SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON IN	)	NO. 85781-4
JASON and LAURA JONGEWARD, husband and wife; GORDON and JEANNIE JONGEWARD, husband and wife and as trustees of the Jongeward Family Trust,	)	EN BANC
Plaintiffs,	)	Filed May 31, 2012
v.	)	
BNSF RAILWAY COMPANY, commonly known as THE BURLINGTON NORTHERN SANTA FE RAILWAY, a Delaware corporation doing business in the state of Washington,	)	
Defendant.	)	

FAIRHURST, J.—This case[1] requires us to construe former RCW 64.12.030

(Code of 1881, § 602), the "timber trespass statute." *Birchler v. Castello Land Co.,* 133 Wn.2d 106, 114, 942 P.2d 968 (1997). Plaintiffs Jason and Laura Jongeward, husband and wife, and Gordon and Jeannie Jongeward, husband and wife, and as trustees of the Jongeward family trust (hereinafter collectively referred to as Jongeward) asserted a timber trespass claim against defendant BNSF Railway Company in the United States District Court for the Eastern District of Washington, after a fire spread from BNSF's property and destroyed Jongeward's trees. The court certified to us three questions:[2]

> QUESTION NO. [1]: 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 [former] RCW 64.12.030?
>
> QUESTION NO. [2]: Can a Plaintiff recover damages under [former] RCW 64.12.030 for trees damaged or destroyed by a Defendant who never has been physically present on Plaintiff's property?
>
> QUESTION NO. 3: Must damages awarded under [former] RCW 64.12.030 be reasonable in relation to the value of the underlying real property?

Certification to Wash. State Supreme Ct. (Certification) at 3.

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[1]*Jongeward* is a companion case to *Broughton Lumber Co. v. BNSF Railway*, No. 85905-1 (Wash. May 31, 2012).

[2]We have reordered the questions. *See Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999).

I. FACTUAL AND PROCEDURAL HISTORY

The parties stipulated to the following facts that constitute the record under RCW 2.60.010(4):

> This is a civil case brought by [Jongeward] against Defendant BNSF.
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> 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. [Jongeward] own[s] property located nearby but not adjoining the railroad right-of-way. The fire spread to [Jongeward's] property and destroyed about 4000 trees on the property. No employee or agent of BNSF was physically on [Jongeward's] property at any time relevant to the start or spread of the fire or the damage to [Jongeward's] trees. The Court has determined that BNSF negligently caused the fire that destroyed [Jongeward's] trees.
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> [Jongeward] [has] asserted a claim for damages under [former] RCW 64.12.030.

Certification at 2.

II. ANALYSIS

Certified questions from federal court are questions of law that we review de novo. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 799, 231 P.3d 166 (2010). We consider the legal issues not in the abstract but based on the certified record provided by the federal court. *Id.* (citing RCW 2.60.030(2)).

> QUESTION NO. [1]: 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 [former] RCW 64.12.030?

Certification at 3.

This question requires us to determine whether the timber trespass statute applies to BNSF's conduct. The meaning of a statute is a question of law we review de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). In interpreting a statute, our fundamental objective is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

The territorial legislature enacted the timber trespass statute in 1869 to (1) punish a voluntary offender, (2) provide treble damages, and (3) "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." Laws of Wash. Terr. 1869, ch. XLVIII, § 556, at 143; *Guay v. Wash. Natural Gas Co.*, 62 Wn.2d 473, 476, 383 P.2d 296 (1963). The statute contains two relevant sections. Former RCW 64.12.030 provides, "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 persons committing such trespasses," the prevailing plaintiff is entitled to treble damages.[3] RCW 64.12.040 provides, "If upon trial of such action

[3]This is the text of former RCW 64.12.030 as it existed at the time of the fire. It reads in its entirety:

> Whenever any person shall cut down, girdle or otherwise injure, or carry

it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his or her own, . . . judgment shall only be given for single damages."

In 1877, the territorial legislature reenacted both former RCW 64.12.030 and RCW 64.12.040, retaining the original language, and the timber trespass statute became the law of Washington at statehood. *See* Laws of Wash. Terr. 1877, ch. XLVIII, §§ 607-08, at 125. The text remained unchanged until 2009, when the legislature amended former RCW 64.12.030 to clarify that treble damages are available for the unlawful cutting of Christmas trees.[4] Laws of 2009, ch. 349, § 4. As a result of this amendment, a comma was inserted between the words "girdle" and "or." *Id.*

Because former RCW 64.12.030 and RCW 64.12.040 relate to the same

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

[4]The current version of RCW 64.12.030 reads:

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

(Reviser's note omitted.)

subject matter, they must be construed together. *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). Former RCW 64.12.030 creates liability and imposes mandatory treble damages when a defendant cuts down, girdles or otherwise injures, or carries off a plaintiff's trees. RCW 64.12.040 serves as a mitigation provision. *See, e.g., Smith v. Shiflett*, 66 Wn.2d 462, 463, 403 P.2d 364 (1965) ("This is another case of trespassing loggers cutting timber and seeking to avoid the statutory treble damages by urging that they did not know they were trespassing." (Footnote omitted.)). "Once a trespass is established [under former 64.12.030], the burden shifts to the defendant to show it was not willful or reckless, but rather was casual or involuntary, or done with probable cause to believe the land was his own." *Hill v. Cox,* 110 Wn. App. 394, 406, 41 P.3d 495 (2002) (citing *Seattle-First Nat'l Bank v. Brommers,* 89 Wn.2d 190, 197-98, 570 P.2d 1035 (1977)). To determine whether BNSF committed a statutory trespass in this case, we consider the statute's plain meaning, canons of construction, and Washington case law.[5]

[5]The dissent worries that our approach contradicts Oregon, Alaska, and New York law. But because Oregon and New York have markedly different statutes, and all three states have markedly different philosophies, our approach *should be* different. For example, while Oregon's statute was originally identical to ours, it now applies "whenever any person . . . willfully injures or severs from the land of another any produce thereof" and provides double damages even when a trespass is casual or involuntary. Or. Rev. Stat. §§ 105.810(1), .815. Because Oregon's legislature broadened its statute and our legislature did not broaden ours, we should construe our statute more narrowly. Further, while Oregon, Alaska, and New York each allow general recovery of punitive damages, *see* Or. Rev. Stat. § 31.730; Alaska Stat. 09.17.020; *Welch v. Mr. Christmas Inc.*, 57 N.Y.2d 143, 454 N.Y.S.2d 971, 440 N.E.2d 1317 (1982), Washington

A. Plain Meaning Analysis

If a statute's meaning is plain on its face, we must "give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wn.2d at 9-10. The plain meaning "is discerned from all that the Legislature has said in the statute." *Id.* at 11. Plain meaning may also be discerned from "related statutes which disclose legislative intent about the provision in question." *Id.* An examination of related statutes aids our plain meaning analysis "'because legislators enact legislation in light of existing statutes.'" *Id.* (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 48A:16, at 809-10 (6th ed. 2000)).

1. *Statutory text*

As noted above, former RCW 64.12.030 applies when a defendant shall "girdle or otherwise injure" a plaintiff's trees. Because the adverb "otherwise" is defined as "in a different way or manner," Jongeward contends that the phrase "otherwise injure" clearly functions as its own distinct category of wrongful action that encompasses a defendant's failure to prevent the spread of a fire. Webster's Third New International Dictionary 1598 (2002). According to Jongeward, the meaning of the statute is plain on its face.

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expressly prohibits punitive damages as a violation of public policy unless explicitly authorized by statute. *Barr v. Interbay Citizens Bank of Tampa, Fla.,* 96 Wn.2d 692, 635 P.2d 441, 649 P.2d 827 (1982); *see also Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P.1072 (1891). The law of other states is simply not as persuasive as the dissent suggests.

But Jongeward's plain meaning analysis begins and ends with the phrase "otherwise injure." When read in isolation, the phrase "otherwise injure" could conceivably be read to encompass a defendant's failure to prevent a fire from spreading. This reading is too limited, however, because a statute's plain meaning must be "discerned from *all* that the Legislature has said in the statute," not just two words. *Campbell & Gwinn*, 146 Wn.2d at 11 (emphasis added).

The legislature used the term "trespass/trespasses" three times to describe the conduct that triggers statutory liability. A proper plain meaning analysis therefore begins with the term "trespass." Our analysis of the term is informed by the common law. *See Suter v. Wenatchee Water Power Co.,* 35 Wash. 1, 6, 76 P. 298 (1904) ("'[I]t is plain that we are bound to consult the common law, and the classification of common-law actions, for the proper determination as to what the law-making power of this state had in mind when using the [term] "trespass."'" (quoting *Hicks v. Drew*, 117 Cal. 305, 308, 49 P. 189 (1897))). A subsequent change in the common law does not impact our statutory analysis. *See Spokane Methodist Homes, Inc. v. Dep't of Labor & Indus.,* 81 Wn.2d 283, 287, 501 P.2d 589 (1972) (Just because "the court makes a change in the common law, [a] statute which was enacted with the existing rule of common law in mind, is [not] automatically amended to conform to the new rule adopted by the court."). We

therefore do not consider the modern view of trespass, but the historical view. *See Bloomer v. Todd*, 3 Wash. Terr. 599, 615, 19 P. 135 (1888) ("The ordinary use of words at the time when used, and the meaning adopted at that time, is usually the best guide for ascertaining legislative intent.").

When the timber trespass statute was enacted, trespass[6] was classified into "two sorts:"[7] trespass on the case and trespass *vi et armis*. VI The Law-Dictionary 288 (1811). Trespass on the case was an act that was not immediately injurious or a culpable omission. *See, e.g., Stenberg v. Pac. Power & Light Co.,* 104 Wn.2d 710, 715, 709 P.2d 793 (1985). The plaintiff's resulting injury was indirect—consequential or collateral. *Id.* at 716. Trespass *vi et armis*, most often referred to as simply trespass, was "[a]ny unlawful act committed with violence, actual or implied, to the person, property, or rights of another." 2 Judge Bouvier's Law Dictionary 608 (12th ed. 1867). Trespass was also described as a "direct

[6]"The writ of trespass was the original writ most commonly resorted to as a precedent." 1 Judge Bouvier's Law Dictionary 243 (12th ed. 1867). It originally supposed "a wrong to be done with force." VI The Law-Dictionary 288 (1811). But "in process of time," trespass was "extended as to include every species of wrong causing an injury . . . apparently for the purpose of enabling an action on the case to be brought in the King's Bench." 1 Bouvier's, *supra,* at 243. Trespass was then used to signify "[a]ny misfeasance or act of one man whereby another is injuriously treated or damnified." 2 Bouvier's, *supra*, at 608.

[7]There were only two sorts, but there were many forms. For example, trespass against realty, or trespass *quare clausum fregit*, was used "to recover damages for injuries to the realty consequent upon entry without right upon the plaintiff's land." 2 Bouvier's, *supra*, at 610. Such trespass was done "*by breaking the close*." *Id.* at 609. But this type of limited trespass was clearly not intended here because the legislature used the phrase "such trespasses" to refer to the verbs "cut down, girdle or otherwise injure, or carry off." Former RCW 64.12.030.

trespass"—an act "'done which is in itself an *immediate* injury to another's person or property.'" *Welch v. Seattle & Mont. Ry.*, 56 Wash. 97, 99, 105 P. 166 (1909) (quoting 3 Blackstone Commentaries 123 (Lewis' ed. 1902)). The plaintiff's resulting injury was "'immediate, and not consequential.'" *Suter,* 35 Wash. at 7 (quoting *Roundtree v. Brantley*, 34 Ala. 544, 554 (1859)).

Because case and trespass actions triggered different statutes of limitations,[8] the direct/indirect distinction was often litigated. S*ee, e.g., id.* ("'It is argued that trespass is a comprehensive term, which includes trespass on the case; and that this cause of action is a trespass on the case to real or personal property, which is embraced in the section under the term "trespass."'" (quoting *Roundtree*, 34 Ala. at 554)). Over time, "trespass on the case" "lost the peculiar character of a technical trespass." 1 Bouvier's, *supra*, at 243. "[T]he name was to a great extent dropped, and actions of this character came to be known as actions on the case." *Id.*

Applying these principles here, the territorial legislature might conceivably have used the term "trespass" to mean any misfeasance that results in injury to a

[8]Trespass *vi et armis* triggered the three-year statute of limitations, while trespass on the case triggered the two-year "catchall" statute of limitations. *Stenberg,* 104 Wn.2d at 715. For example, the defendant in *Suter* owned and operated an irrigation canal near the plaintiffs' property in Chelan County. Waters overflowed the canal and washed over the plaintiffs' land, cutting deep and wide ditches. Because the plaintiffs did not file their complaint until after the two-year statute of limitations had run, the issue was whether the defendant was potentially liable in trespass on the case. We applied the two-year statute of limitations, holding that the damage was consequential and no trespass. We later eliminated the direct/indirect distinction in *Stenberg* to "return to the original understanding" of the statutes of limitations. 104 Wn.2d at 721.

plaintiff's trees. But based on the common understanding of the term "trespass" in 1869, it seems more likely that the legislature used the term "trespass" to mean direct acts causing immediate injuries, not culpable omissions causing collateral damage. *See* 2 Bouvier's, *supra*, at 609 (The term "trespass" was "used oftener" in a restricted signification.); *see also Rayonier, Inc. v. Polson*, 400 F.2d 909, 918 n.11 (9th Cir. 1968) (The "legislature clearly had particular evils in mind when it enacted the treble damage statute.").[9]

The legislature's use of verbs also suggests that the statute applies to direct acts that cause immediate injury, not consequential damage. "Cut" means "to make a gash, incision, or notch" in "any body by an edged instrument, either by striking, as with an ax, or by sawing or rubbing."[1] An American Dictionary of the English

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[9]We also note that the timber trespass sounds in tort and trespass is an intentional tort. *Birchler*, 133 Wn.2d at 115 (citing *Tacoma Mill Co. v. Perry*, 40 Wash. 44, 47, 82 P. 140 (1905)). Contrary to the dissent's argument, the legislature's use of the phrase "casual and involuntary" does not transform an action for trespass into an action for negligence. RCW 64.12.040. An act is involuntary when it "is performed with constraint (*q.v.*), or with repugnance, or without the will to do it. An action is involuntary, then, which is performed under duress." 1 Bouvier's, *supra*, at 747. An "involuntary trespass" is not negligence; it is still a trespass. *Hawley v. Sharley*, 40 Wn.2d 47, 50, 240 P.2d 557 (1952). An act is "casual" when it "happens accidentally, or is brought about by causes unknown; fortuitous; the result of chance." Black's Law Dictionary 178 (1891). An accidental trespass is also not negligence; it is still a trespass. *Rogers v. Kangley Timber Co.*, 74 Wash. 48, 54, 132 P. 731 (1913). And an "[a]ccident may in some cases excuse a trespass." 2 Bouvier's, *supra*, at 609. This appears to be the intent of the legislature; by creating RCW 64.12.040 as a mitigation provision, it permitted defendants to argue that their trespasses were involuntary, accidental, or accomplished under a mistaken belief of ownership.

[1]"[W]hen an entire separation of the body is intended, it is usually followed by . . . *down* . . . or other word denoting such severance." An American Dictionary of the English Language 295 (1853).

Language 295 (1853). "Girdle" means "to make a circular incision, like a belt, through the bark and alburnum of a tree, to kill it." *Id.* at 503. "Carry off" means "to remove to a distance." *Id.* at 177. Because these verbs describe direct acts, which formerly would have been characterized as trespass *vi et armis*, we cannot conclude that the legislature intended the statute to penalize indirect acts or omissions, particularly in light of the treble damages provision.

2. *The fire act*

Because a statute's plain meaning may also be determined from related statutes, BNSF contends that the fire act, RCW 4.24.040-.060, is relevant to our analysis. According to BNSF, the fire act precludes application of the timber trespass statute to negligently set fires.

The fire act was originally enacted in 1877 and is now codified as RCW 4.24.040-.060. It creates a cause of "action on the case" against a defendant who permits a fire to spread and damage a plaintiff's property. *See* Laws of Wash. Terr. 1877, § 3 at 300; Code of 1881, § 1226; Rem. Rev. Stat. § 5647. The fire act applies when a defendant "for any lawful purpose kindle[s] a fire upon his or her own land" but fails to take "such care of it to prevent it from spreading and doing damage to other persons' property." RCW 4.24.040. The fire act also expressly preserves "[t]he common law right to an action for damages done by fires." RCW

4.24.060. Both the statutory claim under RCW 4.24.040 (for fires kindled "for any lawful purpose") and the common law claim preserved by RCW 4.24.060 (for "damages done by fires") allow only the recovery of single compensatory damages.

But the fire act is only marginally helpful to our analysis. The territorial legislature could not have enacted the timber trespass statute in light of the fire act because the timber trespass statute predates the fire act. Further, the fire act does not apply in this case.[11] However, in a broad sense, the fire act does demonstrate that the legislature intended to impose liability for only single compensatory damages when property is destroyed by fire. *See, e.g., N. Bend Lumber Co. v. Chi., M. & P.S. Ry.,* 76 Wash. 232, 234, 135 P. 1017 (1913) (jury properly instructed as to fire act after a fire intentionally started on a railroad company's right of way, spread to plaintiff's property, and destroyed plaintiff's timber); *Burnett v. Newcomb*, 126 Wash. 192, 217 P. 1017 (1923) (fire act imposes liability where defendant starts a fire to destroy weeds on his property but negligently allows fire to spread and damage plaintiff's merchantable timber). It also demonstrates that the legislature intended fire damage to be recoverable through an "action on the case," rather than through a direct trespass action.[12] It also demonstrates that Jongeward

[11]*See Jordan v. Welch*, 61 Wash. 569, 112 P. 656 (1911). The *Jordan* defendant, a railway company, negligently permitted its engine to ignite a fire that spread and damaged the plaintiff's property. *Id*. at 570. The action was not within the terms of the fire act because the defendant did not purposely kindle the fire. *Id*. at 573.

[12]The legislature's decision to include the case language in the fire act does not

may sue BNSF under the common law.

The plain meaning of the timber trespass statute cannot be dispositively determined from the text of the statute or the fire act. The phrase "otherwise injure" could conceivably be read to encompass the defendant's failure to prevent the spread of a fire. But the legislature's use of the word "trespass," as understood at the time, strongly suggests that the legislature intended to punish only direct trespasses causing immediate injury, not culpable omissions causing collateral damage. And while the fire act suggests that the legislature intended to impose only single compensatory damages when property is damaged by fire, the fire act does not conclusively preclude application of the timber trespass statute to negligently set fires.

B. Interpretative Aids

If a statute remains ambiguous after a plain meaning analysis, it is appropriate to resort to interpretive aids, including canons of construction and case law. *Campbell & Gwinn*, 146 Wn.2d at 12.

1. *Canons of construction*

The timber trespass "statute is penal in its nature, not merely remedial. As

demonstrate that the legislature purposely omitted the case language from the timber trespass statute. However, it does suggest that the legislature was aware of the direct/indirect distinction in the common law and knew how to use it to create statutory liability.

such it should be strictly construed."[13] *Bailey v. Hayden*, 65 Wash. 57, 61, 117 P. 720 (1911); *accord Birchler,* 133 Wn.2d at 110; *Grays Harbor County v. Bay City Lumber Co.,* 47 Wn.2d 879, 886, 289 P.2d 975 (1955); *Gardner v. Lovegren*, 27 Wash. 356, 362, 67 P. 615 (1902). Although Jongeward urges us to "remain mindful of the purposes of the provision when engaging in such construction," a strict construction suggests that BNSF should not be subject to the severe penalty of treble damages without clear evidence that it violated the statute. Opening Br. of Pls. at 5.

Under the principle of noscitur a sociis, "a single word in a statute should not be read in isolation." *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Instead, "'the meaning of words may be indicated or controlled by those with which they are associated.'" *Id.* (internal quotation marks omitted) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)). The statutory

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[13]The dissent improperly suggests that the statute is not penal "[w]hen only single damages are in play." Dissent at 14. But under the plain language of the statute, treble damages are *always* in play, because every defendant is potentially liable for treble damages. *See, e.g., Shiflett*, 66 Wn.2d at 464-65 ("It is clear that treble damages will be imposed upon trespassers cutting timber under RCW 64.12.030, unless those trespassing exculpate themselves under the provisions of RCW 64.12.040."). As noted above, the burden is on the defendant to show mitigating circumstances. *See, e.g., Hill*, 110 Wn. App. at 406 ("'Defendant Cox has failed to bring himself within the mitigation provision of the state timber trespass statute, RCW 64.12.040.'" (quoting Clerk's Papers at 692)). Because a plaintiff may not bring an action directly under RCW 64.12.040, the statute cannot reasonably be divided into a penal portion and a remedial portion.

phrase "otherwise injure" must therefore be read in conjunction with the other verbs—cut down, girdle, and carry off. Because each of these verbs connotes direct action, this canon suggests that the timber trespass statute does not apply when a defendant fails to prevent the spread of a fire.

Further, a court must not interpret a statute in any way that renders any portion meaningless or superfluous. *Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001). Although Jongeward contends that a narrow reading of the statute would strip all common sense meaning from the phrase "otherwise injure," the phrase has a separate meaning if it encompasses acts that are similar to the word "girdle," such as spiking or poisoning. Further, if the legislature used the phrase "otherwise injure" to encompass every conceivable act or omission that collaterally injures trees, the terms "cut down," "girdle," and "carry off" would have no separate meaning and would be rendered superfluous.

Finally, "we employ traditional rules of grammar in discerning the plain language of a statute." *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). According to Jongeward, the 2009 punctuation change is further evidence that the legislature intended the phrase "otherwise injure" to serve as a separate and distinct category of wrongful action.

But Jongeward finds significance where none exists. First, the 2009

grammatical change makes the statute consistent with the Washington Code Reviser's style manual, which requires a comma to be inserted between each item in a series of three or more words (except the last). Office of the Code Reviser, Statute Law Committee, Bill Drafting Guide 2011, pt. IV(1)(a)(i), *available at* http://www.leg.wa.gove/CodeReviser/Pages/bill_drafting_guide.aspx#part4.

Further, despite the omission of a comma in the 1869 and 1877 enactments, the 1932 compilation of Remington Revised Statutes included a comma between the words "girdle, or otherwise injure," and we have quoted the language 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, 112 P. 653 (1911). So while we sometimes express a "high regard for the lowly comma," *Peters v. Watson Co*., 40 Wn.2d 121, 123, 241 P.2d 441 (1952), the insertion of a comma in the 2009 statute is of no import here, particularly because the purpose of the amendment was to clarify that the statute applies to Christmas tree theft.

2. *Case law*

If a statute remains ambiguous after a plain meaning analysis, it is also appropriate to refer to relevant case law. *Campbell & Gwinn*, 146 Wn.2d at 12. Jongeward correctly cites two cases for the proposition that the timber trespass

statute applies to the destruction of ornamental trees: *Nystrand v. O'Malley*, 60 Wn.2d 792, 375 P.2d 863 (1962); *Tronsrud v. Puget Sound Traction Light & Power Co.,* 91 Wash. 660, 158 P. 348 (1916). However, Jongeward does not (and cannot) cite a single Washington case where a court has applied the timber trespass statute when a defendant has failed to prevent the spread of a fire.

In each of our cases construing the statute over the last 142 years, the defendant entered the plaintiff's property and committed a direct trespass against the plaintiff's timber, trees, or shrubs, causing immediate, not collateral, injury. Examples include: *Birchler,* 133 Wn.2d at 106, where the defendant encroached on plaintiffs' properties and removed trees and shrubbery; *Guay,* 62 Wn.2d at 473, where the defendants cut a swath on plaintiff's property, destroyed trees, brush and shrubs, and denuded the strip; *Mullally*, 29 Wn.2d 899, where the defendants entered a disputed area and destroyed trees; *Luedinghaus v. Pederson,* 100 Wash. 580, 171 P. 530 (1918), where the defendant trespassed upon plaintiff's land and removed standing timber; *Gardner*, 27 Wash. at 356, where the defendants entered plaintiff's land, cut down and converted into shingle bolts and removed plaintiff's cedar trees; *Maier v. Giske*, 154 Wn. App. 6, 21, 223 P.3d 1265 (2010), where the defendant entered a disputed area and destroyed trees and plants. These cases strongly suggest that the timber trespass statute does not apply when a defendant

negligently causes a fire that spreads and damages a neighbor's trees.

Further, Division Three of the Court of Appeals considered an analogous case and held that the plaintiffs could not bring a timber trespass claim for tree damage due to fungus because the statute did not contemplate an award of damages for canal seepage. *Seal v. Naches-Selah Irrigation Dist.*, 51 Wn. App. 1, 751 P.2d 873 (1988). In so holding, the court rejected the plaintiffs' claim that there was no distinction "'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.'" *Id*. at 4. The court refused to accept the plaintiff's argument that the girdling of a tree by a fungus was "'as much a trespass as the girdling of a tree by a human hand.'" *Id.* Although Jongeward attempts to distinguish *Seal*, the reasoning in *Seal* provides persuasive authority that the timber trespass statute is not implicated by the defendant's conduct.

In sum, our canons suggest that the legislature used the phrase "otherwise injure" to describe direct trespasses that are comparable to cutting down, girdling, and carrying off, such as spiking or poisoning. Our cases demonstrate that the statute applies only when a defendant commits a direct trespass causing immediate injury to a plaintiff's trees, timber, or shrubs. Based on our canons and case law, we hold that a defendant who negligently causes a fire that spreads onto a plaintiff's

property and destroys a plaintiff's trees does not "otherwise injure" the plaintiff's trees for the purposes of former RCW 64.12.030.[14] The plaintiff's remedy is limited to the common law.

> QUESTION NO. [2]: Can a Plaintiff recover damages under [former] RCW 64.12.030 for trees damaged or destroyed by a Defendant who has never been physically present on Plaintiff's property?

Certification at 3.

To answer this question, we must determine whether the timber trespass statute applies when a defendant commits a direct trespass that causes an immediate injury to a plaintiff's timber, tree, or shrub but does not physically trespass onto a plaintiff's land. BNSF contends that the statute applies only when a defendant physically trespasses onto a plaintiff's property, because the acts of cutting down, girdling, and carrying off all require a defendant's physical presence on a plaintiff's property. BNSF's argument has some merit. Because a defendant must be physically present on a plaintiff's land to cut down, girdle or carry off a plaintiff's trees, the text could be read to require physical trespass onto a plaintiff's land. Further, each of our cases involves a defendant who was physically present on the plaintiff's property, and the statute requires the damaged tree to be physically

[14]Our holding does not preclude recovery for involuntary trespass, only for indirect trespass causing consequential or collateral injury.

located "on the land of another person." Former RCW 64.12.030.

But statutory recovery for an unauthorized cutting of trees does not require proof that the wrongdoer was trespassing upon the plaintiff's land. *See JDFJ Corp. v. Int'l Raceway, Inc.,* 97 Wn. App. 1, 970 P.2d 343 (1999). Nothing in the plain language of the statute requires a defendant to be physically present on a plaintiff's land, and it is not difficult to imagine a circumstance in which a defendant trespasses against a plaintiff's trees without trespassing on a plaintiff's property. For example, "a person who stands at his or her fence line and intentionally sprays herbicide on a neighbor's trees" engages in conduct prohibited by the statute because the person commits a direct trespass and causes immediate injury to the plaintiff's trees. Opening Br. of Pls. at 14. It would thwart the clear purpose of the statute to allow that voluntary offender to escape the statute's reach. And as Jongeward points out,[15] it would also be absurd "if that same tortfeasor simply took one more step on to the victim's land, then the statute would apply." *Id.*

Ultimately, the legislature enacted the timber trespass statute to deter specific

[15]Jongeward also cites cases not involving the timber trespass statute for the proposition that trespass does not require human entry onto a plaintiff's land: *Zimmer v. Stephenson,* 66 Wn.2d 477, 403 P.2d 343 (1965) (spark from defendant's tractor burned neighbor's wheat crop); *Bradley v. Am. Smelting & Ref. Co.,* 104 Wn.2d 677, 709 P.2d 782 (1985) (smelter's pollutants trespassed on neighbor's property). But these cases are inapposite. The question before us is not whether physical presence is required for trespass under the common law, but whether physical presence is required to trigger the timber trespass statute. Further, the statute does not supply a common law remedy, but supplements the common law. Although our analysis of the statutory term "trespass" is necessarily informed by the common law, we decline to conflate the two remedies.

conduct and punish a voluntary offender. *Guay*, 62 Wn.2d at 476. Statutory violations involve direct trespass to a tree, not trespass to the land on which the tree grows. Because it is at least possible for a defendant to commit a statutory timber trespass without entering a plaintiff's property, we hold that the timber trespass statute applies when a defendant commits a direct trespass that causes immediate, not collateral, injury to a plaintiff's timber, trees, or shrubs, even if the defendant is not physically present on a plaintiff's property.

> QUESTION NO. 3: Must damages awarded under [former] RCW 64.12.030 be reasonable in relation to the value of the underlying real property?

Certification at 3.

Because the timber trespass statute does not apply in this case, the issue of damages is not properly before us. Under the principle of judicial restraint, we respectfully decline to answer the third certified question.

III. CONCLUSION

When the timber trespass statute was enacted, the term "'trespass'" had "'a well ascertained and fixed meaning.'" *Suter*, 35 Wash. at 7 (quoting *Roundtree*, 34 Ala. at 554). It did not refer to indirect acts or culpable omissions causing collateral damage, but only to direct acts causing immediate injuries. *Id*. ("'It would be a perversion of language to denominate an act, which produced a consequential injury

to real or personal property, a trespass. It would be a perversion alike of the legal and common acceptation of the words.'" (quoting *Roundtree,* 34 Ala. at 554)). It therefore seems likely that the territorial legislature intended the term "trespass" to carry this restrictive meaning in the timber trespass statute. Further, our canons and case law strongly suggest that the legislature intended the timber trespass statute to apply only when a defendant commits a direct trespass that immediately injures a plaintiff's trees. Therefore, we answer no to the first certified question; a defendant who causes a fire that spreads and damages trees on a plaintiff's property does not "otherwise injure" the plaintiff's trees for the purposes of the timber trespass statute. We answer yes to the second certified question; a plaintiff may recover from a defendant who commits a direct trespass against a plaintiff's trees, causing injury that is immediate and not consequential, even if the defendant has never been physically present on the plaintiff's property. And we respectfully decline to answer the third certified question. Because the timber trespass statute does not apply in this case, the question of damages is not properly before us.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Charles W. Johnson

Justice Susan Owens

Justice James M. Johnson

Gerry L. Alexander, Justice Pro Tem.