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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 OPENING BRIEF ON CERTIFIED QUESTION

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. CERTIFIED QUESTION PRESENTED FOR REVIEW .....2

III. STATEMENT OF THE CASE.....2

IV. SUMMARY OF ARGUMENT .....3

V. ARGUMENT .....5

    A. The Plain Language of RCW 64.12.030 Does Not  
        Require Human Entry .....5

    B. The Doctrine of *Ejusdem Generis* is Inappropriate  
        Because the Legislature intended "Otherwise  
        Injure" to be Expansive.....8

    C. Washington Case Law Has Abandoned the Distinction  
        Between Direct and Indirect Trespass .....13

    D. Broughton's Proposed Interpretation is Consistent  
        With Virtually Every Other State with Timber  
        Trespass Liability .....19

    E. RCW 64.12.030 Does Not Require Defendant's  
        Conduct to be "Directed at" Plaintiff's Trees or  
        Property .....23

    F. The Punitive Nature of RCW 64.12.030 Does Not  
        Mandate a Contrary Interpretation.....25

    G. Requiring Physical Entry Creates Anomalous Results  
        that Cannot be Squared with Sound Public Policy .....28

IV. CONCLUSION.....30

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<u>Bailey v. Hayden,</u> 65 Wash. 57, 117 P. 720 (1911)	26
<u>Baker v. Newcomb,</u> 621 S.W.2d 535 (Mo. App. 1981)	22
<u>Birchler v. Costello Land Co., Inc.,</u> 133 Wash. 2d 106, 942 P.2d 968 (1997)	13,18, 26
<u>Bradley v. Am. Smelting and Refining Co.,</u> 104 Wash. 2d 677, 709 P.2d 782 (1985)	16
<u>Broughton Lumber Co. v. BNSF Ry Co.,</u> No. 09-1110-KI, 2010 WL 4670479 (D. Or. Nov. 9. 2010)	8
<u>Brown v. Scott Paper Worldwide Co.,</u> 143 Wash. 2d 349, 20 P.3d 921 (2001)	19
<u>Chadwick Farms Owners Ass'n. v. FHC, LLC,</u> 166 Wash. 2d 178, 207 P.3d 1251 (2009)	6
<u>City of Seattle v. State,</u> 136 Wash. 2d 693, 965 P.2d 619 (1998)	9
<u>Colwell v. Smith,</u> 1 Wash.Terr. 92, 1860 WL 2434 (Wash. Terr. 1858)	15
<u>GO2NET, Inc. v. Freeyellow.com, Inc.,</u> 158 Wash. 2d 247, 143 P.3d 590 (2006)	6
<u>Grays Harbor County v. Bay City Lumber Co.,</u> 47 Wash. 2d. 879, 289 P.2d (1955)	26, 27

<u>International Raceway, Inc. v. JDFJ Corp.,</u> 97 Wash. App. 1, 970 P.2d 343 (1999)	16
<u>Jordan v. Stevens Forestry Services, Inc.,</u> 430 So.2d 806 (La. App. 1983)	22
<u>Kelly v. CB&amp;I Constructors, Inc.,</u> 179 Cal. App. 4th 442, 102 Cal. Rptr. 3d 32 (Cal. App. 2d Dist. 2009)	20, 21
<u>Kurth v. Aerial Blades, Inc.,</u> 634 N.W.2d 307 (S.D. 2001)	22
<u>McLouth v. General Tel. Co. of the S.w.,</u> 164 F. Supp. 496 (D. Ark. 1958)	22
<u>McMurray v. Sec. Bank of Lynnwood,</u> 64 Wash.2d 708, 393 P.2d 960 (1964)	9, 10, 11
<u>Meyer v. Burger King Corp.,</u> 144 Wash.2d 160, 26 P.3d 925 (2001)	19
<u>Mock v. Potlach Corp.,</u> 786 F. Supp. 1545 (D. Id. 1992)	21
<u>Osborne v. Hurst,</u> 947 P.2d 1356 (Ak. 1997)	22
<u>Redhead v. Entergy Mississippi, Inc.,</u> 828 So.2d 801 (Miss. App. 2002)	23
<u>Republic Inv. Co. v. Naches Hotel Co.,</u> 190 Wash. 176, 67 P.2d 858 (1937)	11
<u>Seal v. Naches-Selah Irrigation Dist.,</u> 51 Wash.App. 1, 751 P.2d 873 (1988)	24, 25

<u>Silverstreak, Inc. v. Dept. of Labor and Industries,</u> 159 Wash. 2d 868, 154 P.3d 891 (2007)	9, 10
<u>Swall v. Anderson,</u> 60 Cal. App. 2d 825, 141 P.2d 912 (Dist 1, 1943)	21
<u>Worman v. Columbia County,</u> 223 Or. App. 223, 195 P.3d 414 (2008)	22
<u>Wynn v. Earin,</u> 163 Wash. 2d 361, 181 P.3d 806 (2008)	6, 16
<u>Zimmer v. Stephenson,</u> 66 Wash. 2d 477, 403 P.2d 343 (1965)	14, 15
<b>STATUTES</b>	
Cal. Civ. Code § 3346	20, 21
Cal. Civ. Proc. Code § 733	21
ORS 105.810	22
RCW 2.60.010(4)	2
RCW 30.08.020(7)	10
RCW 64.12.010	26
RCW 64.12.030	passim
RCW 64.12.040	passim
<b>OTHER AUTHORITIES</b>	
Certification from United States District Court, District of Oregon, No. CV-09-11-10-KI.	25
WAC 296-127-018(2)(a)	10

**I. INTRODUCTION.**

This case presents the Court with a narrow question of first impression under Washington law in the context of a certified question from the United States District Court for the District of Oregon – whether a plaintiff may recover damages under Washington's "Injury to or removing trees" statute, RCW 64.12.030, where, without physical entry by defendants on plaintiff's property, the admitted negligence of defendants caused a fire that spread onto plaintiff's property and destroyed thousands of trees.

Although plaintiff will, at trial, present evidence that defendants' actions in starting this fire were willful and not causal or involuntary, this Court is not asked to address that factual question. Rather, this Court is asked to declare that fires caused by the tortious acts of a defendant can constitute a trespass under the terms of RCW 64.12.030, regardless of whether the tortfeasor was ever physically present on plaintiff's

damaged property, or whether the tortious acts that caused the fire were directed at plaintiff's trees or property.

**II. CERTIFIED QUESTION PRESENTED FOR REVIEW.**

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 or property?

**III. STATEMENT OF THE CASE.**

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

This is a civil case brought by plaintiff Broughton Lumber Company against defendants BNSF Railway Company and Harsco Corporation.

On September 20, 2007, a fire broke out along a railroad right-of-way following rail grinding operations jointly conducted by defendants on BNSF tracks near Underwood,

Washington. Plaintiff owns 260 acres of property adjoining the railroad right-of-way. The fire spread to plaintiff's property and destroyed trees on the property. No employee or agent of either defendant was physically present on plaintiff's property at any time relevant to the start or spread of the fire or the damage to plaintiff's trees. Defendants have admitted that they were negligent in failing to prevent the spread of the fire from the right-of-way to plaintiff's property.

Plaintiff has asserted a claim for damages under RCW 64.12.030.

#### **IV. SUMMARY OF ARGUMENT.**

The certified question before this Court is narrow. This Court is not asked to determine whether defendants' conduct was "casual or involuntary" under RCW 64.12.040, or even whether defendants' conceded negligent conduct is otherwise sufficient to trigger damages under the timber trespass statute.

The central issue is whether a tortiously caused fire that "otherwise injures" or destroys trees should rightly be among

the harms protected against by RCW 64.12.030. The plain language of the statute provides a clear answer — physical entry by a human being is not required. Such an interpretation is also consistent with Washington's common law trespass jurisprudence, which should guide the interpretation of the term "trespass" as used in RCW 64.12.030. Broughton's proposed interpretation is also consistent with virtually every other state with statutory timber trespass liability.

Nor does RCW 64.12.030 require that a defendant's conduct be "directed" at the plaintiff's trees or property before liability may be imposed under that statute. Rather, the legislature intended that the nature of the trespass — whether the trespass is casual or involuntary — would impact the measure of damages only. That is a factual question for trial, and not one before this Court.

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: : :

V. **ARGUMENT.**

A. **The Plain Language of RCW 64.12.030 Does Not Require Human Entry.**

Washington's timber trespass statute, RCW 64.12.030, provides in relevant 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 therefore, as the case may be.

RCW 64.12.030 (emphases added).<sup>1</sup>

The next section under RCW 64.12.040 provides for single damages in the case of mitigating circumstances, as follows: "If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass

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<sup>1</sup> RCW 64.12.030 was amended in 2009. The version quoted above was in effect in 2007.

was committed was his own . . . judgment shall only be given for single damages."

The goal in construing a statute is to ascertain and give effect to legislative intent. Chadwick Farms Owners Ass'n. v. FHC, LLC, 166 Wash. 2d 178, 186, 207 P.3d 1251, 1255 (2009). In interpreting statutes like RCW 64.12.030, which enhance the damages available in tort actions recognized at common law, this Court is mindful of two principles. First, when interpreting remedial legislation, the Court is "guided by the principle that remedial statutes are liberally construed to suppress the evil and advance the remedy." GO2NET, Inc. v. Freeyellow.com, Inc., 158 Wash. 2d 247, 253, 143 P.3d 590, 593 (2006) (citation omitted). Second, the legislature is presumed to know the area of law in which it is legislating, and a statute will not be construed in a manner that is inconsistent with the common law absent express legislative intent to change the common law or in derogation of it. Wynn v. Earin, 163 Wash. 2d 361, 371, 181 P.3d 806, 811 (2008).

Significantly, nothing in the plain language of RCW 64.12.030 and 64.12.040, read together, requires that in "otherwise injuring" a tree on the land of another, "such trespass" must be committed physically through human entry by the defendant. That text of those statutes is clear: whenever any person shall "otherwise injure" any tree on the land of another person "without lawful authority" that person is liable for such "trespasses" and is subject to treble damages unless the trespasses were casual or involuntary. The statutes at issue reflect a decision by the Washington legislature to deter trespasses that injure trees by imposing treble damages except in circumstances where the trespass was innocent or involuntary. RCW 64.12.030-64.12.040.

Notably, nothing in the text of those statutes require physical entry by the defendant onto the plaintiff's property. Requiring such an element imports new language into RCW 64.12.030 that does not exist and contravenes the purpose of the remedial legislation.

**B. The Doctrine of *Ejusdem Generis* is Inappropriate Because the Legislature intended "Otherwise Injure" to be Expansive.**

Plaintiff anticipates that defendants will contend that the principle of "ejusdem generis" should be applied to the interpretation of RCW 64.12.030. In requiring actual physical entry on Broughton's land as a condition to maintain a timber trespass claim under RCW 64.12.030, the district court employed the principle of "ejusdem generis." See Broughton Lumber Co. v. BNSF Ry Co., No. 09-1110-KI, 2010 WL 4670479, \*2-4 (D. Or. Nov. 9, 2010) (Opinion and Order granting partial summary judgment) (noting that the term "otherwise injure" follows the words "cut down" and "girdle," and concluding that to "otherwise injure" requires *physical presence* on the plaintiff's property to cut down or girdle trees with tools).

Defendants are incorrect, as was the district court, in using this principle of statutory construction to restrict the scope of compensable injury to trees under the statute. The

ejusdem generis rule is to be employed to support the  
"legislative intent in the context of the whole statute and its  
general purpose." City of Seattle v. State, 136 Wash. 2d 693,  
701, 965 P.2d 619, 624 (1998) (citation omitted).

In Silverstreak, Inc. v. Washington State Dept. of Labor  
and Industries, 159 Wash. 2d 868, 884, 154 P.3d 891, 900  
(2007), this Court explained, "[W]e have previously ruled  
ejusdem generis inapplicable to statutes where general words,  
such as '*or otherwise*,' clearly were intended to include  
something more than specific descriptive words preceding."  
Silverstreak, 159 Wash. 2d at 884 (quoting McMurray v. Sec.  
Bank of Lynnwood, 64 Wash. 2d 708, 714, 393 P.2d 960, 963  
(1964)). In other words, where the term "or otherwise" expands  
the reach of a statute, "ejusdem generis does not apply." Id.

In Silverstreak, the Court considered the proper  
interpretation of WAC 296-127-018(2)(a), which applied  
prevailing wages to all workers who deliver materials to public  
works projects and perform any "spreading, leveling, rolling, or

otherwise participate in any incorporation of the materials into the project." Silverstreak, 159 Wash. 2d at 876. The Court held that the court of appeals erred in applying the canon of ejusdem generis to limit the scope of the Prevailing Wage Act's coverage to only those activities *similar* to spreading, leveling or rolling. Instead, the Court held that a more *expansive* reading should control and broadly construed the governing regulations to include end-dump truck drivers. Id. at 884 ("[T]he words 'or otherwise participate' expand the coverage . . . to workers who participate in incorporating materials into the project *in any way* besides the three enumerated.") (emphasis in original).

Similarly, in McMurray v. Sec. Bank of Lynnwood, 64 Wash. 2d 708, 393 P.2d 960 (1964), a state bank's articles of incorporation, which are required by RCW 30.08.020(7), contained a prohibition against mergers after the initial incorporation. During the bank's first 10 years, the articles prohibited, "without prior written approval" of the banking

supervisor, any "sale, conversion, merger, or consolidation" with another banking entity "whether through transfer of stock ownership, sale of assets, or otherwise." The state bank sought to convert into a national bank and argued that under the principle of ejusdem generis, such a conversion was permissible under the "or otherwise" language because the method of conversion was not in the same nature as a stock transfer or sale. McMurray, 64 Wash. 2d at 714. This Court rejected such an interpretation and held that "the words 'or otherwise' were necessary to encompass *all of the various types* of transactions involved in conversions, mergers, or consolidations." Id. (emphasis added); accord Republic Inv. Co. v. Naches Hotel Co., 190 Wash. 176, 182, 67 P.2d 858, 860 (1937) ("[T]he rule of ejusdem generis is merely a rule of construction, and where it clearly appears in a contract or statute that general words were intended to include something more than specific descriptive words preceding, the rule will not be invoked.").

Under RCW 64.12.030, the term "otherwise injure" was intended to *expand* the scope of types of injuries to trees that might be compensable under the statute. Under Silverstreak and McMurray, this would include injury to trees "*in any way*" besides the two enumerated examples of "cutting down" or "girdling," and it should broadly encompass *all of the various other types of injuries* to trees. The term "otherwise injure" was not intended to be limited, but was used in the statute to expand the manner that trees may be injured and give greater protection to landowners.

Requiring physical entry upon land of another by a human being not only contravenes the plain text of the statute, but it also unreasonably limits the scope of the statute when the term "otherwise injure" was intended to be *expansive*. Such an interpretation is out of touch with the modern approach for adjudicating invasions that harm real property and is contrary to this Court's methodology for statutory construction.

C. **Washington Case Law Has Abandoned the Distinction Between Direct and Indirect Trespass.**

Given that the statute provides treble damages for "trespasses," the holdings of common law cases defining what constitutes a "trespass" in the first place (and whether human entry is required) are key in construing the scope of timber trespass liability. That case law follows the modern trend and does not require human entry or physical presence for trespass liability. The Washington Legislature would not have used the word "trespass" in the statute and intended for courts to disregard more than a century of trespass case law. Additionally, this Court has specifically imported the holdings of common law trespass cases in interpreting the availability of emotional distress damages for claims brought under this very same statute, RCW 64.12.030. See Birchler v. Costello Land Company, Inc., 133 Wash. 2d 106, 942 P.2d 968 (1997).

Washington case law recognizes claims for common law trespass where a defendant starts a fire that spreads and

damages adjacent property. In Zimmer v. Stephenson, 66 Wash. 2d 477, 403 P.2d 343 (1965), the plaintiff owned a field of ripe wheat adjoining the defendant's property. On a hot summer day in July, the defendant decided to plow a fireguard around the edges of his field with an industrial Caterpillar D-6 tractor, which was not designed for farm work. The wind was allegedly blowing towards the plaintiff's land. The defendant was operating the D-6 without a spark arrestor in windy, dry conditions, and he failed to observe other safety precautions. While plowing, the defendant's equipment caused a fire that spread and ignited the plaintiff's wheat crop. The trial court entered judgment for the defendant, but this Court reversed and held that the plaintiff had stated a claim for common law trespass:

The action of the defendant, which plaintiff alleges produced the loss claimed, was not simply the act of plowing a fireguard. It was the act of plowing a fireguard with an improperly equipped spark-emitting tractor on a hot, dry, windy day in close proximity to a field of ripe inflammable wheat. Plaintiff thus alleged a wrongful and affirmative

act, not a culpable and passive omission from which the fire complained of indirectly and immediately resulted.

Zimmer, 66 Wash. 2d at 480.

The Court explained that "[i]f plaintiff's allegations be true, *defendant's action was as wrongful and direct as though he had stood in his field and thrown a burning coal into plaintiff's field*, and the results as immediate." Id. at 480-81 (emphasis added).

Zimmer is one of Washington's leading common law trespass cases, and its rationale that human entry onto the land of another is not a prima facie element of "trespass" liability is equally applicable to RCW 64.12.030. As noted above, the timber trespass statute, RCW 64.12.030, provides that "persons committing such *trespasses*" are liable for treble damages. In enacting that language, the Washington legislature was unquestionably aware of more than a century of common law trespass decisions. See, e.g., Colwell v. Smith, 1 Wash.Terr. 92, 1860 WL 2434 (Wash. Terr. 1858) (person claiming land

under preemption laws will be protected from trespass by another).

Absent express legislative intent to change the common law, a statute will not be construed in a manner that is inconsistent with the common law. Wynn v. Earin, 163 Wash. 2d 361, 371, 181 P.3d 806, 811 (2008). By using the common law word "trespass" in RCW 64.12.030, the legislature plainly understood the concept in its ordinary sense, and, as codified, intended the term to have even broader, more general application. JDFJ Corp. v. International Raceway, Inc., 97 Wash. App. 1, 3, 6-7, 970 P.2d 343 (1999) (timber trespass statute "is not limited simply to situations equivalent to a common law trespass").

The Court's later decision in Bradley v. American Smelting and Refining Company, 104 Wash. 2d 677, 709 P.2d 782 (Wash. 1985), confirmed that a plaintiff is not required to establish physical human entry in order to prove an indirect invasion of land. In Bradley, the Court held that a claim for

trespass could be maintained in connection with a copper smelter's airborne deposits of microscopic particles that migrated some four miles away onto the plaintiff's land.

Bradley, 104 Wash. 2d at 679. The Court explained:

Under the modern theory of trespass, the law presently allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, hence, only a nuisance. In order to recover in trespass for this type of invasion [i.e., the asphalt piled in such a way as to run onto plaintiff's property, or the pollution emitting from a defendant's smoke stack, such as in the present case], a plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the *res*.

Bradley, 104 Wash. 2d at 691.

In the case at bar, the district court declined to follow the holding of Zimmer and other common law trespass cases such as Bradley, which support the notion that physical entry by a person is not a prerequisite for trespass liability. Yet, as this Court has held, seeking guidance from common law trespass

holdings is precisely the right approach for interpreting RCW 64.12.030.

In Birchler v. Costello Land Company, Inc., 133 Wash. 2d 106, 942 P.2d 968 (1997), the Court examined whether Washington's timber trespass statute, RCW 64.12.030, should be construed to allow the recovery of emotional distress damages, which was an issue of first impression. Relying upon the progression of Washington's common law trespass decisions, this Court concluded that a "hundred-year succession of Washington cases supports damages for emotional distress arising from intentional torts such as trespass generally." This Court thus held that emotional distress damages are available under a statutory timber trespass claim. Birchler, 133 Wash. 2d at 117. This Court reasoned that the timber trespass statute sounds in tort, that trespass is an intentional tort, that damages should be "liberally construed" upon proof of an intentional tort, and that to allow them is consistent with the modern rule. Id. at 115-116.

In light of Zimmer and Birchler, RCW 64.12.030 does not require physical presence of a person on the land of another to commit "trespass." Birchler further illustrates that it is entirely appropriate for this Court to seek guidance from common law trespass cases in interpreting the scope of what may constitute a "trespass" under the statute. In light of Washington's common law trespass jurisprudence, human, physical entry is not required.

**D. Broughton's Proposed Interpretation is Consistent with Virtually Every Other State with Timber Trespass Liability.**

State and federal courts outside of Washington have all but unanimously interpreted their analogous timber trespass statutes to authorize enhanced damages for harm caused by fire and other "indirect" injuries to trees. Such cases can provide persuasive authority to assist in this Court's analysis. Meyer v. Burger King Corp., 144 Wash. 2d 160, 166-67, 26 P.3d 925, 928-29 (2001); Brown v. Scott Paper Worldwide Co., 143 Wash. 2d 349, 359, 20 P.3d 921, 926 (2001).

For example, in Kelly v. CB&I Constructors, Inc., 179 Cal. App. 4th 442, 102 Cal. Rptr. 3d 32 (Cal. App. 2d Dist. 2009), the California Court of Appeals held that fire damage constitutes an "injury" to trees as that term is used in California's timber trespass statute, without requiring the defendant to be "physically present" on the plaintiff's property. There, the defendant was erecting a municipal water tank approximately 15 miles from the plaintiff's property. Id. at 448. Sparks ignited a large brush fire that spread over 20,000 acres, including the plaintiff's property. Id. The trial court awarded the plaintiff enhanced damages under Cal. Civ. Code § 3346, which provides for treble or double damages for "wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof[.]" Id. at 450. Recognizing that it is "well established" that the spread of fire onto the land of another constitutes a trespass, the California Court of Appeals held that "under any reasonable interpretation," fire damage constitutes an "injury" to trees as that term is used in the statute. Id. at 463.

Accordingly, the Kelly court affirmed the trial court's award of enhanced damages under California's timber trespass statute.<sup>2</sup>

Id.

In addition to California, the overwhelming majority of courts in other jurisdictions have similarly held that a claim for enhanced damages under the state's timber trespass statute can be based on an injury to trees even if the defendant is not physically present on the plaintiff's property. See, e.g., Mock v. Potlach Corp., 786 F. Supp. 1545, 1549 (D. Id. 1992) (recognizing that Idaho timber trespass statute defines "entry" to include "going upon or over real property, either in person, or by causing any object, substance or force to go upon real

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<sup>2</sup> The phrasing of Cal. Civ. Code § 3346 is substantially identical to Washington's timber trespass statute. Further, California's procedural statute governing damages for timber trespass, Cal. Civ. Proc. Code § 733, is virtually identical to RCW 64.12.030 and is construed consistently with Cal. Civ. Code § 3346. Swall v. Anderson, 60 Cal. App. 2d 825, 141 P.2d 912 (Cal. App. Dist 1, 1943). Accordingly, the California Court of Appeals' interpretation of Cal. Civ. Code § 3346 is useful to assist this Court in interpreting RCW 64.12.030. Brown, 143 Wash. 2d at 359.

property"); Osborne v. Hurst, 947 P.2d 1356 (Ak. 1997) (implicitly accepting fire as actionable under timber trespass statute, but reversing because there was no evidence that fire was intentionally started); Jordan v. Stevens Forestry Services, Inc., 430 So.2d 806 (La. App. 1983) (same); Baker v. Newcomb, 621 S.W.2d 535 (Mo. App. 1981) (aerial over-seeding of wheat crop with grasses constitutes actionable timber trespass); Worman v. Columbia County, 223 Or. App. 223, 195 P.3d 414 (Or. App. 2008) (recognizing that the spraying of herbicides on trees and shrubs is a "deliberate trespass such as involved in cutting standing timber" under ORS 105.810); Kurth v. Aerial Blades, Inc., 634 N.W.2d 307 (S.D. 2001) (recognizing timber trespass action for aerial spraying of herbicides, and noting that timber trespass statute protects against "any injury to . . . trees," not "the unlawful entry onto one's land"). But see McLouth v. General Telephone Co. of the Southwest, 164 F. Supp. 496, 500-01 (W.D. Ark. 1958) (ruling that intentional spraying of herbicide

did not constitute timber trespass because separate statute referred to "injuring" ornamental trees and shrubs, and applying treble damages under companion statute); Redhead v. Entergy Mississippi, Inc., 828 So.2d 801 (Miss. App. 2002) (holding without analysis that fire did not constitute "cut down, deaden, destroy, or take away" trees as used in Mississippi's timber trespass statute).

As set forth above, the vast majority of jurisdictions that have addressed the issue have ruled consistently with plaintiff's interpretation of RCW 64.12.030.

**E. RCW 64.12.030 Does Not Require Defendant's Conduct to be "Directed at" Plaintiff's Trees or Property.**

The plain language of Washington's timber trespass statute reveals the legislature's intent to impose liability under the statute whether or not a defendant's conduct is "directed at" plaintiff's trees or property. RCW 64.12.030 imposes liability on a defendant if they cut down, girdle, or otherwise injure trees on the land of another person by committing a trespass "without

lawful authority." The text of the statute contains no requirement that the trespass be "directed at" the plaintiff's property or trees on their property.

Considering the statute in context with RCW 64.12.040 offers even further evidence of the legislature's intent. RCW 64.12.040 provides that if the trespass was casual or involuntary, or if the defendant had probable cause to believe that the land on which they trespassed was their own, then the defendant is subject to only single damages. Thus, the legislature made an important policy decision that the nature of the trespass would impact only the measure of *damages* imposed, not whether liability should be imposed in the first place.

Seal v. Naches-Selah Irrigation Dist., 51 Wash. App. 1, 751 P.2d 873 (1988), which defendants relied on in the district court below, does not provide otherwise. In Seal, the Washington Court of Appeals did not reach either question presented in this case – whether RCW 64.12.030 requires

physical presence on plaintiff's property or conduct that is directed at plaintiff's property or trees. Seal did not reach the "injury" question because there was no Washington authority on point, and the "directed at" question was not presented to it under the context of the timber trespass statute. Accordingly, as the district court noted in its certification, Seal does not control the question of state law certified to this Court. See Certification from United States District Court, District of Oregon, No. CV-09-1110-KI.

F. **The Punitive Nature of RCW 64.12.030 Does Not Mandate a Contrary Interpretation.**

Broughton also anticipates that defendants will argue, as they did before the federal district court below, that because the timber trespass statute is punitive, it should be interpreted "narrowly." Although several reported Washington decisions make that remark, the narrow interpretation statement relates to the "willful" element of the statute, which again applies to the imposition of treble *damages*, and not the liability aspect of

timber trespass under RCW 64.12.010. The imposition of treble versus single damages is not before the Court on this certified question.

The origin for the statement that RCW 64.12.030 should be construed narrowly stems from three Washington cases. In Birchler v. Castello Land Company, Inc., 133 Wash. 2d 106, 942 P.2d 968 (1997), the Court noted that the "*treble damage remedy* is available when the trespass is 'willful,' because if the trespass is 'casual or involuntary' or based on a mistake and belief of ownership of the land, treble damages are not available" as provided under RCW 64.12.040 (emphasis added). Birchler, 133 Wash. 2d. at 110. In Bailey v. Hayden, 65 Wash. 57, 61, 117 P. 720, 721 (1911), the Court noted that as a statute penal in nature, it should be "strictly construed," but the Court did not otherwise explain the reach of the statute in forbidding conduct. However, the Court did explain the scope of the statute in Gray's Harbor County v. Bay City Lumber, Co., 47 Wash. 2d. 879, 886, 289 P.2d 975, 980 (1955).

In Gray's Harbor, the Court explained the distinction between the imposition of punitive or exemplary damages in civil actions and damages intended to simply compensate. In addressing the reach of the timber trespass statute, the Court stated:

Because the rule allowing a *higher measure of damages* in cases of wilful conversion is in conflict with our frequently expressed policy with regard to punitive damages, it should be strictly limited in its application to those situations in which the *mala fides* of the defendant's act is proven by a preponderance of the evidence.

Gray's Harbor, 47 Wash. 2d at 886 (first emphasis added).

Notably, the authority cited for the proposition that the timber trespass statute is to be interpreted narrowly is aimed at the imposition of a higher measure of damages, which is not before the Court for consideration in this case. The narrow issue before the Court is whether human entry or conduct directed at plaintiff's property is required to impose *liability* under RCW 64.12.030. Defendants, if they choose, may present evidence at trial that such timber trespass was "casual or

involuntary" as a mitigation measure under RCW 64.12.040.

**G. Requiring Physical Entry Creates Anomalous Results that Cannot be Squared with Sound Public Policy.**

Should this Court construe RCW 64.12.030 as narrowly as defendants seek, arbitrary results would occur in determining a defendant's liability under the timber trespass statute.

There are several illustrations that exemplify why this Court should not limit liability under the timber trespass statute by requiring physical entry. For example, a defendant might set fire on its own deeded right-of-way and know that the wind is likely to drive the fire across the property of adjacent landowners. Under defendants' narrow interpretation of the statute, there would be no liability for timber trespass damages caused to the adjacent landowners' property because there was no physical entry onto the adjacent land, even if the defendant's intent *was* to harm the property.

Or, perhaps a defendant has an easement over a landowner's property and recklessly starts a fire within that

easement by knowingly conducting rail grinding without operational fire prevention and suppression equipment. The fire occurs in hot, dry, and windy conditions and the fire spreads onto the property of three adjacent landowners. Again, under defendants' narrow interpretation of RCW 64.12.030, there is only potential liability to one landowner who gave the easement because of physical entry on their property. The three adjacent landowners could not assert a claim for timber trespass.

Finally, consider a defendant who, inches from their property line, shoots fireworks into a neighboring tree farm intending to start a fire. Under defendant's interpretation of RCW 64.12.030, the plaintiff could not maintain an action for timber trespass, despite this intentional destruction of trees, because the fireworks do not constitute human, physical entry.

It makes no sense for tortious actors to avoid the impact of the timber trespass statute as to some landowners and not others based simply on physical entry onto the land. Such an

anomaly is contrary to both Washington case law and the modern approach to intentional torts. When a defendant causes damage to landowners, such an arbitrary distinction should not cut off liability and should not leave injured plaintiffs without a timber trespass remedy.

**VI. 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 20th day of May, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2011, I served the foregoing Appellants' Opening Brief, 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
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by the following indicated method(s):

- by **mailing** a full, true and correct copy thereof in a sealed first-class postage prepaid envelope, addressed to the foregoing attorney at the last known office address of the attorney, and deposited with the United States Post Office at Portland, Oregon 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