WIGGINS, J. (dissenting) — I agree with the majority that the Jongewards (hereinafter referred to collectively as Jongeward) may be unable to recover treble damages. But our legislature enacted this timber trespass statute with more than treble damages in mind. Our timber trespass statute also creates a single damages remedy for plaintiffs whose trees have been damaged by apparently "casual or involuntary" trespass. Jongeward may be entitled to damages on these facts, so this case should be allowed to proceed. Instead of recognizing this potential remedy, the majority takes our timber trespass statute in a new direction, resurrecting a distinction from the English common law that neither party advocates, and that has no proper place in our timber trespass analysis. This approach unnecessarily limits the possibility that a plaintiff like Jongeward can obtain relief, defying the language of the statute, subverting its purpose, and placing us at odds with other jurisdictions including Oregon, on whose statute ours is based. Jongeward might not recover treble damages here, but that should not prevent this case from going forward given the possibility of recovery for casual or involuntary trespass. I respectfully dissent.

I. The approach advocated by BNSF Railway Company (BNSF) would unnecessarily limit recovery for casual or involuntary trespass, contravening the plain language of our statute and placing us at odds with other jurisdictions

As the majority points out, our timber trespass scheme includes two

statutes not just one, former RCW 64.12.030 (Code of 1881, § 602) and RCW 64.12.040. Subsection .030 is a basis for liability, while subsection .040 mitigates that liability in certain circumstances. At the time of the fire at issue in this case, former RCW 64.12.030 imposed treble damages on anyone who cut down, girdled or otherwise injured, or carried off a tree:

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

While subsection .030 creates liability and imposes treble damages, subsection .040 provides that treble damages are not always appropriate and allows a plaintiff to recover single damages when harm to timber is caused by "casual or involuntary" trespass:

> 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 was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.

RCW 64.12.040. Subsection .040 also allows single damages recovery when there is a mistaken belief of ownership. *Id.*

When interpreting our timber trespass scheme, we must look at both subsections .030 and .040. As the majority points out, we construe statutes in context, examining all that the legislature has said on the matter, including provisions in related statutes. Majority at 7 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). The majority criticizes Jongeward for focusing too narrowly on two words, "'otherwise injure.'" Majority at 7-8. I agree that analysis of statutory language cannot be artificially limited to a few select words. But the majority commits the same error as Jongeward, limiting its analysis to one word, "trespass," and failing to account for the relationship between subsections .030 and .040.

As a result, the majority interprets subsection .030 in a way that undermines subsection .040. The majority holds that liability under subsection .030 must be a "trespass *vi et armis*," a "direct act[] causing immediate injur[y]." Majority at 9, 11. But it is a rare case that will involve direct action, comparable to cutting down or girdling, that is also casual or involuntary. The majority makes it extremely unlikely that any plaintiff will ever recover single damages, effectively reading those words out of the statute.

No other jurisdiction that we have found takes an approach anything like this. Nor is this approach advocated by the parties.[1] This statute and others

[1] Under RAP 12.1(a), we can only decide cases on the basis of issues set forth by the parties in their briefs. *See Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 701-02, 222 P.3d 785 (2009). If the majority wants to decide the case on the distinction between trespass *vi et armis* and trespass on the case, we should call for additional briefing as required by RAP 12.1(b).

like it have been litigated throughout the United States for over a century, and until now no court has ever superimposed upon a timber trespass statute the ancient common law distinction between trespass *vi et armis* and trespass on the case. The reason for this is simple: doing so virtually eliminates single damages recovery for casual or involuntary harm, which is plainly actionable under many of these statutes including our own.

More to the point, the majority's approach belies the statute's history. We borrowed our timber trespass statute from Oregon,[2] and Oregon borrowed its statute from the New York Field Code.[3] This is significant, because neither

[2] When Washington enacted its timber trespass statute, it was, word for word, identical to Oregon's. *Compare* Laws of Wash. Terr. 1869, ch. 48, §§ 556-557, at 143-44, *with* 1862 Or. Laws §§ 335-336, at 88-89. Oregon has since revised its statute, although, crucially, the "casual or involuntary" language remains. *See* Or. Rev. Stat. §§ 105.810, .815. Oregon's statute, as originally enacted, stated:

> Sec. 335. Whenever any person shall cut down, girdle or otherwise injure, or carry 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 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 therefor, as the case may be.
>
> Sec. 336. If upon the 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 was committed, was his own, or that of the person in whose service, or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodland, for the purpose of repairing any public highway or bridge, upon the land or adjoining it, judgment shall only be given for single damages.

[3] *Compare* 1862 Or. Laws §§ 335-336, at 88-89, *with* former N.Y. Code Civ. Proc.

Oregon nor New York bases its statutory analysis on the distinction between trespass *vi et armis* and trespass on the case. Thus it is highly unlikely that our legislature, in borrowing those states' laws, somehow intended to create a law wholly unlike them yet completely identical in its text. I cannot take this illogical leap.

Not only is there no support for this ancient distinction in Oregon and New York law or our own case law, but three decades ago we abandoned the distinction between trespass *vi et armis* and trespass on the case in a statute of limitations case. In *Stenberg v. Pacific Power & Light Co.*, we called the distinction "fabricated," noting that it is "'now rejected by most courts, and

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§§ 911-912 (1850); *see also Matanuska Elec. Ass'n v. Weissler*, 723 P.2d 600, 606-07 (Alaska 1986). The New York Field Code states:

> § 911. Every person who cuts down, or carries off, any wood or underwood, tree or timber, or girdles or otherwise injures 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 or city 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, is liable to the owner of such land, or to such city or town, for treble the amount of damages, which may be assessed therefor, in a civil action, in any court having jurisdiction, except as provided in the next section.
>
> The cases to which a penalty is attached for wilful trespass, extended so as to include ornamental trees in the streets.
>
> § 912. If, upon the trial of such action, it appear, that the trespass was causal or involuntary, or that the defendant had probable cause to believe, that the land, on which the trespass was committed, was his own, or that of the person in whose service, or by whose direction, the act was done, judgment must be given for only the single damages assessed in the action.

Former N.Y. Code Civ. Proc. §§ 911-912.

would appear to be slowly on its way to oblivion.'" 104 Wn.2d 710, 718-19, 709 P.2d 793 (1985) (internal quotation marks omitted) (quoting *Zimmer v. Stephenson*, 66 Wn.2d 477, 482-83, 403 P.2d 343 (1965)). The distinction has been banished from our cases and discredited, and yet the majority would resurrect it now in a completely new context in which it has never been previously applied. We have no clear indication that our territorial legislature had this distinction in mind or that it was doing anything more than borrowing a useful statute from Oregon. Absent more compelling evidence of legislative intent, I would adhere to our more recent precedent abandoning the distinction.

The majority approach would effectively limit single damages recovery to the mistaken belief of ownership defense. *See* RCW 64.12.040. We should not equate casual or involuntary action with action taken under a mistaken belief of ownership. The legislature chose to include in the statute both "casual or involuntary" *and* the mistake of ownership defense, and we must assume that in using different words, the legislature meant to indicate different things. *In re Pers. Restraint of Dalluge*, 162 Wn.2d 814, 820, 177 P.3d 675 (2008) ("When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings."). Moreover, as discussed below, this interpretation is contrary to every other jurisdiction that has interpreted casual or involuntary as meaning accidental or negligent.

In ruling out liability for casual or involuntary trespass, the majority

unnecessarily limits single damages liability for accidental, negligent, and involuntary conduct, placing us at odds with other jurisdictions with similar statutes. Equally troubling, the majority's approach contradicts Oregon, Alaska, and New York law. All have similar "casual or involuntary trespass" language. Thus, these states' interpretations are persuasive in interpreting our own statute. *See Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 432, 730 P.2d 653 (1986); *cf. State v. Carroll*, 81 Wn.2d 95, 109, 500 P.2d 115 (1972). Oregon has long interpreted the "[c]asual or involuntary" language in its comparable timber trespass statute as encompassing accidental, as well as "non-negligent, non-volitional trespass." *Wyatt v. Sweitz*, 146 Or. App. 723, 728, 934 P.2d 544, 546-47 (1997); *Oregon & C.R. Co. v. Jackson*, 21 Or. 360, 367, 28 P. 74, 75-76 (1891) (where trespass is not willful but "casual or involuntary," single damages are appropriate). In *Wyatt*, the defendant was liable for casual or involuntary trespass after his truck slid off a roadway and damaged the plaintiff's trees. 146 Or. App. at 728. Likewise, in *Matanuska*, the Alaska Supreme Court drew the same conclusion, defining "'casual'" as by "'accident or negligence.'" *Matanuska Elec. Ass'n v. Weissler*, 723 P.2d 600, 607 (Alaska 1986) (quoting *Viall v. Carpenter*, 82 Mass. (16 Gray) 285, 286 (1860)). The court in *Matanuska* offered a few hypothetical examples of casual or involuntary trespass, including negligently swerving a bulldozer into trees and negligently

igniting dynamite that harms trees.[4] *See also Yarnell v. Baldwin*, 130 Misc. 2d 653, 659, 497 N.Y.S.2d 268, 273 (1985) (defining "casual or involuntary" as accidental, not deliberate). Oregon, Alaska, and New York all allow timber trespass liability based on accidental, negligent, or involuntary action.

Other courts across the nation have interpreted similar language in much the same way. *See, e.g.*, *Governale v. City of Owosso*, 59 Mich. App. 756, 760, 229 N.W.2d 918 (1975) (defining "[c]asual and involuntary" as "the opposite of deliberate and intentional"); *Pluntz v. Farmington Ford-Mercury, Inc.*, 470 N.W.2d 709, 711-12 (Minn. Ct. App. 1991) (defining "'casual'" as "'thoughtless or accidental or unintentional,. . . [h]appening or coming to pass without design, and without being forseen [sic] or expected; coming by chance, . . . unforseen [sic], unpremeditated . . . fortuitous'" (alterations in original) (quoting *Lawrenz v. Langford Elec. Co.*, 206 Minn. 315, 323, 288 N.W. 727, 731 (1939)))).

In stark contrast, the majority opinion places us at odds with these jurisdictions by requiring direct action and thereby eliminating liability for negligent, accidental, or involuntary conduct. In reaching this result, the majority relies on the fact that we have never before found a defendant liable for negligent action under the timber trespass act. Majority at 19-20. But that is precisely why the federal courts certified this question to us: because it is

[4] One can imagine many other kinds of unintended trespass or damage as well, such as a plane crash, a dam failure, pond water runoff, a tree or other structure falling across a property line, removal of lateral support, or snow buildup.

novel and unresolved. The majority's argument from silence proves too much; we have also never held that negligent action *does not* trigger liability under the statute. The majority reaches that result for the first time in this case, eliminating a form of liability that our statute plainly supports.

This strange result causes our timber trespass scheme to contradict itself. It does not make sense to recognize that a plaintiff can in theory recover for casual or involuntary trespass, and yet at the same time adhere to a direct action requirement virtually ensuring no plaintiff will ever recover for such trespass.

Instead, we must interpret subsections .030 and .040 harmoniously, so that neither renders the other superfluous. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) ("'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003))). BNSF, for its part, reaches an overt or directed action requirement only by misapplying the ejusdem generis canon and strict construction for penal statutes. We should decline BNSF's invitation to rely on these canons, instead recognizing that a plaintiff can recover single damages for casual or involuntary action under subsection .040.

II. The majority sensibly rejects BNSF's ejusdem generis argument

The majority correctly rejects the critical flaw in BNSF's reasoning: a misplaced reliance on the ejusdem generis canon. Under the ejusdem generis rule, a general phrase in a statute that is used in conjunction with specific phrases should be interpreted to incorporate only things similar to the specific phrase. *See Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000).

Fundamentally, the language of subsection .030 simply does not follow the pattern associated with ejusdem generis. That canon properly applies where there is a list of specific terms followed by a general term, i.e., "specific, specific, or general." *See Sw. Wash. Ch., Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wn.2d 109, 116, 667 P.2d 1092 (1983). Here, we are interpreting language from former RCW 64.12.030, specifically the words "cut down, girdle or otherwise injure, or carry off."[5] This language creates three categories of culpable action: (1) cutting down trees, (2) girdling or otherwise injuring trees, and (3) carrying off trees. Properly read, the general phrase "otherwise injure" modifies only "girdle," not "cut down" or "carry off." Thus, the general phrase does not appear in a "specific, specific, or general" list as ejusdem generis requires. Rather, the pattern is "specific, specific or general, specific."

This is not just splitting hairs. The first phrase, "cut down," refers to

[5] The statute was amended in 2009, and there is now a comma between "girdle" and "otherwise injure." *See* majority at 5. As the majority makes clear, this addition does not affect this case. *See* majority at 18-19.

harvesting the tree, which results in killing the tree but making it available for something useful such as lumber or firewood. The second phrase, "girdle or otherwise injure," refers to injuring the tree, not cutting it down. The third phrase, "carry off," refers to capturing or transporting the tree. In other words, each represents a separate category of culpable action. Read this way, it is evident from the structure of the sentence that "or otherwise injure" modifies only the "girdle" category, not "cutting down" or "carrying off," or even a general category encompassing all three. We are left with a specific way of injuring a tree—girdling—followed by an expansive general term—"or otherwise injure." This is simply not the "specific, specific, or general" pattern to which the ejusdem generis rule applies.

Instead, it appears that the legislature, in using the phrase "otherwise injure" to modify "girdle," intended to allow liability for all kinds of injuries to trees, not simply girdling. This reading is consistent with subsection .040, which allows liability for casual or involuntary trespass that is not necessarily direct in the sense of trespass *vi et armis*.

This reading ensures that "otherwise injure" does not render other terms in the statute superfluous as the majority suggests. *See* majority at 17-18. Since "otherwise injure" is associated only with "girdle," the terms "cut down" and "carry off" retain independent meaning. The fact that "girdle" is included as an example of a specific type of injury does not make the term superfluous.

This reading of the statute is more consistent with the entire statutory scheme, and under this reading the ejusdem generis canon is not applicable.

But even if one accepts BNSF's flawed reading of the statute, the ejusdem generis rule still does not apply. This court is in agreement with our federal courts that the ejusdem generis rule has no application if there is a clearly manifested legislative intent that the general term be given a broader meaning than the doctrine requires. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 883, 154 P.3d 891 (2007); *United States v. Baranski*, 484 F.2d 556, 567 (7th Cir. 1973).

Here, there *is* such a clearly manifested legislative intent. It is plain that the legislature intended "otherwise injure" to encompass more than simply trespass *vi et armis*, because subsection .040 allows a plaintiff to recover for casual or involuntary trespass. RCW 64.12.040. As discussed above, direct action will almost never be casual or involuntary.[6] Thus, application of ejusdem generis contravenes a clearly manifested legislative intent by restricting the casual or involuntary language out of existence. In this situation, ejusdem generis should not be part of our analysis. *Silverstreak*, 159 Wn.2d at 883; *Baranski*, 484 F.2d at 567.

Even assuming there *is* no contrary legislative intent, BNSF's reliance

[6] Again, casual or involuntary trespass cannot be limited to the mistaken belief of ownership defense. That defense is listed in the statute separately from casual or involuntary trespass, and moreover, as discussed above, Oregon and most other jurisdictions define casual or involuntary to include negligent or accidental trespass.

on ejusdem generis is still misplaced. It does not make sense to apply the rule where a general phrase is modified by "otherwise." The word "otherwise" means "different" or "in a different way or manner." Webster's Third New International Dictionary 1598 (2002). This alone manifests a legislative intent not to limit the general phrase to things comparable to the specific phrases, and other courts have refused to apply ejusdem generis to "otherwise" phrases for this very reason. *City of Toledo v. Beazer Materials & Servs., Inc.*, 912 F. Supp. 1051, 1069 n.4 (N.D. Ohio 1995), *rev'd on other grounds sub nom. City of Toledo v. Beazer E., Inc.*, *noted at* 103 F.3d 128, 1996 WL 683505 (6th Cir.); *People v. Reilly*, 255 A.D. 109, 110, 6 N.Y.S.2d 161, 162 (1938), *aff'd*, 280 N.Y. 509, 19 N.E.2d 919 (1939). *But see Gibson v. Dep't of Licensing*, 54 Wn. App. 188, 192-93, 773 P.2d 110 (1989); *Northlake Concrete Prods., Inc. v. Wylie*, 34 Wn. App. 810, 813-14, 663 P.2d 1380 (1983). Indeed, under BNSF's reading, "otherwise" would mean "comparable to," not different. We should not accept an interpretation that so drastically alters the meaning of an unambiguous word. *Silverstreak,* 159 Wn.2d at 884 (noting that "'[o]therwise'" means "'differently'" and that rules of statutory construction should not give it a contrary meaning (quoting Scribner-Bantom English Dictionary 641 (1977))).

III. When recovery is for single damages, the statute is not penal and should not be strictly construed

The majority rests its interpretation in part on the fact that former RCW 64.12.030 is penal because it imposes treble damages, citing *Bailey v.*

Hayden, 65 Wash. 57, 61, 117 P. 720 (1911). Majority at 15. It is telling that *Bailey* is a treble damages case. When treble damages are imposed, the statute is indeed penal and should be strictly construed. *Bailey*, 65 Wash. at 61. But when the proper remedy is single damages, the statute only compensates the plaintiff and does not punish the defendant. *See Gardner v. Lovegren*, 27 Wash. 356, 67 P. 615 (1902) ("'When this law gives single damages it has a single object, and that is to redress the injured party. But when the damages are to be trebled, the object is two-fold, namely: to redress the injury done, and also to punish the wrong-doer.'" (quoting *Wallace v. Finch*, 24 Mich. 255, 1872 WL 5931, at *2)). When only single damages are being imposed, as in the case of a casual or involuntary trespass, the statute does not warrant strict construction because there is simply no penalty involved.

CONCLUSION

There is not even a hint of language in our timber trespass statute suggesting that liability should turn on the outdated distinction between trespass *vi et armis* and trespass on the case. We should read the statute as it is written, declining to rely on BNSF's erroneous application of ejusdem generis or on strict construction for penal statutes. BNSF has done substantial harm to timber, and our legislature wrote former RCW 64.12.030 and RCW 64.12.040 to allow plaintiffs like Jongeward to argue that they are entitled to damages for harm that was caused in a casual or involuntary fashion.

I respectfully dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:

Justice Debra L. Stephens

Justice Tom Chambers