No. S241825

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

VINCENT E. SCHOLES

Plaintiff and Appellant,

vs.

LAMBIRTH TRUCKING COMPANY,

Defendant and Respondent.

After a Published Decision by the Court of Appeal,
Third Appellate District, No. C070770
Colusa County Superior Court No. CV23759

OPENING BRIEF ON THE MERITS

Gerald Singleton (SBN 208783)
Singleton Law Firm
115 West Plaza Street
Solana Beach, CA 92075
Tel: (760) 697-1330
Fax: (760) 697-1329
Email: gerald@geraldsingleton.com

Martin N. Buchanan (SBN 124193)
Law Offices of Martin N. Buchanan
655 West Broadway, Suite 1700
San Diego, CA 92101
Tel: (619) 238-2426
Email: martin@martinbuchanan.com

Attorney for Plaintiff and Appellant
Vincent E. Scholes

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ISSUE PRESENTED

1. Do the double and treble damages provisions of Civil Code section 3346, subdivision (a), for "wrongful injuries to timber, trees, or underwood," apply to damage caused by fires?

INTRODUCTION

Health & Safety Code sections 13007 and 13008 recognize liability for property damage caused by fire. Another statute, Civil Code section 3346, authorizes double or treble damages for negligently or intentionally inflicted injuries to trees. The question in this case is whether the Court of Appeal in *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442 correctly harmonized these statutes by ruling that a fire victim may recover: (1) actual damages for any type of fire damage to property *other than* trees; and (2) double or treble damages for negligently or intentionally inflicted fire damage to trees. (*Id.* at pp. 459-463.)

The answer is yes. By its plain language, Civil Code section 3346 authorizes double or treble damages for "wrongful injuries to timber, trees, or underwood upon the land of another." (Civ. Code, § 3346, subd. (a).) "Under any reasonable interpretation, fire damage constitutes an 'injur[y]' to a tree." (*Kelly*, *supra*, 179 Cal.App.4th at p. 463.) Nothing in Health & Safety Code sections 13007 and 13008—which merely codified common law principles of liability for fire damage to another's property—precludes imposition of double or treble damages for fire damage to trees under the more specific provisions of Civil Code section 3346. *Kelly* persuasively rejected the contrary holding of *Gould v. Madonna* (1970) 5 Cal.App.3d 404 on this issue, finding that *Gould* "essentially ignored the *best* indicator of the Legislature's intent: the plain language of the statutes." (*Kelly*,

supra, 179 Cal.App.4th at p. 462.) Thus, this Court should adopt the holding of *Kelly* and overrule the contrary holding of *Gould*.

STATEMENT OF FACTS AND CASE

The Court of Appeal's statement of the Factual and Procedural Background is generally accurate. Accordingly, the following summary is taken directly from the Court of Appeal's opinion, with minor changes and citations to the record added.

A. The Fire

Since 2003, defendant Lambirth Trucking Co. ("Lambirth") has operated a soil amendment and enhancement company adjacent to plaintiff Vincent Scholes' real property. (AA 36, 53.) Lambirth's company grinds wood products and stores wood chips, sawdust, and rice hulls, the remnants of which sometimes blew onto Scholes' property. (AA 36, 53.)

On May 12, 2007, a fire broke out at Lambirth's operation. (AA 53.) In the aftermath, Scholes complained to Lambirth about wood chips and rice hulls piling up on his property. (AA 37.) In addition, local authorities warned Lambirth of the hazards presented by such storage. (AA 53.) In response, Lambirth began removing wood chips and rice hulls from Scholes' property. (AA 37.) Subsequently, on May 21, 2007, another fire broke out on Lambirth's property and spread to Scholes' property. (AA 38-41, 53.)

B. Original Complaint

Scholes filed his original complaint on May 21, 2010, three years after the fire. (AA 26-28.) The complaint named as defendants Lambirth and its insurer, Financial Pacific Insurance Company ("Financial Pacific"),

and stated it was for a "dispute compensation on insurance claim." (AA 28.) Scholes alleged "[d]efendants have acccpted liability, dispute amount of damages from fire." (AA 28.) The complaint alleged Scholes lost use of his property and suffered general and property damages. (AA 28.)

C. First Amended Complaint

On January 24, 2011, Scholes filed a first amended complaint against Lambirth and Financial Pacific for damages to property and loss of crops. (AA 29-31.) In his complaint, Scholes sought compensation for property lost in the fire, loss of crops, and loss of use of property. (AA 31.) Scholes did not assert any additional causes of action in the form complaint. (AA 29-31.)

Lambirth and Financial Pacific filed a motion for judgment on the pleadings, arguing Scholes failed to state facts sufficient to state a cause of action. (1 AA 8.) The trial court granted the motion with leave to amend. (1 AA 9, 79.)

D. Second Amended Complaint

Scholes filed a second amended complaint on August 9, 2011, against "John Lambirth Trucking", Financial Pacific, and Financial Pacific's officers and directors. (AA 32-50A.) The second amended complaint alleged a cause of action against Lambirth for trespass, stating Lambirth provided no structures to contain the wood chips and rice hulls on its property, allowed wood chips and rice hulls to trespass on Scholes' property, and provided no water source to suppress "any fire that may ignite in or by said flammable materials." (AA 44.) According to the complaint, "But for the flammable materials from [Lambirth's] business operation that said defendant allowed to encroach and trespass upon [Scholes'] real

property, there would have been no fuel to ignite [Scholes'] personal property stored upon the real property on May 21, 2007." (AA 45.) In October 2011, Scholes agreed to dismiss with prejudice his action against Financial Pacific and its officers and directors. (AA 10.)

Lambirth demurred to the second amended complaint, arguing it was barred by the statute of limitations. The trial court sustained the demurrer with leave to amend. (AA 10, 80, 90.)

E. Third Amended Complaint

Subsequently, on November 15, 2011, Scholes filed a third amended complaint alleging three causes of action: general negligence, intentional trespass, and strict liability (trespass through unnatural activity). (AA 51-75.) The complaint stated that in 2003, Lambirth began operating a soil amendment and enhancement business adjacent to Scholes' property on which it stored wood chips, sawdust, rice hulls, and other combustible material. (AA 53.) The storage of combustible materials violated Civil Code section 1014 and was "unnatural." (AA 53, 55.) According to the complaint, on May 12, 2007, after the fire on Lambirth's property, fire authorities warned Lambirth of the hazards presented by its storage. (AA 53.)

Nine days later, on May 21, 2007, "a fire erupted at the storage site of said combustible materials of Defendant which Defendant failed to either control or suppress due to inadequate water supplies and other fire suppression equipment and inadequate manpower for such purposes which fire spread to the realty of Plaintiff and destroyed personal property, growing crops, and other growth," "motor vehicles," "other mechanical equipment," and "damaged and destroyed a walnut orchard." (AA 53.)

Scholes requested treble damages under Civil Code section 3346 and Code of Civil Procedure section 733 for the damage to the walnut orchard. (AA 52, 53.)

Lambirth filed a demurrer to the third amended complaint arguing it was barred by the statute of limitations and failed to state a viable claim for intentional trespass or strict liability. (AA 76-89.) In response, Scholes asserted a three-year statute of limitations applied to his cause of action for trespass, and the third amended complaint related back to the original complaint. (AA 89-95.)

The trial court sustained the demurrer without leave to amend and dismissed the action. (AA 1, 11, 13-17.) Following entry of judgment, Scholes filed a timely appeal. (AA 20.)

F. Court of Appeal's Opinion

In the Court of Appeal, Scholes argued that: (1) the third amended complaint was timely filed because it related back to his original complaint, which was filed within three years of the fire (AOB 5-7); and (2) his claim for damage to trees was subject to the five-year statute of limitations set forth in Civil Code section 3346, subdivision (c). (AOB 7.)

The Court of Appeal affirmed the judgment. The court ruled that: (1) the three-year statute of limitations of Code of Civil Procedure section 338, subdivision (b) applied to all of Scholes' claims; (2) the amended complaints were untimely because they were filed more than three years after the fire and did not relate back to the original complaint; and (3) Civil Code section 3346 and its five-year statute of limitations for wrongful injuries to timber, trees, or underwood do not apply to fire damage. (*Scholes v. Lambirth Trucking Co.* (2017) 10 Cal.App.5th 590.)

In ruling that Civil Code section 3346 does not apply to fire damage to trees, the Court of Appeal relied on its own 1970 decision in *Gould*, *supra*, 5 Cal.App.3d at pp. 406-407. (*Scholes*, *supra*, 10 Cal.App.5th at pp. 601-602.) The Court of Appeal acknowledged that "the court in *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442 ... disagreed with our analysis in *Gould* and found that section 3346 does apply to fire damage to trees." (*Scholes*, *supra*, 10 Cal.App.5th at p. 602.) The Court of Appeal also acknowledged that "[t]he federal district court adopted *Kelly*'s analysis in *United States v. Sierra Pac. Industries* (E.D. Cal. 2012) 879 F. Supp. 2d 1096 [*Sierra Pacific*]." (*Id.* at p. 602, fn. 3.) However, the Court of Appeal concluded: "Despite *Kelly*'s disagreement with our analysis, *Gould* remains viable and controlling here." (*Id.* at p. 602.)

ARGUMENT

I. Civil Code Section 3346 Applies to Fire Damage to Trees

The Court of Appeal erred by following its own 1970 decision in *Gould* and rejecting the more recent and more persuasive authority in *Kelly*. Reading the relevant statutes together, and harmonizing their provisions, a fire victim may recover damages for any type of property damage suffered in the fire (Health & Saf. Code, §§ 13007, 13008), and may recover double or treble damages for fire damage to trees. (Civ. Code, § 3346.) Before demonstrating why *Kelly* was correctly decided, we begin by tracing the chronological history of the relevant statutes and case law.

A. Pre-1931 Statutes

Until they were repealed in 1931, Civil Code section 3346a (enacted in 1905) and Political Code section 3344 (enacted in 1872) both read as follows: "Every person negligently setting fire to his own woods, or

negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured." (See *Kennedy v. Minarets & W. Ry. Co.* (1928) 90 Cal.App. 563, 580 [quoting statutes].) These statutes were not limited to property loss. Thus, they authorized treble damages for any injury suffered in the fire, including personal injury. (*Haverstick v. Southern Pac. Co.* (1934) 1 Cal.App.2d 605, 615-618.)

Since long before 1931, two other statutes have separately allowed treble damages for wrongful injuries to trees. Code of Civil Procedure section 733 (originally enacted in 1851) was incorporated into the Code of Civil Procedure in 1872. (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1310.) Still on the books in the same form today, it states: "Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber 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." (Code Civ. Proc., § 733.)

Civil Code section 3346 (enacted in 1872) was copied from a timber trespass statute in the New York Field Code. (*Fulle, supra*, 7 Cal.App.5th at p. 1310 & fn. 2.) Until 1957, Civil Code section 3346 read as follows: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the

authority of highway officers for the purpose of a highway; in which cases the damages are a sum equal to the actual detriment." (Former Civ. Code, § 3346, repealed by Stats. 1957, ch. 2346, p. 4076.)

"Although neither section [Code Civ. Proc., § 733 or Civ. Code, § 3346] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762, citing cases.) "The obvious purpose of [these] code sections is to protect trees and timber on private land." (*Swall v. Anderson* (1943) 60 Cal.App.2d 825, 828.)

B. 1931 Fire Liability Law

In 1931, the Legislature repealed former Civil Code section 3346a and former Political Code section 3344, and enacted the Fire Liability Law. (Stats. 1931, ch. 790, p. 1644.) Section 1 stated: "Any person who: (1) Personally or through another, and (2) Willfully, negligently, or in violation of law, commits any of the following acts: (1) Sets fire to, (2) Allows fire to be set to, (3) Allows a fire kindled by him to escape to the property, whether privately or publicly owned, of another, is liable to the owner of such property for the damages thereto caused by such fire." (*Ibid.*) Section 2 stated: "Any person who allows any fire burning upon his property to escape to the property, whether privately or publicly owned, of another, without exercising due diligence to control such fire, is liable to the owner of such property for the damages thereto caused by such fire." (*Ibid.*)

The 1931 Fire Liability Law did *not* repeal or amend the statutes allowing treble damages for wrongful injuries to trees. (Code Civ. Proc., § 733; Civ. Code, § 3346.)

C. 1953 Enactment of Health & Safety Code Sections 13007 and 13008

In 1953, the Legislature repealed the Fire Liability Law of 1931 and codified its provisions by adding Health & Safety Code sections 13007 and 13008. (Stats. 1953, ch. 48, pp. 682-683.) Section 13007 now provides: "Any person who personally or through another willfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire." (Health & Saf. Code, § 13007.) Section 13008 provides: "Any person who allows any fire burning upon his property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control such fire, is liable to the owner of such property for damages to the property caused by the fire." (Health & Saf. Code, § 13008.)

The 1953 enactments did not repeal or amend the statutes allowing treble damages for injuries to trees. (Code Civ. Proc., § 733; Civ. Code, § 3346.)

D. 1957 Repeal, Amendment, and Reenactment of Civil Code Section 3346

In 1957, the Legislature "repealed, amended, and reenacted" Civil Code section 3346. (*Fulle, supra*, 7 Cal.App.5th at p. 1311, citing Stats. 1957, ch. 2346, § 2, p. 4076.) The new version of section 3346 reenacted the original statutory language allowing treble damages, but added a new double damages provision, and also adopted a five-year statute of limitations.

Civil Code section 3346 now states in relevant part:

> (a) For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by authority of the highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment....
>
> (c) Any action for the damages specified by subdivisions (a) and (b) of this section must be commenced within five years from the date of the trespass.

As interpreted by the courts, the treble-damages provision of section 3346 is discretionary and the double-damages provision is mandatory. (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138.) As a result, "[t]here are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages." (*Drewry v. Welch* (1965) 236 Cal.App.2d 159, 181; accord *Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn. 3.)

The availability of these statutory damages does not preclude an award of punitive damages for conduct covered by the statute. However, a

plaintiff cannot recover both punitive damages and multiple damages under section 3346 for the same conduct. (*Baker*, *supra*, 190 Cal.App.3d at p. 1138.)

E. 1970 *Gould* Decision

In 1970, the Third District concluded that the double-damages provision of Civil Code section 3346 does not apply to negligently caused fires, reasoning that fire damage is instead governed by Health & Safety Code sections 13007 and 13008. (*Gould*, *supra*, 5 Cal.App.3d at pp. 406-407.) Noting that the double-damages provision applies "where the trespass was casual or voluntary" (Civ. Code, § 3346, subd. (a)), *Gould* first questioned whether the negligent spreading of a fire even constitutes trespass. The court stated: "There is no California case in which section 3346 of the Civil Code has been applied to the negligent spreading of a fire, and we have found no case determining that such spreading is a trespass." (*Gould*, *supra*, 5 Cal.App.3d at p. 406.)

Gould also relied on what it referred to as the "statutory history" of these provisions. (*Gould*, *supra*, 5 Cal.App.3d at p. 407.) Without actually citing or referring to any legislative committee reports or other official legislative history, *Gould* concluded: "The statutory history of the sections ... demonstrates a legislative intention that only actual damages be recoverable for injury caused by negligently set fires. That history indicates that the Legislature has set up a statutory scheme concerning timber fires completely separate from the scheme to meet the situation of the cutting or other type of injury to timber." (*Ibid.*) Finding that the double damages provision of section 3346 was a penalty, the court further stated that "if the Legislature intended a penalty in connection with injury by fire, it would have placed it in the sections dealing with fires." (*Id.* at p. 408.)

Finally, *Gould* reasoned: "The normal use of Civil Code, section 3346 is in cases where timber has been cut from another's land, either with or without knowledge that the cutting was wrongful. It has been suggested that the purpose of the statute is to educate blunderers (persons who mistake boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner." (*Gould, supra*, 5 Cal.App.3d at p. 408.) "We have found no indication anywhere that anyone has considered that the double damages provisions of section 3346 are applicable to fire damages caused by negligence." (*Ibid.*)

F. 1996 *Elton* Decision

In *Elton v. Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1301, the Court of Appeal ruled that a negligent invasion by fire which causes damage to real property constitutes a trespass under California law. (*Id.* at pp. 1305-1307.) The court relied on prior California decisions holding that similar "intangible intrusions such as noise or vibrations may constitute a trespass if they cause physical damage." (*Id.* at p. 1307, citing cases.) The court also relied on decisions from other jurisdictions holding "that a fire can constitute a trespassory invasion." (*Ibid.*, citing cases.)

G. 2009 *Kelly* Decision

In 2009, the Second Appellate District, Division Five, squarely rejected the holding of *Gould* and ruled that the double-damages provision of section 3346 *does* apply to tree damage from negligently caused fires. (*Kelly, supra*, 179 Cal.App.4th at pp. 459-463.) In a thorough discussion of the issue authored by the late Justice Richard Mosk, the court found that the trial court had properly doubled the damages awarded for injuries to trees

caused by a negligently sparked brush fire. (*Ibid.*)

At the outset, *Kelly* noted, "it is now established that the spread of a negligently set fire to the land of another constitutes a trespass." (*Kelly*, *supra*, 179 Cal.App.4th at p. 460, citing *Elton*, *supra*, 50 Cal.App.4th at pp. 1305-1307.) "*Gould* ... was decided more than 20 years before the decision in *Elton*. Accordingly, to the extent the court in *Gould* based its conclusion on the fact that no prior case had held that the spread of a fire could be a trespass [citation], that factor no longer applies." (*Ibid.*)

Kelly concluded that there was no conflict between the Health & Safety Code statutes governing fire damage to property generally and the more specific damages provisions of section 3346 covering injuries to trees. "Based on their plain language these statutes are easily harmonized. Under section 13007, a tortfeasor generally is liable to the owner of property for damages caused by a negligently set fire.... If the fire also damages trees—that is, causes 'injuries to ... trees ... upon the land of another' (§ 3346, subd. (a))—then the actual damages recoverable under section 13007 may be doubled (for negligently set fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to section 3346.)" (*Id.* at p. 461.)

Kelly further explained: "The fundamental problem with the decision in *Gould*, *supra*, 5 Cal.App.3d 404, 85 Cal.Rptr. 457—quite apart from its speculation and assumptions as to the intent of the Legislature—is that the court essentially ignored the *best* indicator of the Legislature's intent: the plain language of the statutes." (*Kelly*, *supra*, 179 Cal.App.4th at p. 462.) "The plain language of section 3346 is not ambiguous.... Under any reasonable interpretation, fire damage constitutes an 'injur[y]' to a tree. There is no dispute that the fire was a trespass (see *Elton*, *supra*, 50

Cal.App.4th at pp. 1305-1307, 58 Cal.Rptr.2d 202), or that the trespass in this case was 'casual or involuntary' within the meaning of section 3346." (*Id.* at p. 463.) The court held: "When there is no ambiguity or absurdity on the face of the statute, we may not manufacture one by resort to legislative history." (*Id.* at p. 463.)

H. 2012 *Sierra Pacific* Decision

In *Sierra Pacific*, *supra*, 879 F. Supp. 2d 1096, the district court decided that the United States was entitled to double damages under section 3346 for harm to timber, trees, or underwood caused by the negligent spread of a fire onto federal lands. (*Id.* at pp. 1113-1117.) After acknowledging the conflicting decisions on this issue in *Gould* and *Kelly* (*id.* at p. 1114), the district court predicted that "the California Supreme Court would approve" the more recent decision in *Kelly*. (*Id.* at pp. 1115-1116.)

Sierra Pacific rejected *Gould*'s holding "'that the Legislature has set up a statutory scheme concerning timber fires completely separate from the scheme to meet the situation of the cutting or other type of injury to timber.'" (*Sierra Pacific*, *supra*, 879 F. Supp. 2d at p. 1116, quoting *Gould*, *supra*, 5 Cal.App.3d at p. 407.) The court noted that "§§ 13007 and 13008 are not specific to injury to timber, but apply generally to any damages caused by the willful, negligent or unlawful spread of fire. Because the doubling and trebling of damages required by § 3346 is specific to injury to timber, trees or underwood, it is reasonable to conclude that, while the Legislature intends that a party can recover damages for any injury caused by the negligent spread of fire, it also intends that a party can recover double damages for injuries suffered by its timber, trees or underwood." (*Sierra Pacific*, *supra*, 879 F. Supp. 2d at p. 1116.) "*Gould* fails to

differentiate between a broad statute covering any injuries caused by the negligent spread of fire and a narrow statute granting additional protection to timber, trees or underwood." (*Ibid.*)

I. 2012 Legislation

In 2012, the Legislature enacted Health & Safety Code section 13009.2 governing civil actions by public agencies for property damage caused by fire. Subdivision (d) explicitly prohibits public agencies from recovering enhanced damages for fire damage to trees under Civil Code section 3346 or Code of Civil Procedure section 733.[1] The Legislature has enacted no similar exception for fire damage to trees on private property.

J. *Kelly* Was Correctly Decided

For multiple reasons, *Kelly* correctly ruled that Civil Code section 3346 applies to fire damage to trees. Thus, the Third District Court of Appeal erred in this case by following its own prior decision in *Gould*.

1. "The plain language of section 3346 is not ambiguous." (*Kelly*, *supra*, 179 Cal.App.4th at p. 463.) The statute applies to any "wrongful injuries to timber, trees, or underwood upon the land of another." (Civ.

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[1] Subdivision (d) states in relevant part: "A public agency plaintiff who claims environmental damages or any kind under subdivision (a) or (b) shall not seek to enhance any pecuniary or environmental damages under this section. This section is not intended to alter the law regarding whether Section 3346 of the Civil Code or Section 733 of the Code of Civil Procedure can be used to enhance fire damages, but this section does confirm that if a public agency claims environmental damages under subdivision (a) or (b), it shall not seek to enhance any damages recovered under this section for any reason, and shall not use Section 3346 of the Civil Code or Section 733 of the Code of Civil Procedure to do so, regardless of whether those sections might otherwise apply." (Health & Saf. Code, § 13009.2, subd. (d).)

Code, § 3346, subd. (a).) "Under any reasonable interpretation, fire damage constitutes an 'injur[y]' to a tree." (*Kelly*, *supra*, 179 Cal.App.3d at p. 463.) Moreover, the statute allows recovery of two or three times "the sum as would compensate for the *actual detriment.*" (Civ. Code, § 3346, subd. (a), emphasis added.) As used in the Civil Code, "detriment" means "a loss or harm suffered in person or property." (Civ. Code, § 3282.) Fire damage to trees falls squarely within this definition.

There is nothing to the contrary in Health & Safety Code sections 13007 and 13008. These statutes do not preclude doubling or tripling of the damages caused to trees in a fire under Civil Code section 3346. They do nothing more than recognize liability for "damages to the property caused by the fire." (Health & Saf. Code, §§ 13007, 13008.) A statute merely imposing liability for causing property damage does not impliedly preclude the operation of another statute authorizing double or treble damages for causing a specific type of property damage. Sections 13007 and 13008 do not say that the recovery for all types of property damaged by fire must be strictly limited to actual damages, nor do they purport to displace or supersede other applicable statutes authorizing double or treble damages.

"Based on their plain language, these statutes are easily harmonized." (*Kelly*, *supra*, 179 Cal.App.4th at p. 461.) As the *Kelly* court explained:

> Under section 13007, a tortfeasor is generally liable to the owner of property for damage caused by a negligently set fire. "[T]he statute places no restrictions on the type of property damage that is compensable." [Citation.] Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. [Citations.] If the fire also damages trees—that is, causes "injuries to ... trees ... upon the land of

another" (§ 3346, subd. (a))—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to section 3346. (*Id.* at p. 461; accord *Sierra Pacific*, *supra*, 879 F. Supp. 2d at p. 1116.)

2. *Gould*'s contrary interpretation *would* result in a conflict between these statutes. Although Health & Safety Code sections 13007 and 13008 do not use the term "actual damages," *Gould* interpreted them to mean that *only* "actual damages" may be recovered for any fire damage to property, including trees. (*Gould*, *supra*, 5 Cal.App.3d at p. 407-408.) But Civil Code section 3346 says that double or treble damages may be recovered for *any* wrongful injury to trees. Instead of attempting to reconcile this conflict, *Gould* declared Civil Code section 3346 inapplicable to fire damage, defeating its plain language. By contrast, *Kelly* "harmonized" the statutes to avoid such a conflict. (*Kelly*, *supra*, 179 Cal.App.4th at p. 461.) "Statutes that are apparently in conflict should, if reasonably possible, be reconciled [citation], even when the court interprets provisions in different codes." (*Walters v. Weed* (1988) 45 Cal.3d 1, 9.)

3. *Gould* wrongly concluded that the Legislature in enacting Health & Safety Code sections 13007 and 13008 intended to set up a "completely separate" statutory scheme exclusively governing the damages recoverable for all types of property damage from fires. (*Gould*, *supra*, 5 Cal.App.3d at pp. 407-408.)

As a general rule, a statutory remedy is exclusive only if it "creates a right that did not exist at common law and provides a comprehensive and detailed scheme for its enforcement." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 79.) "However, when the statute merely *recognizes* a cause of action (because the claim had a preexisting common law analogue), then 'all forms

of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears.'" (*Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1252, quoting *Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826; see also *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215.)

The Fire Liability Law of 1931, as later codified in Health & Safety Code sections 13007 and 13008, did *not* create a new right without a preexisting common law analogue. Under longstanding principles of common law pre-dating 1931, a defendant could be held liable for negligently causing a fire resulting in damage to another's property or negligently allowing a fire to spread to another's property. (See, e.g., Gaynor, Liability of Property Owner for Damages from Spread of Accidental Fire Originating on his Property, 17 A.L.R. 5th 547 (1994) § 2[a].)

Since its earliest days, California has recognized the viability of such claims for negligence "at common law, without regard to the provisions" of any statute. (*Clark v. San Francisco & S. J. Val. Ry. Co.* (1904) 142 Cal. 614, 617 [affirming negligence judgment against railroad for starting fire on its property that spread to plaintiff's property]; see also *Wilson v. Southern Pac. R. Co.* (1882) 62 Cal. 164, 172-176 [affirming negligence judgment against warehouse owner for fire that destroyed plaintiff's wool]; *Henry v. Southern Pac. R. Co.* (1875) 50 Cal. 176, 182-183 [rejecting claim that "if by negligence a fire shall commence on the premises of one proprietor and spread from thence to those of another, the latter shall never have his action against him guilty of the negligence"]; *Flynn v. San Francisco & San Jose R. Co.* (1870) 40 Cal. 14, 18-19 [directing entry of judgment for plaintiff on

negligence claim against defendant for starting fire on his property that spread to plaintiff's property].)

A pre-1931 example with facts similar to this case is *Fay v. Cox* (1920) 45 Cal.App. 696. There, "a fire started on the ranch of defendant, subsequently spreading to that of plaintiff on the south, and destroyed about 150 acres of standing ripened barley ...." (*Id.* at p. 697.) A jury awarded the plaintiff damages against the defendant for negligently causing the fire. (*Id.* at pp. 697-698.) The Court of Appeal affirmed the judgment on a negligence theory. (*Id.* at pp. 698-703; see also *Feather River Lumber Co. v. United States* (9th Cir. 1929) 30 F.2d 642, 642-643 [affirming judgment for United States where "defendant carelessly and negligently set and caused to be set a certain fire, which fire it carelessly and negligently allowed to spread upon certain described public lands" destroying timber].)

As these cases demonstrate, the liability provisions of Health & Safety Code sections 13007 and 13008 did not "create[] a right that did not exist at common law." (*Rojo, supra*, 52 Cal.3d at p. 79.) They "merely codif[ied] the basis of fire liability." (*People v. Southern Pac. Co.* (1983) 139 Cal.App.3d 627, 633.) Nor do these statutes provide a "comprehensive and detailed scheme" for their enforcement. (*Rojo, supra*, 52 Cal.3d at p. 79.) And *nothing else* signals that the Legislature intended these statutes to be the exclusive remedy for all types of fire damage. Absent any such expression of legislative intent, "[w]hen a statute recognizes a cause of action for violation of a right, *all forms of relief* granted to civil litigants generally ... are available." (*Commodore Home, supra*, 32 Cal.3d at p. 215, emphasis added.) This includes the double and treble damages available to civil litigants generally for intentionally or negligently inflicted injuries to trees. (Civ. Code, § 3346.)

4. If the Legislature had intended to prohibit recovery of double or triple damages for fire-related injuries to trees when it enacted the Fire Liability Law in 1931 and then codified it in 1953, it would have been easy to say so explicitly. In fact, the Legislature demonstrated that it was capable of doing just that in 2012, when it enacted a similar law allowing public agencies to recover for property damages caused by fire, but explicitly prohibited public agencies from recovering multiple damages for injuries to trees under Civil Code section 3346 or Code of Civil Procedure section 733. (Health & Saf. Code, § 13009.2, subd. (d).) The Legislature has never created any such exemption for fire damage to trees on *private* property.

When it enacted the Fire Liability Law in 1931, the Legislature repealed former Civil Code section 3346a allowing treble damages for all types of injuries caused by negligence in setting or spreading a fire, but left in place the existing version of Civil Code section 3346 permitting treble damages for willful injuries to trees. (Stats. 1931, ch. 790, p. 1644.) In doing so, the Legislature said nothing about exempting fire damage from the provisions of section 3346. By repealing section 3346a, and leaving section 3346 in place without creating any exemption for fire damage, the Legislature manifested its intent for section 3346 to continue to apply to all wrongful injuries to trees on private property, including fire damage. And when the Legislature later repealed, amended, and reenacted section 3346 in 1957 to authorize double damages for negligently inflicted injuries to trees, it again created no exception for fire damage. "'We must assume that the Legislature knew how to create an exception if it wished to do so.' [Citation.]" (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

5. Even though there is nothing to suggest that the Legislature intended such a result, the logic of *Gould* would also preclude imposition of *punitive damages* for fire damage to all types of property—even in cases of deliberate arson. According to *Gould*, the Health & Safety Code provisions only permit recovery of "actual damages" for property damage from fire. (*Gould, supra*, 5 Cal.App.3d at p. 407.) If so, that would not only bar an award of multiple damages under Civil Code section 3346, it would also prohibit an award of punitive damages under Civil Code section 3294.

By their terms, the coverage of these Health & Safety Code statutes extends to acts of arson. Section 13007 applies to anyone who sets a fire to the property of another "*wilfully*, negligently, or in violation of law." (Health & Saf. Code, § 13007, emphasis added.) Thus, if these Health & Safety Code provisions were the exclusive remedy for all covered property damage caused by fire, as *Gould* ruled, then punitive damages could not be awarded under Civil Code section 3294 even for intentional acts of arson. For example, someone who deliberately burned down another's home could only be held liable for actual damages, not punitive damages. Nothing in the language or history of these statutes suggests that the Legislature intended such a result. "Statutory damages and punitive damages arising out of the same cause of action are not mutually exclusive." (*Baker, supra*, 190 Cal.App.3d at p. 1138.)

6. *Gould* also engaged in "speculation and assumptions as to the intent of the Legislature." (*Kelly, supra*, 179 Cal.App.4th at p. 462.) *Gould* found that the "statutory history of the sections" supported its conclusion that the Legislature intended to set up a separate statutory scheme exclusively governing property damage from fires. (*Gould, supra*, 5 Cal.App.3d at p. 407.) Yet *Gould* cited no actual legislative history to

support this conclusion. When it referred to the "statutory history," it evidently just meant the chronology of the relevant statutes. But the "chronology of the ... statutes" actually supports the opposite result. (*Garcia v. State* (1967) 247 Cal.App.2d 814, 816 [newer statute prohibiting prisoner from suing public entity did not impliedly limit right of prisoner's widow and children to sue for his wrongful death under older statute].) As in *Garcia*, it "must be presumed that the Legislature was aware of its own legislation" allowing treble damages for injuries to trees when it enacted the Fire Liability Act, and would have created an explicit exception for fire damage if it had so intended. (*Ibid.*) Moreover, *Gould* failed to acknowledge that the Legislature repealed, amended, and reenacted Civil Code section 3346 by adding the double-damages provision in 1957, four years *after* it enacted the Fire Liability Act.

7. Even if the text of these statutes could not be reconciled, the conflict would still have to be resolved in favor of Civil Code section 3346 as the "more specific" and "later-enacted statute." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 964.) Health & Safety Code sections 13007 and 13008 were enacted in 1953 and are part of a general statutory scheme covering civil and criminal liability relating to fires. (Health & Saf. Code, § 13000, et seq.) Civil Code section 3346 was repealed and reenacted in its current form in 1957, and is a more specific statute governing damages for injury to trees. "If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation]." (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.)

8. To the extent *Gould* based its holding on the fact that there was no case holding that the spread of a fire could be a trespass (*Gould, supra*, 5

Cal.App.3d at p. 406), its rationale has been undermined by the subsequent decision in *Elton*. (*Kelly, supra*, 179 Cal.App.4th at p. 460.) Furthermore, by the time of the repeal, amendment, and reenactment of Civil Code section 3346 in 1957, the Legislature would have understood that a "trespass" includes both direct and indirect invasions of the property. (See *Coley v. Heckler* (1928) 206 Cal. 22, 28 ["The trend of decisions of this court is generally in accord with the doctrine ... that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries"]; *Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [holding that the "distinction between direct and indirect invasions is not recognized in this state" and finding that "[v]ibrations, under certain circumstances, can constitute a trespass"].)

The Legislature is presumed to have been aware of the prior judicial interpretation of words it chose to employ in the statute. (*People v. Cruz* (1996) 13 Cal.4th 764, 775.) By using the word "trespass" repeatedly when it repealed and reenacted Civil Code section 3346 in 1957, the Legislature chose to apply it to both direct and indirect invasions of property causing harm to trees. "The disappearance of the earlier distinction between direct and indirect harm suggests that any barriers to the inclusion of the negligent spread of fire into the ordinary meaning of trespass had vanished by 1957." (*Sierra Pacific, supra*, 879 F. Supp. 2d at p. 1115.)

9. *Gould* also erred by relying on the absence of any indication that the Legislature expressly "considered that the double damages provisions of section 3346 are applicable to fire damages caused by negligence." (*Gould, supra*, 5 Cal.App.3d at p. 408.)

When the Legislature "has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular

application may not have been contemplated by the legislators.'" (*People v. Bostick* (1996) 46 Cal.App.4th 287, 297, quoting *Barr v. United States* (1945) 324 U.S. 83, 90.) "[C]ommonsense would dictate against requiring the Legislature to anticipate and enumerate all possible applications of other statutes or legal principles in every bill it enacts. '[M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out' instances of a statute's intended application." (*Shaddox v. Bertani* (2003) 110 Cal.App.4th 1406, 1413-1414, quoting *Boyce Motor Lines, Inc. v. United States* (1952) 342 U.S. 337, 340.)

"'Old laws apply to changed situations. The reach of [an] act is not sustained or opposed by the fact that it is sought to bring new situations under its terms.'" (*People v. Bell* (2015) 241 Cal.App.4th 315, 343, quoting *Browder v. United States* (1941) 312 U.S. 335, 339-340.) "Statutes are 'not to be confined to the 'particular application[s] ... contemplated by the legislators.'" (*Ibid.*, quoting *Diamond v. Chakrabaty* (1980) 447 U.S. 303, 315-316.) "Instead, they are interpreted as embracing everything that 'subsequently fall within [their] scope ....'" (*Ibid.*, quoting *De Lima v. Bidwell* (1901) 182 U.S. 1, 197; see, e.g., *Fulle*, *supra*, 7 Cal.App.5th at pp. 1315-1317 [holding that annoyance and discomfort damages resulting from tortious injuries to trees are subject to damage multipliers of Civil Code section 3346 and Code of Civil Procedure section 733, even though "this damage measure was not expressly recognized for tortious injury to trees in California until 2009"].)

As *Kelly* concluded, the plain language of section 3346 covers wrongful injuries to trees from any cause, including fire. (*Kelly*, *supra*, 179

Cal.App.4th at pp. 462-463.) And fire damage to property constitutes a trespass under California law. (*Elton*, *supra*, 50 Cal.App.4th at pp. 1305-1307.) "Whatever the original policy behind Civil Code section 3346 and the context within which it is normally used, the language of the statute is broad-sweeping ...." (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 868.)

10. Finding that the double and treble damages provisions of Civil Code section 3346 are penal in nature, *Gould* stated: "It would appear that if the Legislature intended a penalty in connection with injury by fire, it would have placed it in the sections dealing with fires." (*Gould*, *supra*, 5 Cal.App.3d at p. 408.) This is illogical. The double and treble damages provisions of Civil Code section 3346 are not limited to fires; they apply to any type of wrongful injury to trees. If the Legislature intended the statute to apply broadly to *all* wrongful injuries to trees, including those caused by and those *not* caused by fires, it would make no sense to "place[] it in the sections dealing with fires." (*Ibid.*)

In sum, *Kelly* correctly found that *Gould* was wrongly decided. The Court of Appeal below followed *Gould* uncritically without grappling with any of the serious problems identified in *Kelly*. For the reasons stated above, the double and treble damages provisions of Civil Code section 3346 apply to fire damage to trees on private property.

K. The Five-Year Statute of Limitations Applies to Scholes' Claim for Fire Damage to His Walnut Orchard

In his third amended complaint, Scholes sought treble damages for the fire damage to his walnut orchard under Civil Code section 3346. (AA 52, 53.) The third amended complaint was filed on November 15, 2011, within five years of the May 21, 2007 fire. (AA 10, 51.) Thus, without

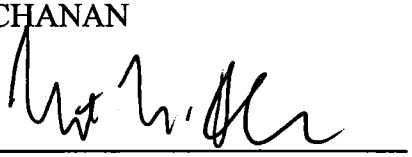
applying the relation-back doctrine, Scholes' claim for damages to the walnut orchard was timely filed within the five-year limitations period of Civil Code section 3346, subdivision (c). Accordingly, the judgment of the Court of Appeal should be reversed.

CONCLUSION

Civil Code section 3346 applies to wrongful injuries to trees, including fire damage. *Kelly* correctly ruled that the double and treble damages provisions of Civil Code section 3346 apply to fire damage to trees on private property. Thus, Scholes' third amended complaint was timely filed within the five-year statute of limitations for his claims of fire damage to his walnut orchard. (Civ. Code, § 3346, subd. (c).) *Gould* should be overruled and the judgment of the Court of Appeal reversed.

Dated: July 12, 2017

LAW OFFICES OF MARTIN N. BUCHANAN



By: Martin N. Buchanan

SINGLETON LAW FIRM
Gerald Singleton

Attorneys for Plaintiff and Appellant
Vincent E. Scholes

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I certify that the foregoing Opening Brief on the Merits was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 7,393 words, exclusive of the matters that may be omitted under subdivision (c)(3).

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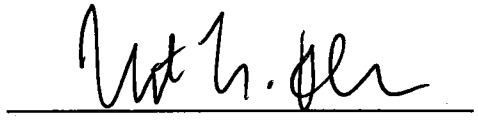


By: Martin N. Buchanan

SINGLETON LAW FIRM
Gerald Singleton

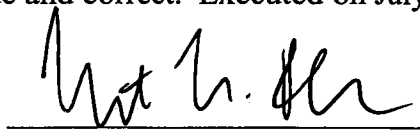
Attorneys for Plaintiff and Appellant
Vincent E. Scholes

CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 655 W. Broadway, Suite 1700, San Diego, California 92101. On July 12, 2017, I served the **OPENING BRIEF ON THE MERITS** by mailing a copy by first class priority mail to each of the following:

California Court of Appeal Third Appellate District 914 Capitol Mall Sacramento, CA 95814	James T. Anwyl Anwyl & Stepp, LLP 2339 Gold Meadow Way, Ste. 210 Gold River, CA 95670-6328 (Counsel for Respondent Lambirth Trucking Company)
Hon. Jeffrey Thompson Colusa County Superior Court 547 Market Street Colusa, CA 95932	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 12, 2017, at San Diego, California.



Martin N. Buchanan