statute should not be read in isolation, . . . the meaning of words may be indicated or controlled by those with which they are associated.” *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)). This rule of statutory construction is termed *noscitur a sociis*. In *Jackson*, this Court applied *noscitur a sociis* and “held that the word ‘shelter’ in the phrase ‘food, water, shelter, clothing, and medically necessary health care,’ as used in RCW 9A.42.010(1), should not be isolated and analyzed apart from the words surrounding it.” *Id.* This Court further observed that “[i]n interpreting statutory terms, a court should take into consideration the meaning naturally attaching to them from the context, and adopt the sense of the words which best harmonizes with the context.” *Id.* (citations and quotations omitted). Here, the Timber Trespass Statute applies where “any person 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 (emphasis added). The term “otherwise injure” should be read with the terms “cut down,” “girdle,” and “carry off.” Each of these terms connotes both a physical presence on property and a deliberate action that injures or removes trees. The term “otherwise injure” should not be read outside of this context to apply to any and all injuries to trees.

Second, this reading of “otherwise injure” is supported by the rule that “general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms.” *City of Seattle v. State, Dep’t of Labor & Indus.*, 136 Wn.2d 693, 699, 965 P.2d 619 (1998). This rule of statutory construction is termed *ejusdem generis*. *Id.*

In short, specific terms modify or restrict the application of general terms where both are used in sequence. By way of illustration, we have noted that “[t]he *ejusdem generis* rule is generally applied to general and specific words clearly associated in the same sentence in a pattern such as ‘[specific], [specific], or [general]’ or ‘[general], including [specific] and [specific].’” *Southwest Wash. Ch., Nat’l Elec. Contractors Ass’n v. Pierce County*, 100 Wn.2d 109, 116, 667 P.2d 1092 (1983) (alterations in original) (citations omitted).

*Id.* (citations omitted). Here, the term “otherwise injure” is a general term that is limited by the preceding specific terms. The statutory language –

“cut down, girdle or otherwise injure” – follows the classic enumeration to which *ejusdem generis* applies: “[specific], [specific], or [general].” *Id.* Accordingly, “otherwise injure” should be limited by the types of injuries enumerated in the statute; that is cutting down or girdling trees.

Moreover, “[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). If “otherwise injure” is interpreted to encompass any damage to trees without regard to the predicate act or the means used to damage the tree, then most of the Timber Trespass Statute would be rendered “meaningless or superfluous.” For example, the terms “cut down” and “girdle” would have no separate meaning and would be rendered superfluous.

Further, this Court will “avoid a literal reading if it would result in unlikely, absurd or strained consequences.” *City of Seattle*, 136 Wn.2d at 697 (quoting *Whatcom County*, 128 Wn.2d at 546). The Jongewards’ interpretation would turn the Timber Trespass Statute into a treble damages for any damage to trees statute. Thus, for example, a homeowner’s Christmas lights might short-circuit and cause a fire that spreads to his neighbor’s property and burns his neighbor’s trees and house. Under the Jongewards’ construction of the Timber Trespass

Statute, the homeowner would face treble damages claims for the damaged trees (but not for the house). Or a speeding, reckless driver who skids on ice on the road and runs into a tree would face treble damages. The Jongewards' interpretation of the Timber Trespass Statute would flood the courts with treble damage claims whenever someone's trees are damaged. These are absurd results not contemplated by the Timber Trespass Statute. This Court should decline to apply the punitive treble damages provision of the Timber Trespass Statute whenever a tree is damaged on a person's property.

Instead of looking to the Legislature's actual intent in enacting the Timber Trespass Statute, the Jongewards argue in the negative that "there is no *indicium* whatsoever that the Legislature did not intend the "otherwise injure" language of the provision to include destruction by fire." Pls.' Br. at 24. This reasoning is not sound. First, the question is not whether fire itself can, in some circumstances, be an actionable injury under the Timber Trespass Statute. A person could enter onto the land of another and choose to injure trees by setting them on fire instead of girdling them. That may be actionable under the statute but it is not the question before this Court. The question here is whether a fire that spreads from another parcel of land unintentionally is the same type of

injury as entering land to girdle or cut a tree. For all the reasons already mentioned, the answer to that question is “no.”

Second, a statute must be construed “so as to effectuate the legislative intent.” *City of Seattle*, 136 Wn.2d at 697. Stating that there is no evidence that the Legislature did not intend something in enacting a statute is tortured logic and irrelevant. The Jongewards’ citation to *Nystrand v. O’Malley*, 60 Wn.2d 792, 375 P.2d 863, 864 (1962), is not to the contrary. *Nystrand* is inapposite because, like every other case cited by the Jongewards that involve the Timber Trespass Statute, the *Nystrand* defendants entered the plaintiff’s land and willfully destroyed trees. 60 Wn.2d at 793 (“by employing the use of a bulldozer, [defendants] graded the proposed access route and removed two trees from the southwest corner of the plaintiffs’ lot...”).

The Jongewards’ argument that the 2009 amendment to the Timber Trespass Statute indicates legislative intent to give a broad meaning to “otherwise injure” is without support. The Jongewards offer nothing from the 2009 amendment’s legislative history or legal citation in support of their assertion that the insertion of a comma before “otherwise injure” indicated an intent that the term be read broadly. Nor could they do so. The 2009 amendment had one purpose: to include Christmas trees in the Timber Trespass Statute. Final Bill Report, HB 1137 (2009), available at

<http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House%20Final/1137%20HBR%20FBR%202009.pdf>. (“Christmas trees are included in existing tree theft statutes that permit a plaintiff to recover treble damages....”). The addition of Christmas trees to the statute was the only substantive change. There were minor changes in the amendment that added commas, deleted extraneous verbiage and simplified language for readability. *See id.* But nothing in the legislative history suggests that insertion of a comma in front of “otherwise injure” was intended to give the term a broad reading separate from the preceding terms. Indeed, the Legislature’s characterization of the Timber Trespass Statute as a “tree theft” law undermines the Jongewards’ broad reading of the statute.

Further, the grammatical change is consistent with the style manual long used by the Washington Code Reviser, which requires the insertion of a comma between each item in a series of three or more words, except the last.<sup>2</sup> While this Court has expressed “high regard for the lowly comma,” *Peters v. Watson Co.*, 40 Wn.2d 121, 122-23, 241 P.2d 441 (1952), the Jongewards cannot attach significance to its insertion in the 2009 amendment in the instant case, because this Court and the Code Reviser have consistently separated the terms “girdle, or otherwise injure”

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<sup>2</sup> See Office of the Code Reviser, Statute Law Committee, *Bill Drafting Guide 2011*, Part IV(1)(a)(i), available at [http://www.leg.wa.gov/CodeReviser/Pages/bill\\_drafting\\_guide.aspx#part4](http://www.leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx#part4).

with a comma. The 1932 compilation of Remington Revised Statutes included a comma between the words “girdle, or otherwise injure . . . ,” despite the omission of a comma in the 1869 and 1877 enactments. Rem. Rev. Stat. § 939 (1932). Further, this Court quoted the “cut down, girdle, or otherwise injure” language with the comma as it now appears in cases both before and after the 1932 codification. *See Mullally v. Parks*, 29 Wn.2d 899, 908-09, 190 P.2d 107 (1948); *Simons v. Wilson*, 61 Wash. 574, 574, 112 P. 653 (1911); *Gardner v. Lovegren*, 27 Wash. 356, 360, 67 P. 615 (1902).

Moreover, the insertion of a comma and use of the word “or” in a list is of no import to application of the *ejusdem generis* rule of construction. This Court itself includes a comma preceding an “or” in its general example of lists to which the rule applies. *See City of Seattle*, 136 Wn.2d at 699 (“[t]he *ejusdem generis* rule is generally applied to general and specific words clearly associated in the same sentence in a pattern such as ‘[specific], [specific], or [general]’ . . . .”) (citations and quotations omitted) (emphasis added). Neither the comma nor the “or” counter the notion that a general term at the end of a list is limited to the class of the preceding terms.

Finally, the Legislature’s use of the word “otherwise” does not change application of *ejusdem generis*. The Jongewards posit that

“otherwise” means “in a different way or manner.” Pls.’ Br. at 26. But that simply begs the question already before this Court: in which different ways or manners does injury to trees fall within the Timber Trespass Statute. Examining “otherwise” outside of the context of the statutory language, as the Jongewards do, is improper. *See Roggenkamp*, 153 Wn. 2d at 623 (“a single word in a statute should not be read in isolation”).

**B. Damages Prior to Trebling Must be Reasonably Related to the Underlying Property Value**

The final question before this Court relates to damages:

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

The answer is yes.

Restoration damages in Washington must be reasonable. In awarding damages, Washington courts “should use a measure of damage that makes the injured party as whole as possible without conferring a windfall.” *Pugel v. Monheimer*, 83 Wn. App. 688, 692, 922 P.2d 1377 (1996) (emphasis added). Accordingly, this Court has held that if property may be restored to its original condition, then “the measure of damages is the reasonable expense of such restoration....”<sup>3</sup> *Colella v. King County*,

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<sup>3</sup> This rule applies to temporary injuries to land. Whether loss of old growth trees as alleged in this case is a temporary or permanent injury to land is an open question. If the Jongewards claim that such an injury is permanent then the proper award of damages is diminution in value of the land. *Id.*

72 Wn.2d 386, 393, 433 P.2d 154 (1967) (citing multiple cases) (emphasis added). The court of appeals has applied this rule of reasonableness to the Timber Trespass Statute by relating restoration damages to the value of the underlying property. *Allyn v. Boe*, 87 Wn. App. 722, 735, 943 P.2d 364 (1997), *review denied*, 134 Wn.2d 1020 (1998) (“[A]lthough 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.”).<sup>4</sup>

Limiting restoration damages available under the Timber Trespass Statute to a reasonable amount in relation to the value of the underlying real property as done in *Allyn* is appropriate. Washington courts have tied restoration damages to the underlying real property value in similar circumstances. *See, e.g., Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 543-45, 871 P.2d 601, *review denied*, 124 Wn.2d 1029, 883 P.2d 326 (1994), *overruled on other grounds by Phillips v. King County*, 87 Wn. App. 468, 943 P.2d 306 (1997). In *Pepper*, the plaintiffs’ property was damaged by water run-off from the defendants’ development activities on neighboring land. *Id.* at 528. The court held that restoration damages were available, but that “reasonable repair costs cannot be

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<sup>4</sup> This rule applies to recovery of “restoration and replacement costs” for violations of the Timber Trespass Statute that affect “ornamental greenery on residential or recreational land.” *Id.* at 733. Whether the Jongewards’ trees are ornamental is a question of fact not before this Court. BNSF does not waive or concede any future argument on the point.

without limits.” *Id.* at 544. The reasonable limitation imposed was based on the underlying property value. The court held that restoration damages could exceed the diminution in value of the property as long as they did not exceed the total pre-injury value of the property. *Id.* This was based on the holdings of other jurisdictions and the court’s sentiment that “[i]t would be anomalous for the plaintiff to recover more in damages than he could recover for complete destruction of the property.” *Id.* at 544-45.

This common sense notion applies to the Timber Trespass Statute. When a property has trees of significant age or beauty, those aesthetics are embedded in the market value of the property. The underlying property value thus takes into account the value of the trees and serves as a reasonable basis for limitation of restoration damages. Otherwise, the plaintiff could receive a windfall by recovering “more in damages [for harm to only the trees on the property] than he could recover for complete destruction of the property.” *Id.* (language added for context).<sup>5</sup>

Other states have reached similar results. *See, e.g., Heninger v. Dunn*, 101 Cal. App. 3d 858, 864-66, 162 Cal. Rptr. 104 (Cal. Ct. App.

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<sup>5</sup> To the extent that the Jongewards claim emotional connection to the trees, this Court has already allowed the recovery of emotional distress damages under the Timber Trespass Statute. *Birchler*, 133 Wn.2d at 117. The fact that the statute allows trebling of damages, including emotional distress damages, means that the plaintiff will, by definition, recover an amount far in excess of the actual damages. Requiring that the sum of these damages, before the statutory trebling, bear some relation to the total fair market value of the property itself does nothing more than prevent an enormous windfall.

1980) (holding that damages of \$241,257 to replace mature trees was manifestly unreasonable in relation to the land's value of \$179,000 before trespass); *Bd. of County Comm'rs of Weld County v. Slovek*, 723 P.2d 1309, 1317 (Colo. 1986) (restoration damages available "[i]f the damage is repairable, and the costs, although greater than original value, are not wholly unreasonable in relation to that value..."). In *Heninger*, the California Court of Appeals analyzed case law from across the country and articulated how the reasonableness rule should apply to timber trespass statutes:

Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered. Proposed replacement costs may be unreasonable or excessive in relation to the damage inflicted upon the land or its value prior to the trespass. In such cases, the achievement of a reasonable approximation of the land's former condition may involve something less than substantially identical restoration. Several decisions involving claims for the costs of identical replacement of a substantial number of mature trees have indicated that it may be more appropriate to award costs for the planting of saplings, or a few mature trees, or underbrush to prevent erosion and achieve a lesser but, over time, reasonable aesthetic restoration.

*Heninger*, 101 Cal. App. 3d at 865 (citations omitted). This Court should limit timber trespass damages to those damages reasonable in relation to the underlying value of the land as articulated in *Allyn* and *Heninger*.

The Jongewards urge this Court to overrule *Allyn* without presenting any argument as to why *Allyn* is an incorrect application of Washington law. Instead, the Jongewards merely assert that Judge Houghton's dissent in *Allyn* is the "more enlightened" view. Pls.' Br. at 32. Rather than follow the rule of reasonableness, the Jongewards ask for this Court to award a triple windfall. An award of restoration damages with no limit represents a windfall. That windfall then is trebled under the Timber Trespass Statute. Recovery of this magnitude is not supported by the Timber Trespass Statute, nor normal tort law principles of damages.

Restatement (Second) of Torts § 929 Comment b does not help the Jongewards. First, the Jongewards do not provide any authority for adopting Comment b into the penal statutory remedy established in the Timber Trespass Statute. Indeed, the trebling of reasonable damages more than compensates plaintiffs for willful damage to their trees.

Second, Washington law imposes a reasonableness limitation on the recovery of restoration damages. *Colella*, 72 Wn.2d at 393; *Allyn*, 87 Wn. App. at 735. The Jongewards do not explain (and they could not) why *Colella* and *Allyn* are inconsistent with Restatement (Second) of Torts § 929 Comment b or otherwise need to be overruled.

Third, consideration of the Restatement does not lead to a different result. The Restatement itself states that restoration damages are "the

reasonable cost of replacing the land in its original position.” Restatement (Second) of Torts § 929 cmt. b (1965) (emphasis added). Indeed, the courts in *Allyn*, *Slovek* and *Heninger* cite this section of the Restatement and still conclude that restoration damages are subject to a limit of reasonableness related to the value of the underlying property.

Fourth, the Jongewards’ reliance on the Restatement (Second) of Torts § 929 Comment b misses the point. The Restatement and case law impose a reasonableness requirement. The Restatement Comment b suggests that restoration damages can on occasion exceed the market value of the property, a proposition adopted in *Allyn*. That is not the issue. The issue is whether the reasonableness requirement should be measured in comparison to the value of the property, the test adopted in *Allyn*. Nothing in the Restatement suggests that using the market value of the property as a marker against which to measure the reasonableness of damages is inappropriate. Indeed, it is the best measure for assuring plaintiffs do not receive an undue windfall. Tellingly, the Jongewards do not propose any alternative.

The Jongewards’ citation to the Montana case of *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007) is inapposite. *Sunburst* related to widespread and catastrophic environmental damage to residential property that posed long-term adverse health effects. Neither

destruction of timber, nor any sort of timber trespass statute was at play. Moreover, *Sunburst* does not hold that restoration damages need not be reasonably related to value of the underlying property. Rather, the court held that it would not strictly cap the amount of restoration damages to the pre-tort market value of the property. *Id.* at 1089-90. This was based on a policy concern that a strict cap would encourage tortfeasors to undertake dangerous activities knowing damages would be capped at the market value of the property, while property owners would face a Hobson's choice of selling "homes they do not want to leave or continue to live under an increased threat of exposure to toxic chemicals." *Id.* at 1090. Such a drastic choice and extreme policy considerations are not raised by timber trespasses especially in light of the treble damages provision for willful actions. In other words, to the extent that the Timber Trespass Statute was enacted to prevent exercise of a private right of eminent domain, that concern is already addressed by the provision for treble damages. *See Henriksen*, 33 Wn. App. at 125 (describing justification for treble damages, in part, as discouraging the practice of private eminent domain). This Court should decline to extend the Timber Trespass Statute beyond its original purposes and provision for treble damages by allowing restoration damages without limitation.

## V. CONCLUSION

The Legislature intended that the Timber Trespass Statute apply in specific cases. And it has been applied consistently for over 140 years to cases where a defendant physically enters another's property and damages trees using particular means (cutting, girdling, carrying away). A fire that spreads unintentionally from neighboring land is not within this legislative purpose because there is no physical presence on plaintiff's land and such a fire is not within the statute's plain meaning of "otherwise injure." This Court should not expand the Timber Trespass Statute beyond the Legislature's original intent. Further, damages for restoring destroyed trees must be reasonably related to the underlying value of the land. To hold otherwise would result in a windfall for the plaintiff that is trebled. This Court should answer the certified questions accordingly.

RESPECTFULLY SUBMITTED this 27th day of May, 2011.

PACIFICA LAW GROUP LLP

By           /s Paul J. Lawrence            
Paul J. Lawrence, WSBA #13557  
Gregory J. Wong, WSBA # 39329  
Attorneys for Defendant  
BNSF Railway Company

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**Cc:** Paul Lawrence; Greg Wong; Kimberly Evanson; [eymann@eahjlaw.com](mailto:eymann@eahjlaw.com); [sljones@eahjlaw.com](mailto:sljones@eahjlaw.com); [jdallison@eahjlaw.com](mailto:jdallison@eahjlaw.com); [scolgan@corrchronin.com](mailto:scolgan@corrchronin.com); [julie.owens@paineambly.com](mailto:julie.owens@paineambly.com); [haglund@hk-law.com](mailto:haglund@hk-law.com); [horngren@hk-law.com](mailto:horngren@hk-law.com); [kelley@hk-law.com](mailto:kelley@hk-law.com); [tbrown@cvk-law.com](mailto:tbrown@cvk-law.com); [ashienvold@eckertseamans.com](mailto:ashienvold@eckertseamans.com); [praskin@corrchronin.com](mailto:praskin@corrchronin.com); [dmorrison@cvk-law.com](mailto:dmorrison@cvk-law.com); Dawn Taylor  
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**Katie Dillon || Pacifica Law Group LLP**  
Legal Assistant to Gregory J. Wong  
1191 Second Avenue, Suite 2100  
Seattle WA 98101  
email: [katie.dillon@pacificallawgroup.com](mailto:katie.dillon@pacificallawgroup.com)  
206-245-1707 (direct) 206-971-4700 (office) 206-245-1758 (fax)

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