

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

No. 85781-4

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**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.

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CERTIFICATION QUESTIONS FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON  
HONORABLE ROSANNA MALOUF PETERSON,  
CHIEF DISTRICT JUDGE  
CAUSE No. CV-09-0010-RMP

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**REPLY BRIEF OF PLAINTIFFS**

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## I. INTRODUCTION

BNSF Railway Company (“BNSF”) attempts to divert the Court’s attention from the certified questions at issue. It does so by conflating RCW 64.12.030 and RCW 64.12.040. RCW 64.12.030, the “Injury to or removing trees – Damages” statute, is the only statutory provision at issue in the questions certified to the Court. BNSF’s arguments regarding the intent required to uphold treble damages relate to RCW 64.12.040, the “Mitigating circumstances – Damages” statute, and are therefore beyond the scope of the certified questions. As set forth in the Opening Brief of Plaintiffs (“Opening Brief”), the issue of whether BNSF was willful or reckless in starting the Marshall Fire must rise or fall on the determination of the trier of fact after all relevant evidence has been put before the trier of fact by the parties. Opening Brief at 20-21.

BNSF also attempts to restrict the scope of RCW 64.12.030 by contending it requires physical trespass by the defendant and the cutting or removal of trees. Brief of Defendant BNSF Railway Company (“BNSF Brief”) at 1-2. The problem with this narrow focus, which BNSF underscores by constantly referring to RCW 64.12.030 as the Timber Trespass Statute, is that BNSF ignores the express language of that statute.

Not only does RCW 64.12.030 encompass persons who “cut down” or “carry off” trees or timber—themes which fit nicely in BNSF’s construct of this statute—it also applies to girdling trees (a process under which a ring of bark and the underlying cambium layer is removed from a tree leading to its death) and to trees that are “otherwise injure[d].” These latter categories do not fall within the “[t]aking another’s timber and selling it for profit” concern touted by BNSF. BNSF Brief at 1, 7-8. Indeed, girdling trees and destroying them in that way is akin to injuring trees in other ways, such as by herbicide or, as in this case, by fire.

The broader scope of RCW 64.12.030 is further reflected in other language of the statute. Its terms extend even to shrubs and covers injury to trees and shrubs located 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.” This language moves well beyond simple pecuniary loss through the taking of timber. Indeed, this language recognizes that trees and shrubs have intrinsic value, and evidences a legislative intent to protect the

rights of those who own or otherwise have control over them. This the Court has already acknowledged by holding RCW 64.12.030 covers the destruction of ornamental trees as well as timber, applying in such cases restoration and replacement costs as the measure of damages, not stumpage value. *See, e.g., Birchler v. Costello*, 133 Wn.2d 106, 111-12, 942 P.2d 968 (1997).

RCW 64.12.030 authorizes a “person” to bring an action “against the person committing the trespasses or any of them” to seek redress for the damage done. By referring to “trespasses or any of them,” RCW 64.12.030 makes clear that all the acts enumerated—cutting down, girdling, otherwise injuring or carrying off trees, timber or shrubs—are discretely and separately available as individual causes of action. As pointed out in the Opening Brief, the statute’s reference to “trespasses or any of them” refers to the nature of the damage done, not to physical presence on the property involved. Opening Brief at 10-13.

Finally, BNSF contends full restoration costs should not be awarded the Jongewards because such an award would constitute a

windfall. As the Jongewards pointed out in their Opening Brief, the adoption by this Court of Restatement (Second) of Torts §929 provides the framework to award full restoration costs, provided there is sufficient evidence the Jongewards will actually use the award to that end. If the facts presented to the jury warrant consideration of full restoration costs, then to disallow them would reward the wrongdoer at the expense of the victim.

## II. ARGUMENT

A. **The Certified Questions Ask This Court to Determine Whether BNSF Has Committed a Trespass Under RCW 64.12.030. They Do Not Require This Court to Determine Whether the Jongewards Are Entitled to Treble Damages.**

This case is here as a result of a dispute between the Jongewards and BNSF as to whether the Jongewards can bring a cause of action under RCW 64.12.030. This dispute is framed by the first two certified questions from the United States District Court for the Eastern District of Washington:

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?

These certified questions strike at a single, overarching issue: Whether a defendant who causes a fire that spreads onto plaintiff's property, and destroys plaintiff's trees, has committed a trespass within the terms of RCW 64.12.030, allowing plaintiff to bring a cause of action under that statute.

The certified questions do not require the Court to assess whether the Jongewards are entitled to treble damages. Instead, the purpose served by each of the above certified questions is to examine two distinct sub-issues that arise when addressing the broad, overarching issue. Those issues are whether RCW 64.12.030 contains a "physical presence" requirement and whether the conduct of BNSF—which led to the destruction of over 4,000 trees—falls within the meaning of "otherwise injure" as used in the statute.

Thus, the first two certified questions are concerned with whether a trespass within the meaning of RCW 64.12.030 is present. They are designed to provide guidance to the District Court in resolving the question whether the Jongewards may bring a cause of action under

RCW 64.12.030 *at all*. BNSF fails to recognize this, and its principle error is to conflate two distinct issues: (1) whether its wrongful conduct constitutes a trespass under RCW 64.12.030; and (2) whether the Jongewards are entitled to treble damages under the stipulated, bare-boned facts appearing on the record here. This second issue is not before the Court.

The stipulated facts reflect the determination made by the District Court that BNSF was negligent. This Court ought not to be misled, however, into thinking the District Court's determination makes any difference at all under the certified questions. The determination of negligence made by the District Court in no way precludes the Jongewards from presenting evidence at trial that BNSF's conduct was sufficiently willful or reckless to sustain treble damages under the statute. *Seattle First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 197-98, 570 P.2d 1035 (1977) ("Once the plaintiff has proven the trespass and damages, the burden shifts to the defendant to show the trespass was casual or involuntary . . . , so that single damages only would be awarded to the plaintiff.").

Accordingly, it may fairly be said that BNSF acted *at least* negligently in causing the fire that destroyed the Jongewards' trees. As this is so, the certified questions do not ask whether the Jongewards may

recover treble damages. BNSF and the Jongewards have still to present evidence in that regard, pursuant to RCW 64.12.040. The determination of treble damage liability thus awaits a finding by the trier of fact at trial that BNSF's conduct contained an element of willfulness or recklessness (i.e., was not "causal or involuntary"). *Id.*; *Gibson v. Thisius*, 16 Wn.2d 693, 695, 134 P.2d 713 (1943). ("The question of the character of the trespass – whether it was willful or involuntary and in good faith – [is] for the jury".)

**B. RCW 64.12.030 Applies Here Because Defendant BNSF Committed a Trespass under the Terms of the Statute.**

**1. A Cause of Action may be Pursued under RCW 64.12.030 if a Trespass under the Statute has been Committed.**

RCW 64.12.030 provides a cause of action. The cause of action may be pursued against a defendant who commits one of the trespasses enumerated in the statute. It is not necessary that the trespass be found intentional to bring a cause of action under the statute in the first instance. This the Court has made clear in cases where it held the trespass at issue was not committed intentionally but still allowed recovery of single damages under RCW 64.12.040. *Luedinghaus v. Pederson*, 100 Wash. 580, 171 P. 530 (1918); *Tronsrud v. Puget Sound Traction*, 91 Wash. 660, 158 P. 348 (1916); *Hawley v. Sharley*, 40 Wn.2d 47, 240 P.2d 557 (1952).

BNSF has sought to impress upon this Court the idea that the Jongewards have argued for a “substantial expansion” of RCW 64.12.030 by claiming a right to treble damages under the statute when only negligence is present. BNSF Brief at 1, 2, 6-9, 18-20. In doing so, BNSF both misconstrues the argument of the Jongewards and distracts the Court from the call of the certified questions.

To be clear, the Jongewards are not claiming a right to treble damages if BNSF is not ultimately found to be willful or reckless. As BNSF has pointed out, “[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). The certified questions do not ask the Court to revisit its well-established precedent. The Jongewards do not either.

Instead, the Jongewards contend facts appearing on the record here are sufficient to constitute a statutory trespass under RCW 64.12.030, allowing them to bring a cause of action under the statute. Accordingly, the Jongewards claim a right to damages made available to a plaintiff who can show a statutory trespass under RCW 64.12.030. The available remedies are treble damages or single damages, depending on the character of defendant’s conduct.

The remedial scheme is created by RCW 64.12.030 and its companion, RCW 64.12.040. RCW 64.12.030 sets forth the prohibited conduct—“such trespasses”—that will expose a person who causes such trespasses “without lawful authority” to treble damage liability. RCW 64.12.040 functions to suspend the imposition of treble damage liability upon a showing by the defendant that its conduct was “casual or involuntary.” It thus articulates the state of mind the statutory trespasser must have possessed for treble damages to attach. Therefore, “willfulness” or “recklessness” is not a prerequisite to a RCW 64.12.030 trespass. “Willfulness” or “recklessness” is a prerequisite to a finding of treble damage liability under RCW 64.12.040.

**2. BNSF Misreads RCW 64.12.030 by Adding a Physical Presence Element that is not part of the Statute.**

There is no dispute between the Jongewards and BNSF that a statute plain on its face must be given that effect. Yet, despite this long-established rule, BNSF contends that RCW 64.12.030 requires physical presence on the land involved even though such language does not appear in the statute. BNSF Brief at 6-8. BNSF argues that the statute’s language “on the land of another person” supports its position that physical presence is required. BNSF Brief at 12. To the contrary, this phrase refers to the

location of the injured timber, trees, or shrubs, not the location of the defendant.

In related statutes, the Washington legislature has expressly made presence on the land of another a prerequisite for the cause of action involved. *See, e.g.*, RCW 79.02.310 (“Every person who willfully commits any trespass upon any public lands of the state and cuts down, destroys, or injures any timber, or any tree . . . .”); RCW 79.02.320 (“Every person who shall cut or remove, or cause to be cut or removed, any timber growing or being upon any public lands of the state . . . .”); RCW 4.24.630 (“Every person who goes onto the land or another and who removes timber . . . .”). In contrast, RCW 79.02.300, like RCW 64.12.030, distinguishes between use or occupancy of public lands and injuring public land by providing:

Every person who, without authorization, uses or occupies public lands, removes any valuable material as defined in RCW 79.02.010 from public lands, or causes waste or damage to public lands, or injures publically owned personal property or publicly owned improvements to real property on public lands, is liable to the state for treble the amount of the damages.

RCW 79.02.300 goes on to provide for single damages if “the person, at time of the unauthorized act or acts, did not know, or have reason to know, that he or she lacked authorization.”

In light of these legislative distinctions, BNSF's contention that RCW 64.12.030 requires physical presence on the Jongewards' land must be rejected. The "prohibited act" is not, as BNSF argues, "physical presence on plaintiffs' land." BNSF Brief at 7. The prohibited acts are those set forth in RCW 64.12.030, the cutting down, girdling, or otherwise injuring or carrying off a tree, timber or shrub without lawful authority. Those are the acts that give rise to the cause of action created by RCW 64.12.030, and nothing more.

What BNSF is essentially contending is that RCW 64.12.030 requires a common law trespass as one of its elements. Not only is this not set forth in the statute, such an element has been rejected by the Courts. *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999); *Rayonier, Inc. v. Polson*, 400 F.2d 90 (9th Cir. 1968).

### **3. RCW 4.24.040 is not Applicable.**

BNSF's citation to RCW 4.24.040 does not alter the scope of RCW 64.12.030. RCW 4.24.040 applies only to those who "for any lawful purpose kindle a fire[.]" BNSF can hardly make the claim that it started a fire on its right of way on an August morning without any one to tend to it for a lawful purpose. Clearly, BNSF's conduct fits within the "without lawful authority" language of RCW 64.12.030 as opposed to the "lawful purpose" language of RCW 4.24.040. Moreover, it needs to be

emphasized once again that the Jongewards have not conceded that mere negligence on the part of BNSF is all that happened here. This issue will be addressed by the finders of fact pursuant to RCW 64.12.040.

**4. BNSF's Attempt to Otherwise Limit RCW 64.12.030 should be Rejected.**

As noted in the introduction, BNSF seeks to limit the applicability of RCW 64.12.030 well beyond its plain language. The statutory purpose, however, cannot be restricted to the protection of landowners from those who would remove trees or shrubs for profit. BNSF Brief at 8. If that were the case, the reference to “girdle” would be meaningless. “Girdle” is defined in the *Merriam-Webster* on-line dictionary as follows: “to cut away the bark and cambium in a ring around (a plant) usually to kill by interrupting the circulation of water and nutrients . . . .” <http://www.merriam-webster.com/dictionary/girdle> (last visited June 15, 2011). It is difficult, if not impossible, to contend that destroying a tree by girdling it has any profit motive for the offender. Similarly, such an interpretation of RCW 64.12.030 would render meaningless the use of the words “otherwise injure”.

BNSF also argues that no case has considered the applicability of statute like RCW 64.12.040 to a situation where a fire spreads onto the property of another, destroying trees. While these cases may be rare, the

plain language of RCW 64.12.030 encompasses such causes of action. This has been recognized by at least one court. In *Hackleton v. Larkan*, 326 Ark. 649, 933 S.W. 2d. 380 (1996), the Supreme Court of Arkansas considered a case where a statute similar to RCW 64.12.030 and RCW 64.12.040 were considered with respect to a fire which spread from a neighbors land. In *Hackleton*, the Court noted that the jury, after determining the amount of damages, found that the actions of the neighbor were not intentional within the meaning of that statute. It should also be noted that the Arkansas statute, A.C.A. 18-60-102, a copy of which is attached as an appendix, begins with “A person trespassing as follows . . .” and then describes various acts that constitute a trespass. Like RCW 64.12.030, it is the particular acts described in the statute which are determinative, not the physical presence of the actor.

**5. *Seal v. Naches-Selah Irrigation Dist.* is Distinguishable.**

The Jongewards have discussed *Seal v. Naches-Selah Irrigation Dist.*, 51 Wn. App. 1, 751 P.2d 873, review denied, 100 Wn.2d 1041 (1988) in their Opening Brief at 28-30 and will not repeat that discussion here. However, it seems clear from the trial court in *Seal* that the Irrigation District made any number of attempts to rectify the seepage problem. *Id.* at 2, 10. As such, *Seal* is best seen as a case where the trial

court considered that the intent required under RCW 64.12.040 could never be found with respect to the Irrigation District. These facts distinguish *Seal* from the present case where the requisite intent under RCW 64.12.040 remains to be resolved.

**6. “Otherwise Injure” as used in RCW 64.12.030 is not Ambiguous.**

With all due respect to BNSF, the term “otherwise injure” is not ambiguous and must apply to trees destroyed by fire. Indeed, BNSF makes no argument that it is ambiguous. More tellingly, BNSF concedes, as it must, that “otherwise injure” is not ambiguous when it admits that RCW 64.12.030 would be available as a cause of action if the defendant went on the land of another and started a fire that injured trees. BNSF Brief at 19. Thus, even under BNSF’s view, there can be no doubt that burning a tree comes within the purview of the “otherwise injure” language of RCW 64.12.030.

BNSF recognizes that statutory language should be read so that “no portion is rendered meaningless or superfluous.” BNSF Brief at p. 18 (citing *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). Yet, from that, BNSF argues that “otherwise injure” should be limited by the types of injuries enumerated in the statute: “cutting down or girdling trees”. BNSF Brief at 18. Of course, in making

this argument BNSF is rendering the phrase “otherwise injure” meaningless. Nor does it follow that “girdle” or “cut down” would have no separate meaning if “otherwise injure” meant any injury.

“Girdle” and “cut down” were intended to provide specific examples of harm. The words “otherwise injure” “were intended include something more than specific descriptive words preceding.” *McMurray v. Sec. Bank of Lynnwood*, 64 Wn.2d 708, 714, 393 P.2d 960 (1964) (quoting *Republic Inv. Co. v. Naches Hotel Co.*, 190 Wash. 176, 182, 67 P.2d 858 (1937)). This Court “has a duty to give meaning to every word . . .” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007).

**C. Restatement (Second) of Torts §929 should be Adopted**

In their Opening Brief, the Jongewards argued that the adoption by this Court of Restatement (Second) Torts §929 would provide the appropriate framework to determine damages in this case. Opening Brief at 30-37. The Jongewards respectfully refer the Court to those arguments and will not repeat them at length here. In summary, the application of §929 will allow the trier of fact to weigh the evidence of damage in light of the testimony from the Jongewards regarding using those proceeds to restore, as best they can, what they have lost. To do otherwise simply penalizes the Jongewards by relegating them to live on their property now

devoid of trees while at the same time allowing BNSF to escape full responsibility for the damage it caused.

### III. CONCLUSION

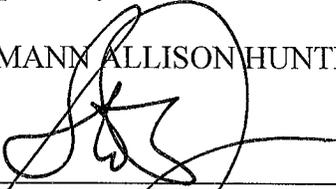
For the foregoing reasons, and those set forth in the Opening Brief, this Court should answer Certified Questions 1 and 2 in the affirmative, and further rule that restoration costs should be awarded without regard to the underlying value of the land.

DATED this 15<sup>th</sup> day of June, 2011.

Respectfully submitted,

EYMANN ALLISON HUNTER JONES P.S.

By:



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APPENDIX

A.C.A. § 18-60-102 (2011)

**18-60-102. Injuring, destroying, or carrying away property of another.**

(a) A person trespassing as follows shall pay a person injured treble the value of a thing damaged, broken, destroyed, or carried away, with costs, if the person shall:

(1) Cut down, injure, destroy, or carry away any tree placed or growing for use or shade or any timber, rails, or wood, standing, being, or growing on the land of another person;

(2) Dig up, quarry, or carry away any stone, ground, clay, turf, mold, fruit, or plants; or

(3) Cut down or carry away, any grass, grain, corn, cotton, tobacco, hemp, or flax, in which he or she has no interest or right, standing or being on any land not his or her own, or shall wilfully break the glass, or any part of it, in any building not his or her own.

(b) If any person trespasses upon land in violation of the provisions of this section and if the land is owned by several joint tenants, tenants in common, coparceners, or other co-owners, then any co-owner who has not given consent to the trespass shall be entitled to treble the value of the thing so damaged, broken, destroyed, or carried away, with costs, the treble damages to be computed according to the amount of the undivided interest of the co-owner.

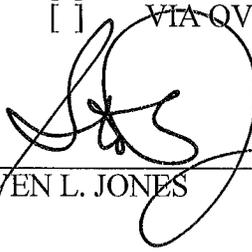
(c) If on the trial of any action brought under the provisions of this section it shall appear that the defendant had probable cause to believe that the land on which the trespass is alleged to have been committed, or that the thing so taken, carried away, injured, or destroyed, was his or her own, the plaintiff in the action shall recover single damages only, with cost.

**HISTORY:** Rev. Stat., ch. 153, § 4; C. & M. Dig., § 10322; Acts 1937, No. 29, § 1; Pope's Dig., § 1299; Acts 1957, No. 88, § 1; A.S.A. 1947, §§ 50-105, 50-107.

**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 15<sup>th</sup> day of June, 2011, I caused to be served a true and correct copy of the *Reply Brief of Plaintiffs*, addressed to the following in the manner described below:

Ausey H. Robnett III	<input type="checkbox"/>	VIA E-MAIL
Paine Hamblen LLP	<input type="checkbox"/>	VIA HAND DELIVERY
717 West Sprague Avenue, #1200	<input checked="" type="checkbox"/>	VIA U.S. MAIL
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