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IN THE SUPREME COURT OF CALIFORNIA

VINCENT E. SCHOLES

Plaintiff and Appellant,

v.

LAMBIRTH TRUCKING COMPANY,

Defendant and Respondent.

AFTER AN PUBLISHED DECISION BY THE COURT OF APPEAL,
THIRD APPELLATE DISTRICT, CASE NO. C070770
COLUAS COUNTY SUPERIOR COURT CASE NO. CV23759

RESPONDENT'S BRIEF

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SUMMARY OF ARGUMENT

Plaintiff/Appellant VINCENT E. SCHOLES ("Appellant" or "Scholes") sued Defendant/Respondent LAMBIRTH TRUCKING COMPANY ("Respondent" or "Lambirth") for damages to his real and personal property which resulted from a fire which spread from Lambirth's business operation to Scholes' real property on May 21, 2007. Scholes commenced this action exactly three years after the fire with a factually devoid form Complaint, which he later amended three times.

The Third Amended Complaint ("TAC") is in issue herein. This TAC was filed approximately four and one half years after the fire. It alleged two counts of trespass by fire and a claim of strict liability for the fire damage. Lambirth demurred to the TAC on the grounds that the statute of limitations had expired, and the trial court correctly sustained the demurrer without leave to amend. After judgment was entered, Scholes appealed to the Third District Court of Appeal. The court of appeal correctly upheld the decision of the trial court on the stated basis that Scholes' trespass claims were barred by the statute of limitations set forth in Code of Civil Procedure § 338(b).

Scholes has now filed a Petition in this court, claiming that both the trial court and the Appellate Court erred in sustaining the demurrer. However, the trial court correctly sustained the demurrer to Scholes' TAC: Scholes' claims for trespass by fire were not commenced within the three-year statute of limitations set forth in Code of Civil Procedure § 338(b). Scholes failed to either allege facts to support a Civil Code § 3346 statute of limitations or to argue for its application at the trial

court level. Additionally, as the court of appeal correctly found, Civil Code § 3346 cannot be utilized to multiply damages to fire damaged trees in a case where fire has escaped to the real property upon which the trees are growing.

Instead, Scholes' claim is necessarily predicated on fire damage to his real property which is governed by Health and Safety Code §§ 13007 and 13008 and thus, subject to the three-year statute of limitations contained in Code of Civil Procedure § 338(b). Because he failed to allege facts giving rise to any viable claim until after the three-year period had expired, the trial court correctly sustained the demurrer to the Third Amended Complaint. Thereafter, the court of appeal correctly affirmed that decision. Therefore, the judgment should be affirmed.

ISSUE PRESENTED

1. Whether the gravamen of Scholes' Complaint is trespass by fire on real property; and

2. Whether Code of Civil Procedure § 338(b) governs all property damage which result from an escaped fire , including fire damage to growing trees, or whether Civil Code § 3346 provides an exception to California's comprehensive fire liability rules.

STANDARD OF REVIEW

The standard of review is well settled in cases such as this which involve an appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend:

> "[t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment."

Aubry v. Tri–City Hospital Dist. (1992) 2 Cal.4th 962, 966–967. Citations omitted. Further, the court is not bound by the trial court's analysis of questions of law, and it independently reviews the interpretation of statutory provisions. *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 10.

That said, "[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564. Thus, in challenging a judgment, the appellant must raise claims of reversible error or other defect, and "present argument and authority on each point made."

County of Sacramento v. Lackner (1979) 97 Cal.App.3d 576, 591. Scholes has failed to meet this burden.

FACTUAL BACKGROUND

Since 2003, Lambirth has operated a business on property adjacent to Scholes' real property which involves the grinding of wood products and storage of wood chips, sawdust and rice hulls. (Appellant's Appendix ("AA") 036, ¶¶ 11-12, 15; 053, ¶ 1.)

On May 12, 2007, a fire started on Lambirth's property. Local government authorities "*warned*" Lambirth "*of the hazards presented by such storage.*" AA 053, ¶ 2. Nine days later, on May 21, 2007, a fire erupted on Lambirth's property which spread to Scholes' neighboring property. According to the Second Amended Complaint ("SAC"), Lambirth allowed flammable material to "*trespass and encroach*" on Scholes' property, and but for that encroachment, "*there would have been no fuel to ignite Appellant's personal property stored*" thereon. In the TAC, Scholes alleged that Lambirth "*failed to either control or suppress [the fire] 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 that its storage was a statutory violation. AA 053, ¶¶ 3-4. Scholes claim the fire damaged Scholes' real property, growing crops, walnut "orchard[1]" and numerous items of personal property (AA 053, ¶¶ 3, 5; AA 058-075), amounting to a total of $204,277.82 in damages. AA 052, ¶ 14.

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[1] This "orchard" consisted of twelve trees of unknown age, size or productivity.

PROCEDURAL BACKGROUND

I. ORIGINAL COMPLAINT.

Appellant filed his original form Complaint in this action exactly three years after the fire, on May 21, 2010. AA 026. That Complaint stated that it was for a "*dispute compensation on insurance claim.*" AA 026-028. It alleged only that, "*Defendants have accepted liability, dispute amount of damages from fire.*" AA 028, ¶ 15. Emphasis added. Appellant alleged he suffered loss of use of property, general damages and property damage. AA 028, ¶ 11. No other facts were alleged.

II. FIRST AMENDED COMPLAINT.

Eight months after the original Complaint was filed, Appellant filed his First Amended Complaint ("FAC") for "*Damage to Property and Loss of Crops.*" AA 029-031. Appellant indicated that he was seeking "*Compensation for property lost in fire[,] loss of crops,*" and loss of use of property. AA 031. Emphasis added. No other facts were alleged. AA 031. On July 26, 2011, the trial court granted Lambirth's Motion for Judgment on the Pleadings with leave to amend. Respondent's Appendix ("RA") 0096-0097.

III. SECOND AMENDED COMPLAINT.

On August 9, 2011, more than 3 years after the fire, Appellant filed his SAC. AA 032-034. This SAC alleged that Lambirth had (1) provided no structures to contain the rice hulls and wood chips to Respondent's operation, (2) allowed the wood chips and rice hulls to encroach and trespass onto Appellant's property (AA 045, ¶¶ 67, 71),

and (3) provided no water source "*to suppress any fire that may ignite in or by said flammable materials.*" AA 044, ¶ 70. "*But for the flammable materials from [Respondent's] business operation that said defendant allowed to encroach and trespass upon [Appellant's] REAL PROPERTY, there would have been no fuel to ignite [Appellant's] personal property stored upon the REAL PROPERTY on May 21, 2007.*" AA 045, ¶ 72. Emphasis added.

On September 8, 2011, Lambirth demurred to the SAC on the ground the claims were barred by the statute of limitations. RA 0098-0143, 0162-0170. On November 4, 2011, the trial court sustained the demurrer with leave to amend. RA 0172, ¶ 2.

IV. THIRD AMENDED COMPLAINT.

On November 10, 2011, Appellant filed his TAC alleging three causes of action: (1) negligent trespass; (2) intentional trespass; and (3) strict liability (trespass through unnatural activity). AA 051-055. The Third Amended Complaint alleged that "*[i]n 2003, [Respondent] ... began operating a soil amendment and enhancement business on realty adjacent to that of Plaintiff on which Defendant stored wood chips, sawdust, rice hulls, and other combustible material ...*" AA 053, ¶ 1. Emphasis added.

A fire erupted in Lambirth's storage site on May 12, 2007, after which local fire authorities warned it of the hazards presented by its storage. AA 053, ¶ 2. 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 on said realty ..., motor vehicles, ... other mechanical equipment, [and] damaged and destroyed a walnut orchard. ..*
AA 053, ¶¶ 3, 5. Emphasis added.

Scholes' first cause of action, entitled general negligence, alleged negligent trespass, stating that the storage of the combustible materials violated various statutes including Civil Code §1014[2], and also referenced the fact that "said fire also damaged and destroyed a walnut orchard." Plaintiff's second cause of action, entitled "intentional tort," alleged that Lambirth consciously disregarded the risk of fire, thus intentionally trespassed on Plaintiff's land. AA 054, ¶ ¶ 2-3. Plaintiff's third cause of action, also entitled "intentional tort" alleged that because the storage of the combustible materials was "unnatural," Lambirth was strictly liable for his damages "under the common law doctrine of *Wintergreen v. Winterbottom*[3]." Plaintiff's prayer for damages included a request for all actual damages, treble damages pursuant to Civil Code §3346 and Code of Civil Procedure §733, and costs pursuant to Code of Civil Procedure § 1021.9. AA 053, ¶ 5.

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[2] Civil Code §1014 relates to ownership of land formations on river banks. Thus, this reference does not make sense.

[3] Lambirth has attempted to locate the case to which Scholes referred without any success. Moreover, the allegations in the TAC do not support a strict liability claim, but rather, are either irrelevant to such a claim or indicate that reasonable care would have ameliorated the risks posed by Lambirth's operation.

V. DEMURRER TO THIRD AMENDED COMPLAINT GRANTED.

Lambirth filed a demurrer to the Third Amended Complaint in part based on the fact that it was barred by the applicable statute of limitations. AA 079-088; RA 0245-0248. Scholes opposed the demurrer on the ground that the Third Amended Complaint related back to the original Complaint and a three-year limitation period applied to his trespass action. AA 089-095. Neither party argued the viability of the claim being raised herein: that is, whether the reference to treble damages to trees growing on the burnt property entitled Scholes to benefit from the five-year statute of limitations set forth in Civil Code § 3346(c) for any part of his claims for trespass to real property. Instead, the main focus of the arguments was whether the doctrine of relation back rendered Scholes' claims timely, and whether the case was governed by a two-year statute of limitations or the 3-year statute provided in to Code of Civil Procedure § 338(b).

On January 10, 2012, the trial court sustained the demurrer and dismissed the action. RA 0251-0252. Thereafter a Judgment of Dismissal was entered. AA 017; RA 0254-0255.

VI. THIRD DISTRICT COURT OF APPEAL AFFIRMS JUDGMENT.

Appellant appealed the trial court's decision to the Third District Court of Appeal. In his appeal, he argued that the TAC was timely filed because it related back to his original Complaint (Appellate's Opening Brief ("AOB") 5-7). He also argued *for the first time* that the

portion of his claim which was predicated on damages to his orchard was subject to the five-year statute set forth in Civil Code § 3346(c).

The court of appeal rejected Scholes' arguments, holding that (1) his claims were subject to the three-year statute of limitations in Code of Civil Procedure § 338(b); and (2) that the TAC could not relate back to the original, factually devoid Complaint because

> "the original complaint, devoid of actual allegations, fails to meet section 425.10, subdivision (a)'s minimal fact pleading requirement. The original complaint does not identify the property at issue or specifiy the damages suffered; it merely lists "loss of use of property" and "property damage". The complaint fails to specify the date, origin, or scope of the fire. The original complaint does not set forth the relationship between the parties or any duties owed to Scholes by Lambirth. Nor does the Original complaint specify any causes of action except for checking the box for "Property Damage". Nothing in the original complaint sets forth any factual basis for Scholes' subsequent claims for negligent trespass, intentional trespass, or unnatural activity trespass. It is impossible to even infer the nature of any dispute between Scholes and Lambirth."

Scholes v. Lambirth (2016) 10 Cal.App. 5th 590, 602. Accordingly, the court of appeal correctly held that the TAC was barred by the statute of limitations, and thereafter, affirmed the judgment of dismissal. This appeal followed.

ARGUMENT

I. SCHOLES NEVER CLAIMED ENTITLEMENT TO A FIVE-YEAR LIMITATIONS PERIOD AT THE TRIAL COURT LEVEL.

The claim that Plaintiff is making before this court is not one which the trial court was ever asked to decide: although Scholes filed *four* different Complaints for the fire damage to his property, he did not plead a claim for a violation of Civil Code § 3346 in *any* of those four Complaints. Instead, the Complaints alleged only that Scholes had suffered various types of damages as a result of the fire which Lambirth had allowed to spread to Scholes' property. Even when the issue of the statute of limitations was initially raised in response to the TAC, Scholes *still* did not claim that the five-year statute of limitations in Civil Code § 3346(c) applied. Rather, he argued that the claim would be timely under the three year statute of limitations set forth in Code of Civil Procedure § 338(b)[4]. It was not until this argument failed, resulting in the dismissal of his case on the grounds of the statute of limitations, that Scholes claimed for the first time that Civil Code § 3346 rendered any part of his claim timely.

However, "[it]t is a well-established tenet of appellate jurisprudence that a litigant may not pursue one line of legal argument in the trial court, and having failed in that approach, pursue a different, and indeed, contradictory line of argument on appeal..." *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519. This is exactly what

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[4] Scholes argued that the Third Amended Complaint should be deemed to relate back to his initial Complaint, thus rendering his claims timely under Code of Civil Procedure § 338(b).

Scholes has done. Thus, Scholes entire § 3346(c) argument should be disregarded by this court.

II. CODE OF CIVIL PROCEDURE § 338(b) PROVIDES THE CORRECT STATUTE OF LIMITATIONS FOR PLAINTIFF'S CLAIMS.

The issue of damages has never been in issue in this case: the decision from which this Petition was taken was a dismissal of Scholes' claims on the grounds of the statute of limitations. Thus, the sole question this court must resolve is whether the court of appeal correctly determined that Code of Civil Procedure § 338(b) provides the statute of limitations applicable to Plaintiff's claims for fire trespass. As explained below, the gravamen of the facts and claims alleged is "[a]n action for ... injury to real property" (Code of Civil Procedure § 338(b)). Thus, the court of appeal's decision was correct and should be upheld.

A. THE GRAVAMEN OF THIS ACTION IS INJURYTO SCHOLES' REAL PROPERTY.

"To determine the statute of limitations which applies to a cause of action, it is necessary to identify the nature of the cause of action, i.e., the "gravamen" of the cause of action. [Citations.]" *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606. The gravamen of an action depends on the nature of the right sued upon or the principal purpose of the action. *Davies v. Krasna* (1975) 14 Cal.3d 502, 515. "[I]t is the underlying injury and not the legal theories of recovery superimposed on the injury that dictates the applicable statute of limitations. [Citation.]" *McCoy v. Gustafson, supra*, 180 Cal.App.4th at p. 104.

Moreover, "[t]he nature of the cause of action and the primary right involved, not the form or label of the cause of action or the relief demanded, determine which statute of limitations applies." *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22–23. Thus, in ruling upon the applicability of a statute of limitations, neither the caption, nor the prayer of a Complaint will conclusively determine the nature of the liability from which the cause of action flows. Instead, "the true nature of the action will be ascertained from the basic facts...." *H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 717.

What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct. See *Richardson v. Allstate Ins. Co.* (1981) 117 Cal.App.3d 8, 11–13. The statute of limitations applicable to the gravamen of the case is applicable to the entire cause of action, regardless of the existence of other claims for which a different statute of limitations might otherwise apply. See *Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1531. As particularly relevant here, where negligent conduct has caused injury to real property, the gravamen of the cause of action is the injury to the real property. *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 105. Real property consists of land, and that which is either affixed, incidental, or appurtenant to that land. Civil Code § 658. Emphasis added. As relevant to this case, trees which are attached to land by their roots are deemed affixed to land. Civil Code § 660. Emphasis added. Thus, the gravamen of

Scholes' claims, including those for fire damage to his growing trees, is a claim for injury to his real property.

Scholes ignores the above rules of law. Instead, his Petition appears to be predicated entirely upon the incorrect assumption that, in addition to his causes of action for trespass to his real property, the TAC contained a cause of action for "wrongful injury to trees," pursuant to Civil Code § 3346. However, the TAC did not allege facts sufficient to state a cause of action for wrongful injury to trees. Instead, it simply alleged that that Lambirth either negligently or intentionally allowed fire from his property to spread to Scholes' neighboring property, resulting in significant damage to that property and items located thereon, including damage to 12 walnut trees. Scholes then conclusory asserted in the prayer that Scholes is entitled to treble damages for the damage to the trees he had growing on his property at the time of the fire, along with a request for attorney fees pursuant to Code of Civil Procedure § 1021.9. AA 053.

There were no allegations that Lambirth did anything directly to the trees themselves, but only that the trees were one of a lengthy list of items which were damaged as a result of the fire which escaped to Scholes' property. There are no allegations that Lambirth either entered onto Scholes' property to injure the trees, nor that he even gave any thought whatsoever to the trees located on that property. Accordingly, the essence of Scholes' claims is real property trespass by fire, not wrongful injury to trees. Because the gravamen of the TAC is fire damage to Scholes' real property, the applicable statute of limitations is the three-year statute of limitations contained in Code of

Civil Procedure §338(b). Scholes' claim was not filed within that three-year period. Thus, both the trial court and the court of appeal correctly determined that his claims were barred by the statute of limitations.

B. THE APPLICABLE STATUTE OF LIMITATIONS FOR GROWING TREES WHICH ARE DAMAGED BY FIRE TRESPASS IS CODE OF CIVIL PROCEDURE §338(B).

Because Scholes is now claiming that his TAC contains a claim for wrongful injury to trees, a threshold question must be addressed in order to determine whether Scholes' claims were time barred: that is, whether the applicable statute of limitations to claims for trees which are damaged as part of a fire trespass is Code of Civil Procedure §338(b), which provides a maximum three-year limitations period for trespass or injury to real property, or Civil Code § 3346(c), which provides a limitations period of five-years for an action for damages based on "wrongful injury to" or "wrongful removal" of trees. As this Court has noted:

> "[i]n seeking to determine which statute of limitations was intended to govern on facts such as those before us, our goal is to discern the probable intent of the Legislature so as to effectuate the purpose of the laws in question. [Citations.] We examine the statutes in their context and with other legislation on the same subject [citation]. If they conflict on a central element, we strive to harmonize them so as to give effect to each. If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citations] and more specific provisions take precedence over more general ones. [Citation.] Absent a compelling reason to do otherwise, we strive to construe each statute in accordance with its plain language."

Collection Bureau of San Jose v. Rumsey (2000) 24 Cal.4th 301, 309–310.

Following these guidelines, this Court must first examine the plain language and legislative purpose of the two statutes of limitations at issue. Such an examination demonstrates that the two statutes of limitation, Code of Civil Procedure § 338(b) and Civil Code § 3346(c) can be harmonized in this case. As set forth in Section II.A hereinabove, the Legislature specifically provided both (1) for a three-year statute of limitations for trespass to real property, and also (2) that trees which are damaged as a result of a trespass which damages the real property itself, are part of that real property. On the other hand, Civil Code § 3346 was intended to apply only to cases in which the injury was directed at the trees themselves. See *Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1315. In this case, the tree damage was incidental to the real property damage. Thus, the court of appeal correctly determined that Scholes' claims in this case were barred by the statute of limitations.

III. THE LEGISLATURE INTENDED CHAPTER 1 OF DIVISION 12 OF THE HEALTH AND SAFETY CODE TO GOVERN THE SCOPE AND EXTENT OF LIABILITY FOR FIRE DAMAGE IN CALIFORNIA.

Scholes contends that the portion of his cause of action which relates to his fire damaged trees is governed by the special statute of limitations set forth in Civil Code § 3346 rather than Code of Civil Procedure § 338(b). While Scholes contends that this can be done simply by looking at the words used in Civil Code § 3346, and

thereafter concluding that the fire damage is "injury" to trees, the court's task is not that perfunctory. Instead, the court must interpret words in a statute in light of their ordinary meaning while taking into account "the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." *In re R.T.* (2017) 3 Cal.5th 622, 627. Citations omitted. Additionally, a statute must be "construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized." *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489.

The application of long-established principles of statutory construction results in the inescapable conclusion that Civil Code § 3346 does not apply to this case. Instead, as noted by the Court of Appeal, "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." *Scholes v. Lambirth Trucking, et. al.* (2016) 10 Cal.App. 5th 590, 602, citing *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407. That scheme, which is set forth in Chapter 1 of Division 12 of the Health and Safety Code, is aptly titled "Liability in Relation to Fires," and delimits the parameters of both the liability for fire injuries and the measure of damages for fire losses. Thus, as explained below, in order to further the strong Legislative purposes inherent in this statutory scheme, Scholes' claim must be decided in a manner consistent with this Chapter.

A. 1872

In 1872, California enacted Political Code § 3344 as its first fire damages statute. Section 3344 provided for treble damages in any case where a property owner "negligently suffer[ed] any fire to extend beyond [his or her] own land." *Galvin v. Guatala Mill Co.* (1893) 98 Cal.268, 270 (quoting Political Code § 3344). As initially enacted, Political Code § 3344 allowed treble damages. As this Court recognized, the multiplier for fire damage at Political Code § 3344 was intended to prevent fires from destroying timber, grass and other property. *Garnier v. Porter* (1891) 90 Cal. 105. As the Court explained,

> "When [Political Code §3344] was first enacted . . . . [f]requent fires spread over the country, destroying timber, grass, and other property. . . . Unquestionably, the law was designed to prevent such calamities as far as possible."

Id. at p. 108.

B. 1893

In 1893, this court analyzed the liability and damages which could be recovered for

> "the destruction of tan bark, cord wood, etc. by fires alleged to have been negligently set by the defendant upon its own land...and which it negligently permitted to escape, and to extend to the plaintiff's land"

solely by reference to section 3344 of the Political Code. No mention is made of either Civil Code § 3346 or Code of Civil Procedure § 733. *Galvin v. Gualala Mill Co.* (1893) 98 Cal.268.

C. 1905.

1. <u>This Court analyzes fire damage to a tract of timber land pursuant to Political Code § 3344.</u>

In *Sampson v. Hughes,* (1905) 147 Cal. 62, this court analyzed the liability for the negligent spread of fire to a tract of timber land under Political Code § 3344. The case made no mention whatsoever of the possibility that the fire damage to the timber should be analyzed under any other statutory scheme.

2. <u>Legislature Replaces Political Code § 3344 with Civil Code § 3346a.</u>

In 1905, the Legislature enacted Civil Code §3346a, which contained the identical multiplier that had been contained in Political Code § 3344. Newly enacted section 3346a provided in pertinent part that "[e]very person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable to treble damages to the party injured." Former Civ. Code, § 3346a (1905).

Legislators are presumed to be aware of "judicial decisions interpreting the language they chose to employ." Thus, by adopting the same language which was contained in Political Code § 3344, the Legislature is presumed to (1) have been aware of this Court's earlier decision which construed those words in Political Code § 3344 to apply

to fires destroying property including timber, and also to (2) intend the same meaning to apply to the same words in the newly adopted Civil Code §3346a. See *People v. Cruz* (1996) 13 Cal.4th 764, 775.

Both former Civil Code §3346a and Political Code §3344 were enacted due to the Legislature's recognition that danger from fires in California was so great as to justify the police power of the state to impose treble damages. Both sections were also upheld as a valid exercise of the state's police power in *Kennedy v. Minarets & Western Ry. Co.* (1928) 90 Cal.App. 563. As the court explained,

> [t]he danger from fires in a dry country like California is so great as to justify the police power of the state in imposing treble damages, and in no county is the necessity for greater care being exercised against the spread of fires than during the summer months where conditions are always favorable for extensive conflagrations and the absence of moisture rendering the extinguishment of fires, when once started, so difficult. All of these considerations justify the exercise of the police power of the state in imposing damages, such as to ensure the reasonable care and precautions necessary under the conditions so existing." *Id.* at p. 581.

D. 1928.

In 1928, an appellate court interpreted the fire statutes broadly, this time explaining that the statutes applied any time fire was negligently permitted to escape and burn the property of others. Relying on three earlier decisions of <u>this</u> court[5], an appellate court broadly interpreted the fire liability statutes, noting that [only] two

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[5] *Sampson v. Hughes* (1905) 147 Cal. 62, *Galvin v. Gualala Mill Co.* (1893) 98 Cal.268, and *Garnier v. Porter* (1891) 90 Cal. 105.

questions were involved in deciding whether or not the statutes applied: "[f]irst, negligently setting fire; second, negligently permitting the fire to escape and burning the property belonging to others." *Kennedy v. Minarets & W. Ry. Co.* (1928) 90 Cal.App. 563, 580.

E. 1931.

In 1931, the Legislature dramatically shifted the focus of its efforts to fight California wildfires from the imposition of punitive treble damages to an expansive compensatory statutory scheme. This law, which was aptly titled "[a]n act defining the civil liability for failure to control fires" eliminated treble damages for the injured landowner in favor of actual damages for the injured landowner together with reimbursement of all costs associated with suppressing fires. Stats. 1931, ch. 790, p. 1644 (Deerings Gen. Laws, 1944, Act 2586); *Ventura County v. Southern California Edison Co.* (1948) 85 Cal.App.2d 529.

The Fire Liability law consisted of several sections which were intended to be read together to define the parameters of fire liability. To begin with, newly enacted Section 1 provided:

> [a]ny 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 or attended by him to escape to the property, whether privately or public owned, of another, is liable to the owner of such property for the damages thereto caused by such fire.

Stats. 1931, ch. 790, § 1, p. 1644. Section 2 provided that:

> [a]ny 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.

Stats. 1931, ch. 790, § 2, p. 1644. Finally, recovery of fire suppression expenses was governed by Section 3. This section stated that "[t]he expenses of fighting such fires shall be a charge against any person made liable by this act." Stats. 1931, ch. 790, § 3, p. 1644.

As demonstrated by the above sections, the Fire Liability Law repealed the fire damage multiplier part of both Political Code § 3344 and Civil Code § 3346a. Stats. 1931, ch. 790, §§ 5-6, p. 1644. In place of that multiplier, the Fire Liability Law imposed liability for only actual damages, then defined those damages to encompass the entirety of the expenses of both private and public entities incurred to fight those fires. Stats. 1931, ch. 790, § 4, p. 1644. This amounted to a repeal of the authorization for a multiplier for fire damage to trees in favor of a comprehensive "fire liability" scheme that placed the financial burden both the damages resulting from wildfires and that of fighting those wildfires on the person or entity that caused those fires. *Ventura County v. Southern Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 534.

These changes in the Legislature's focus concerning fire liability are critical to the court's analysis in this case. Courts construe statutes by "giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166. When construing statutes, it is

generally presumed that the Legislature intends to change the meaning of a law when it deletes express provisions of the prior version. *Kodani v. Snyder* (1999) 75 Cal.App.4th 471, 476, fn. 7. Thus, when the Legislature deletes an express provision of a statute, it is ordinarily to be presumed that it intended a substantial change in the law. *People v. Dillon* (1983) 34 Cal.3d 441, 467. This presumption is especially strong when the Legislature not only deletes an express provision of a statute but also "substitut[es] ... an alternative provision." *People v. Salazar* (183) 144 Cal.App.3d 799, 807.

Moreover, as this Court has noted, "the repeal of the statute ... together with the enactment of a new law on the same subject ... strongly suggests that the Legislature intended a [different]rule." *People v. Valentine* (1946) 28 Cal.2d 121, 142. By deleting a provision, the Legislature is presumed to have intended a change in the law. *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 231. Here, the Legislature made the express decision to end the damage multiplier for fire damages in favor of a comprehensive and extremely expansive actual damage scheme . Thus, it should be presumed that the Legislature intended that the financial resources of the fire damage wrongdoer were best utilized by attempting to fully compensate both the injured property owner and those that had attempted to fight the fires rather than by simply punishing a negligent fire starter by awarding one of injured parties a multiplier of its damages.

As explained by the court in *Ventura County, supra*,

> [t]he clear intent of the Fire Liability Law is to require reimbursement by the wrongdoer for expenses incurred in the suppression of fire. This liability may be enforced by

> any person or agency entitled thereto, and not solely by the agencies of government. The purpose is not to secure pre-venue but to compel compensation by one who has by his willful act, negligence, or violation of law, forced the expenditure of money by others. That this compensation is eminently fair and equitable seems clear from the fact that the expenses of firefighting normally are beneficial to the wrongdoer in that they serve to limit the extent of the destruction and thereby mitigate the damages. The burden of suppressing a fire set to or allowed to spread to the property of another thus rests squarely upon him whose willful or negligent acts or omissions necessitated that expense, and not upon the government or careful property owner." *Id.* at pp. 534.

Thus, as recognized by the *Ventura* court, the Legislature once again validly exercised its police power in 1931 to remove the multiplier for damages in fire damage cases in favor of reimbursing the person(s) or entities who fought to suppress the fire so as to best minimize the risk of the fire spreading. The repeal of a multiplier under these circumstances is as demonstrative of the Legislature's intent with respect to the permissibility of such a multiplier as if the Legislature had expressly added a provision prohibiting a multiplier.

F. 1934.

In 1934, it was recognized that the language of Political Code § 3344 provided a right of recovery for personal injuries as well as property loss caused by fires. *Haverstick v. So. Pacific Co.* (1934) 1 Cal.App.2d 605, 612.

G. 1949.

In 1949, the Legislature again used its police power to regulate the allocation of resources needed to fight fires, adding Chapter 4 (entitled "Fire and Police Protection") to Government Code, Title 5, Division 2, Part 2. This chapter regulated the manner in which the powers and duties exercised jointly by cities, counties, and other agencies regarding fire protection was to be exercised. In particular, the chapter provided specifically for the allocation of firefighting resources and the ability to contract with other entities to perform firefighting functions. Government Code § 55600 et. Seq.

H. 1953.

In 1953, the Legislature codified the Fire Liability Law, with minor changes, as Health and Safety Code §§ 13007, 13008, and 13009. Stats. 1953, ch. 48, §§ 1-3, p. 682. The Statutes and Amendments to the Codes for 1953 broadly describe these sections as addressing "Liability for fire damage." (Stats. 1953, ch. 48, §§ 1-2, p. 682) and the Legislature has not substantially amended any of these sections since they have been enacted[6].

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[6] The only one of these sections which has been amended at all is Section 13009, which has been amended in minor respects on several occasions but continues to create liability "for the fire suppression costs incurred in fighting the fire." Health & Safety Code, § 13009; see Stats. 1971, ch. 1202, § 1, p. 2297; Stats. 1978, ch. 1118, § 1, p. 3422; Stats. 1980, ch. 525, § 1, p. 1462; Stats. 1981, ch. 976, § 1, p. 3800; Stats. 1982, ch. 668, § 1, p. 2738; Stats. 1987, ch. 1127, § 1, p. 3846; Stats. 1992, ch. 427, § 91, p. 1627; Stats. 1994, ch. 444, § 1, p. 2410.

Health and Safety Code §§ 13007 and 13008 use essentially the same words as the Legislature had used in the Fire Liability Law. Like their predecessor fire statutes, both sections authorize only actual damages. Health and Safety Code § 13007 states:

> 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 & Safety Code § 13007. Similarly, Health and Safety Code § 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 the damages to the property caused by the fire.

Health & Safety Code § 13008. Finally, in the same manner as former section 3 of the Fire Liability Law, Health and Safety Code § 13009 authorizes recovery of all fire suppression expenses, including those incurred by a litigant or a public or private agency incurring the expenses. Stats. 1953, ch. 48, § 3, p. 682.

The above statutory language illustrates the fact that, as was the case with the predecessor statutes, the Legislature intended that §§ 13007 and 13008 ensure that recovery in cases of escaping fire be limited to actual damages, plus fire suppression costs. *Gould, supra*, at 406-407. Thus, at all times since 1931, the Legislature has specifically provided that those who cause fires are liable for both (and

only) the entirety of the actual damages caused by the fires and the (often extremely substantial) costs of fighting those fires[7].

IV. COURTS HAVE CONSISTENTLY INTERPRETED THE FIRE LIABILITY LAW BROADLY TO APPLY TO ALL TYPES OF FIRE DAMAGE.

Presumably because of the state's strong interest in protecting its citizens and their property from wild fires, Health and Safety Code § 13007 has a history of liberal construction. See *McKay v. State of California* (1992) 8 Cal.App.4th 937, 939. Since 1953, cases have uniformly held that section 13007 places "no restrictions on the type of property damage that is compensable." See, e.g., *McKay v. California* (1992) 8 Cal.App.4th 937, 940. Additionally, the earlier cases consistently held that sections 13007 and 13008 govern the extent of liability for all fire damaged property, including trees.

For example, in 1970, the court in *Gould v. Madonna* (1970) 5 Cal.App.3d 404, examined Health and Safety Code Section 13007 and its statutory history, noting that "we have found no indication anywhere that anyone has considered that the double damages provisions of section 3346 are applicable to fire damage caused by negligence. *Id.* at p. 408. The court noted that that statutory history

> "demonstrates a legislative intention that only actual damages be recoverable for injury caused by negligently set fires. That history indicates that the Legislature has

[7] For example, in the case of *People v. ex rel Girjalva v. Superior Court* (2008) 159 Cal.App.4th 1072, the appellate court affirmed a decision awarding $3,871,695 in fire suppression costs against the persons who negligently started a fire. Moreover, because the costs were incurred by a public entity, the doctrine of comparative fault was held not to apply to *any* of the fire-fighting decisions which were made.

> 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."

Id. at p. 407. Citation omitted.

Many later cases since *Gould* have also analyzed timber fires under Section 13007 and interpreted its damage provisions expansively. For example, in 1983, a court ruled that Section 13007 entitled a private landowner whose land was burned was entitled to both the fair market value of destroyed timber *and* the cost of restoring the property through reforestation. *People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627. As the court explained, the fire damaged the property "not only through destruction of trees used for timber, but through damage to the soil...[t]hese are separate injuries." *Id.* at p. 635. No mention was made of the possibility any other statutory scheme applied to any of the damages.

Nine years later, another appellate court recognized that, in a proper case, recovery under the fire liability statutes could include both lost profits and the property's diminution in value. *McKay v. California* (1992) 8 Cal.App.4th 937. Like the court in *Southern Pacific Co., supra*, the court used Section 13007 to analyze the fire damage to growing fruit trees in the case without reference to any other statutory scheme. See *Id.* at p. 939. As the court explained,

> "in view of the broad language of health and Safety Code section 13007 and its history of liberal construction, ...the statute places no restrictions on the type of property damage that is compensable."

Id. at p. 940.

In 2009, the court in *Kelly v. CB & I Constructors, Inc.,* (2009) 179 Cal.App. 4th 442, continued the liberal interpretation of the application of Section 13007, holding that a plaintiff was entitled to restoration costs which "substantially exceeded the market value of the property before the fire." *Id.*[8]

Most recently, in 2017, the court in *Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337 held that a plaintiff was also entitled to emotional distress damages in a fire trespass case. Notably, although 155 avocado trees were destroyed by the fire, the damages were analyzed under general trespass law. No mention was made of either section 733 or 3346.

V. BOTH CODE OF CIVIL PROCEDURE SECTION 733 AND CIVIL CODE §3346 WERE ENACTED TO PREVENT PERSONS FROM TAKING/ DAMAGING ANOTHER'S TREES FOR PROFIT.

Statutes are to be interpreted in context, "examining other legislation on the same subject, to determine the legislature's probable intent." *California Teachers Assn. v. Governing Board of Rialto Unified School District* (1997) 14 Cal.4th 627, 642. The context of a statute includes both the legislative purpose in enacting the statute and the legislative history of the enactment. See *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 358 (superseded by statute on other

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[8] The *Kelly* court thereafter incorrectly determined that in addition to this extremely costly actual damage award, the plaintiffs were also entitled to the multiplier set forth in Civil Code § 3346 for the damage to the trees on the property. As set forth in section VII.A herein, this last finding was both erroneous and inconsistent with the Legislature's intent.

grounds). If the plain meaning of statutory text is insufficient to resolve the question of its interpretation or the statutory language permits more than one reasonable interpretation, courts may look to the statute's purpose, public policy, and legislative history of the enactment and the impact of an interpretation on public policy. *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.

Furthermore, the provisions of the various California codes "are to be read and construed together under the 'well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute." *Pesce v. Department of Alcoholic Beverage Control* (1958) 51 Cal.2d 310, 312.

As relevant to the court's analysis in this case, neither Code of Civil Procedure § 733 nor Civil Code §3346 defines "wrongful injuries to timber, trees or underwood." Thus, neither statute, standing alone, can resolve the question of whether the sections apply to actions for tree damage occasioned by fire escaping to another's property. Instead, the court must rely on the rules of statutory construction, including consideration of the legislative history, historical context and the impact of the interpretations. See *California Teachers Assn. v. Governing Board of Rialto Unified School District* (1997) 14 Cal.4th 627, 632.

In this case, as set forth hereinabove, the Legislature enacted two different statutory schemes in 1872: one for fire damages, and another which was were intended to prevent people from appropriating other person's trees (or portions thereof) for their own purposes. These two

statutory schemes must be examined concurrently. In particular, any analysis of these two statutory schemes must take into account the fact that, by creating separate multipliers for injury to trees from fire and injury to trees from trespass in 1872, the Legislature necessarily understood these multipliers to apply in distinct circumstances. *See, e.g., Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1246. The Legislature has not taken any actions in the more than 100 years to suggest that it has changed its opinion in this regard.

A. 1872.

In 1872, the Legislature enacted Code of Civil Procedure § 733[9] which provided:

> "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."

The same year, the Legislature enacted Civil Code § 3346 governing injury to trees from trespass. As originally enacted, Civil Code § 3346 stated that

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[9] This section was originally enacted in 1851 (See Stats. 1851, ch. 5, § 251, p. 92). It was incorporated into the Code of Civil Procedure in 1872. See *Fulle v. Kanani* (20017) 7 Cal.App.5th 1305, 1310. Code of Civil Procedure § 733 has remained in force without change since it was first enacted in 1872.

> "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 . . . ."

Former Civil Code § 3346 (1872).

B. 1895.

In 1895, this Court held that a Civil Code § 3346/Code of Civil Procedure § 733 action was not a common law action of trespass, but a special statutory action with its own required elements. See *Stewart v. Sefton* (1895) 108 Cal. 197, 205-207. In *Stewart,* the court found that the elements of the action were met by a claimed "willful severance and removal of the trees from what he then knew to be the property of the plaintiff." *Id.* at p. 207.[10]

C. 1935.

McCormick on Damages recognized that section 3346 was an expression of the policy of increasing the risks of timber appropriation to the point of making it unprofitable. As McCormick noted,

> "[i]f the wrong complained of is ... the cutting of [plaintiff's trees] by the defendant and his appropriation of the timber, then, *if the defendant's depredation was done under an innocent mistake as to boundary or ownership, he will usually be held* <u>*in an action in the nature of trespass to the land, as in the cases of negligent injury to the timber by fire or the like*</u>, only for the diminished value of the land or the value of the trees before cutting. This hardly seems an adequate measure of relief to a plaintiff who intended to market his trees, not by selling them as

[10] Ultimately, the court did not apply the statutes in *Stewart* because the plaintiff suffered no actual damage.

> standing timber, but by cutting them and selling them as logs or lumber."

McCormick Handbook on the Law of Damages (1935 ed., § 126, p. 499) as cited in *Drewry v. Welch* (1965) 236 Cal.App.2d 159, 178. Emphasis added.

D. 1957.

1. <u>The Legislature amended portions of Section 3346.</u>

In 1957, the Legislature repealed, amended, and reenacted Civil Code § 3346. (Stats. 1957, ch. 2346, §§ 1-2, p. 4076.) As reenacted, Civil Code §3346 added both a double multiplier that applied in certain situations in which "the trespass was casual and involuntary" and a lengthened statute of limitations stating that:

> (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 the authority of 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."

Stats. 1957, ch. 2346, § 2, p. 4076.

Notably, the Legislature elected not to amend its previous language stating that a multiplier governs the measure of damages "[f]or wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof." (Compare Stats. 1957, ch. 2346, § 2, p. 4076 with former Civ. Code, § 3346 (1872); see *Drewry v. Welch* (1965) 236 Cal.App.2d 159, 171. Instead, the language concerning "wrongful injuries to timber, trees, or underwood upon the land of another" remained the same as originally enacted in 1872. Thus, there is no valid reason to ascribe any other meaning to the words "injury to trees" than that originally intended in 1872.

2. <u>The 1957 amendments continued to focus on the deterrence of wrongful appropriation of trees.</u>

In determining Legislative intent, particular attention can be paid to correspondence between an act's sponsoring senator and an association affected by the new legislation. See *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1257-1258. Not only was the intent of the 1872 Legislature the deterrence of timber appropriation, but the 1957 Legislature had the identical goal. Prior to the 1957 changes to section 3346, "Assemblyman Frank P. Belotti, who introduced the bill, corresponded with several landowners and officials from the United States Department of the Interior, Bureau of Land Management (BLM) regarding the need for more effective enforcement." *Fulle, supra*, 7 Cal.App.5th at p. 1315, fn. 6. This is consistent with the Act's stated purpose of addressing "wrongful

injuries to or removal of timber, trees, or underwood upon the land of another." Stats. 1957, ch. 2346, § 2, p. 4076.

The Legislature "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof." *People v. Yartz* (2005) 37 Cal.4th 529, 538. Even so, the Legislature added the multiplier for "casual or involuntary" conduct in section 3346 at approximately the same time as the fire liability statutes were eliminating penalties or restricting recoverable damages to actual damages in favor of provisions allowing fire suppression costs to be recovered. Thus, and particularly since no pre-1957 case had ever interpreted either Code of Civil Procedure § 733 or Civil Code §3346 to apply to fire damage to trees, "[i]t 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 v. Madonna, supra,* at 408.

Moreover, section 3346 contains no language extending its reach to "injuries" to growing trees which are injured by fires within the scope of the fire liability statutes. Particularly in light of both the consistently recognized broad reach of the fire liability statutes, and the fact that the timber injury statute had never previously been utilized to analyze injury to timber that had been caused by fire, "[i]f the Legislature had intended this statute to have a broader scope, it is likely the Legislature would have" so stated." See *In re Jose D.* (1990) 219 Cal.App.3d 582, 587. Its choice not to do so is a further indication that it had no such intent.

VI. NEITHER CODE OF CIVIL PROCEDURE SECTION 733 OR CIVIL CODE SECTION 3346 WERE INTENDED TO APPLY TO TREES DAMAGED BY AN ESCAPING FIRE.

Scholes urges the court to ignore both the specific facts he pled in his Complaint, and the gravamen of his claim to find that, because part of his claimed fire damages consists of "injury to trees" which were located on that fire damaged property, the five-year statute of limitations contained in Civil Code Section 3346(c) applies to the tree damage. This is incorrect. As set forth above, the Legislature initially enacted both fire damage statutes and timber damage statutes which contained punitive multiplier provisions, then removed fire damages from the ambit of the penalty statutes in order to make them the express subject of a separate scheme regulating the prevention and suppression of fires (Chapter 1 of Division 12 of the Health & Safety Code) which did not include any penalty damages. As previously stated, "[t]hat 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." *Gould v. Madonna, supra,* at p. 407.

Civil Code §3346 was never intended to apply to actions in which escaping fire causes incidental damage to trees growing on fire ravaged real property. Instead, Code of Civil Procedure §733 and Civil Code §3346, which provide for punitive damages for injuries to trees, were originally enacted to make timber appropriation unprofitable. *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1741.

Because of the punitive nature of the two statutes, the appellate courts have cautioned that the multipliers must be construed strictly. See e.g. *Drewry*, at pp. 172-173. Accordingly, if there is any ambiguity in whether Civil Code section 3346 applies to "trespass" by the spreading of fire, the statute should be construed narrowly to apply to only those situations originally intended by the Legislature. The statute cannot be construed broadly to authorize a multiplier for fire damage to trees, particularly when the Legislature specifically repealed such a multiplier.

However, construed in harmony, section 3346 cannot be interpreted to impose damages to trees injured by escaping fire. Instead, the section was aimed at those who personally enter onto another's property and cause damage to the trees there. This scheme is entirely separate from the general timber injury statutes. As the court recognized in *Gould v. Madonna* (1970) 5 Cal.App.3d 404

> [t]he 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.
> *Id.* at p. 408. Emphasis added.

"It has been suggested that the purpose of the statute is to educate blunderers (persons who mistake location of boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner." *Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1315. Citations omitted.

Viewed in this light, the enactment of a special statute for timber damage and appropriation which contains mandatory multipliers makes

sense: unlike wildfires, the cutting and theft of timber can be profitable in and of itself. As a result, "statutes like section 3346 [which provide for multipliers] are an expression of the policy of increasing the risks of timber appropriation to the point of making it unprofitable." *Gould, supra*, 5 Cal.App.3d at p. 408. As noted by the court in *Drewry, supra*, 236 Cal.App.2d at p. 176,

> "[p]articularly applicable to the cutting and removing of timber without the owner's permission is . . . '[t]he need for deterrence . . . since compensatory damages will at most restore the wrongdoer to the status quo ante and may even leave him with a profit."

(Quoting Note, Exemplary Damages in the Law of Torts (1957) 70 Harv. L.Rev. 517, 522).

Extending the use of this multiplier to trees damaged by fires would have disastrous consequences to all persons found to have negligently allowed another's land to catch fire, which consequences bear no relationship to the Legislative goals in enacting §§ 733 and 3346. Despite the likely fact that there is neither any intent to profit from a fire, nor any realistic possibility of such profit, a negligently set fire can escape to a great many surrounding properties, triggering extraordinary liability exposure, and enormous suppression costs. Fire damaged trees are not taken, but simply destroyed along with the remainder of the real property located in the fire's path.

Moreover, there is no need for the punitive multiplier in any case. A defendant who acts in conscious disregard of the possibility of causing such a fire would be subject to punitive damages.[11] Civil

[11] Due to "the penal nature of these provisions," a court cannot

Code § 3294. Thus, the Legislature has already created extremely strong incentives both to exercise caution to avoid fire hazards and to avoid intentionally setting fires. There is neither any need nor any to further penalize persons who cause fire damage which incidentally damages trees, nor is there any logic for doing so. Thus, as the *Gould* court recognized, the legislative treatment of various statutes makes clear that the penalty provisions in sections 733 and 3346 do not apply to damages to timber that result from a fire.

VII. SCHOLES' REMAINING ARGUMENTS ARE NOT PERSUASIVE

A. *Kelly v. CB & I* was incorrectly decided.

Scholes argues that the decision of the Second District Court in *Kelly v. CB & I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461, which reached the opposite conclusion than that reached thirty-five years earlier in *Gould*, should be applied to this case. *Kelly* held that tree damages caused by a fire generally recoverable under Health & Safety Code §13007 could also be subject to Civil Code §3346(a). Notably, however, the *Kelly* court improperly limited itself to the plain language of the statutes, and failed to consider that language in the context of either enactment's legislative purpose or legislative history. See *Smith v. Rae-Venter Law Group*, *supra*, at 358. Thus, the *Kelly*

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simultaneously award section 3346 multiplier damages and Civil Code § 3294 punitive damages. This would effectively punish a defendant twice, and is also "not necessary to further the policy … of educating blunderers (persons who mistake locating of boundary lines) and discouraging rogues (persons who ignore boundary lines." *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169.

decision improperly failed to examine whether, in enacting Health & Safety Code §13007, *et seq.*, to eliminate formerly available treble damages, the Legislature intended to limit recoverable damages to actual damages, plus fire suppression, investigation, and emergency medical expenses. This was error.

Interestingly, the *Kelly* court began its "analysis" by noting the broad scope of the type of compensable property damage which fell within the scope of Section 13007:

> "[section 13007] places no restrictions on the type of property damage that is compensable. Such damages might include, for example, damages to structures, to moveable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire."

Kelly v. CB & I Constructors, Inc. (2009) 179 Cal.App.4th 442, 461. Citations omitted. Thereafter, and without any explanation, the court simply concludes that fire damaged trees are not governed by Section 13007, stating that

> "if the fire also damages trees…then the actual damages recoverable under section 13007 may be doubled…or trebled…pursuant to section 3346."

Id. at p. 461. This conclusion is not only not explained, but is also inconsistent with both the Legislative history of the two statutory schemes and the *Kelly* court's recognition that the Legislature intended section 13007 to be interpreted broadly to cover all types of property damages.

Although words in a statute should be given their plain meaning, those words "must be read not in isolation but in the light of the statutory scheme." *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735. "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." *Id.* at p. 735. Thus, section 3346 cannot be considered in isolation and without regard to the fact that the history, text, and logic of the statutory scheme applicable to wildfires demonstrates that the Legislature rejected a multiplier for fire damage to trees. As set forth herein, "it is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 55. Thus, because the Legislature specifically amended the statutes governing wildfire damage to repeal the multiplier for fire damages, Kelly's decision that the Legislature intended a multiplier for certain types of fire damage through an expansive interpretation of another statute that does not mention fire at all cannot be allowed to stand. Instead, this case is governed by the plain language of Health and Safety Code §§ 13007 and 13008[12] and,

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[12] Scholes also cites to recently enacted Health and Safety Code §13009.2 as support for the proposition that the Legislature intended private plaintiffs whose trees have been damaged by fire to be entitled to a multiplier of tree damages. However, [c]ourts are not at liberty to impute a particular intention to the legislature when nothing in the language of the statute implies such an intention." *Dunn-Edwards Corp. v. Bay Area Air quality Management Dist.* (1992) 9 Cal.App.4th 644, 658. Section 13009.2(d) states explicitly that "[t]his section is not

as is the case with all fire damaged property to which it applies the remedy for fire damaged trees consists solely of the actual "damages to the property caused by the fire" rather than some multiplier of those damages. Health & Safety Code, §§ 13007, 13008.

B. Scholes misunderstands the holding of *Elton v. Anheusser-Busch.*

Scholes also argues that the validity of the court's holding in *Gould* holding is dependent on the court's observation that a negligently caused fire did not at that time constitute a "trespass" within the meaning of Civil Code § 3346. Scholes Opening Brief 19-20, 29-30, citing *Elton v. Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1301, 1305-1307. To begin with, while this observation by the *Gould* court is technically correct, it is also somewhat misleading: this court first recognized that an intentionally set fire which traveled to another's property could constitute a trespass in 1887. See *Gale v. McDaniel* (1887) 72 Cal. 334. Fifty years later, in 1928, while not specifically referencing fire, this court held that "trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries." *Coley v. Hecker* (1928) 206 Cal. 22, 28. Thus, it was settled that courts had the authority to apply the trespass doctrine to fires long before the *Elton v. Anheuser-Busch* decision.

More importantly for the purpose of this analysis, the *Elton* Court did not decide the issue of whether or not Section 3346 could be

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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..." Thus, it cannot be deemed to have done so.

applied to growing trees which were damaged by fire. Instead, the *Elton* court merely stated that Code of Civil Procedure § 1021.9 addressed costs, whereas Civil Code § 3346 addresses damages holding that

> "[a]s an item of costs, an award of attorney's fees pursuant to section 1021.9 is not inconsistent with a legislative intent that the only damages recoverable are those described in Health and Safety Code sections 13007 and 13008."

Id. at p. 1308. Emphasis added. Cases are not authority for propositions not considered. *People v. Wells* (1996) 12 Cal.4th 979, 984, fn. 4. Thus, there is no inconsistency between the *Elton* decision or a conclusion that Health and Safety Code §§ 13007 and 13008 govern fire damages to growing trees. On the contrary, the *Elton* Court of Appeal made clear its reasoning was consistent with the "legislative intent" limiting fire damages to Health and Safety Code sections 13007 and 13008-as explained by *Gould*. *Ibid.*

C. The incorrect reasoning of *U.S. v. Sierra Pacific* has no bearing on this case.

Scholes also relies heavily on a decision by the Eastern District of California, *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2012) 879 F.Supp.2d 1096 which "predicted" that this Court "would approve" of the *Kelly* analysis of section 3346. *Id.* at p. 1116. However, the federal district court did so based on a rule of statutory interpretation which is contrary to the California rule. Specifically, *Sierra Pacific* reasoned that section 3346 should apply to fire damage because the

Legislature in 2011 "chose not to pass a bill that would have stated that trespass under § 3346 cannot be by fire." *Sierra Pacific*, at pp. 1116-1117. However, as this Court has repeatedly observed, unpassed bills have "little value" as evidence of legislative intent. See *People v. Wade* (2016) 63 Cal.4th 137, 146, internal quotation marks omitted. Additionally, in California, it is settled that the declaration of a later Legislature is of little weight in determining the relevant intent of the legislature that enacted the law. *Lolley v. Campbell* (2002) 28 Cal.4th 367, 379.

Finally, the unpassed bill cannot demonstrate the legislative intent in this case because one-year later the Legislature enacted Health and Safety Code §13009.2(d) which expressly declined to resolve the issue. Health & Safety Code, § 13009.2, subd. (d). Because the Legislature expressly declined to resolve this issue in 2012, the unpassed bill from 2011 is of no value whatsoever in determining legislative intent. Instead, as set forth herein, the most recent evidence of the Legislature's intent was its reenactment of Civil Code section 3346 in 1957, with the intent to "deter timber appropriation" (*Fulle, supra*, 7 Cal.App.5th at p. 1315, fn. 6.) and to address "wrongful injuries to or removal of timber." Stats. 1957, ch. 2346, § 2, p. 4076, emphasis omitted. Notably, both (1) the Legislature did so using language that had never been applied to any type of fire damage governed by the Fire Liability Law, and (2) there is absolutely no indication that the Legislature intended the statute to apply to any situations which fell within the fire statutory scheme.

D. The amendment of portions of Section 3346 did not impliedly preempt the provisions of sections 13007 and 13008.

Scholes also argues that Civil Code section 3346 is a "later-enacted statute" that should impliedly preempt Health and Safety Code §§ 13007 and 13008. As support for this contention, he points to the 1957 Act that amended Civil Code section 3346 by adding a double damages provision for tree damage from casual or involuntary trespass. See Stats. 1957, ch. 2346, § 2, p. 4076. However, the double damages provision is no more specific to fire damage than was the treble damages provision which was enacted in 1872, simultaneously with the original fire liability statutes.

Moreover, Civil Code section 3346 neither makes any reference to fire losses, nor did the Legislature even mention fire damage when passing that amendment. (*Ibid.*) Instead, as it had in 1872, the Legislature simply spoke to the "removal of timber." (*Ibid.*, emphasis omitted.) Moreover, as set forth above, the legislative history shows that the bill was amended to "deter timber appropriation." (*Fulle, supra*, 7 Cal.App.5th at p. 1315, fn. 6.) Thus, there is nothing about the amendment of Civil Code section 3346 suggests the Legislature intended to impliedly preempt Health and Safety Code §§ 13007 and 13008.

Additionally, the implied preemption doctrine does not apply when the Legislature reenacts a statute without changing its wording. *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 311. In this case, the Legislature's repeal and reenactment of section 3346

did not change any of the statutory terms applying a multiplier to "injuries to timber, trees, or underwood upon the land of another, or removal thereof." Compare Stats. 1957, ch. 2346, § 2, p. 4076 with former Civ. Code, § 3346 (1872). Thus, this reenactment of section 3346 cannot be deemed to render it enacted for this purpose.

Finally, repeals by implication are "disfavored." *People v. Siko* (1988) 45 Cal.3d 820, 824. In order to find a repeal by implication, two acts must be "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419. Here, however, the two acts in issue can be easily reconciled simply by interpreting section 3346 (which makes no mention of either fire damage or any other type of indirect damage to trees which is an incidental result of the damage to the real property upon which the trees are growing) to mean damage which is directed at the trees rather than the real property on which they grow.

E. Civil Code § 3346 is not "more specific" than Health & Safety Code §§ 13007 and 13008.

Scholes also argues that Civil Code § 3346 is a "specific" statute that should effectively trump the "general" statute governing property damage that is caused by fire. Scholes Opening Brief, p. 29. However, Civil Code section 3346 makes no mention whatsoever of fire. On the other hand, Health and Safety Code §§ 13007 and 13008-allowing only actual damages for fire-were enacted specifically to address the grave dangers inherent in the spread of wildfire. Those dangers necessarily include the likelihood that whatever trees are

located on fire damaged property will also be damaged by fire, perhaps fatally so. In this regard, Health and Safety Code § 13007 has been considered a "special statutory rule" that applies "where property is damaged by a negligently set fire." *McKay v. State of California* (1992) 8 Cal.App.4th 937, 939. Thus, both the *McKay* court and the *Gould* court correctly held that "double damages provisions of Civ. Code, § 3346 are inapplicable to property damage resulting from negligently set fire." See *McKay v. State of California, supra,* 8 Cal.App.4th at p. 939.

F. Punitive damages cannot be recovered concurrently with the multiplier damages of § 3346.

Scholes also argues that when a statute "recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215, emphasis added; see OBOM 24-26. Scholes then argues that "nothing" indicates the Legislature intended to create different statutory schemes. Scholes Opening Brief, p. 26. His argument ignores the fact that, while punitive damages are available in appropriate cases filed under Health and Safety Code §§ 13007 and 13008 (Civil Code § 3294), punitive damages cannot be recovered concurrently with either of the mandatory multipliers found in Section 3344. *Hassoldt v. Patrick, supra,* 84 Cal.App.4th at 169. Accordingly, a decision in his favor would result in the anomalous situation in which punitive damages

could be recovered for part of a real property trespass, but not for any incidental fire damage to trees.

The argument also ignores over a century of legislation which established different statutory schemes that were created to govern damage to real property and its appurtenances from fire and injury to trees from trespass. Thus, to the extent section 3294 is relevant to the issues in this case, it does not assist Scholes but rather undermines his arguments.

VIII. POLICY REASONS DEMAND THAT SECTION 3346 NOT BE EXPANDED TO INCLUDE FIRE LOSSES

In any trespass case, the proper measure of damages is the one that will fully compensate the plaintiff for damages that have occurred or can with certainty be expected to occur. See *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 606. However, damages may cover the loss or injury sustained *and no more*. *Estate of de Laveaga* (1958) 50 Cal.2d 480, 488. Emphasis added. However, in order to hold that section 3346 applies to this case, this court must necessarily ignore the above rules. Applying Scholes' rule will not only give those plaintiffs who own trees more than the amount necessary to cover the loss sustained, but also will allow a person who sustains "tree injury" to recover more than a similarly situated person who suffers personal injury as the result of a fire governed by sections 13007 and 13008. However, "[t]he rights to property and to protection against its destruction are certainly no greater than the right to personal security, and a "party injured" is no less a "party injured" because his

body has been impaired instead of a piece of property owned by him has been destroyed." *Haverstick v. So. Pac. Co.* (1934) 1 Cal.App.2d 605, 617. Thus, this court should not countenance this absurd result.

Finally, the punitive nature of Section 3346 cannot simply be ignored, particularly when it is compounded with the Legislature's mandate that a person responsible for a negligently set fire is not only broadly responsible for any and all types of damage caused by that fire, but also responsible for *all* cost of suppression, regardless of whether or not they are reasonable, or within the financial means of a defendant. Thus, Lambirth respectfully requests this court uphold the decision of the court of appeal.

CONCLUSION

The trial court correctly sustained the demurrer to Scholes' TAC: Scholes' claims for trespass by fire were not commenced within the three-year statute of limitations set forth in Code of Civil Procedure Section 338(b). Scholes failed to either allege facts to support a Civil Code § 3346 statute of limitations or to even to argue for its application at the trial court level when the statute of limitations was raised. Additionally, as the court of appeal correctly found, Civil Code § 3346 cannot be utilized to multiply the damages to fire damaged trees in a case where fire has escaped to the real property upon which they are growing.

Instead, as the court of appeal correctly recognized, the only liability for the tree damage which could be predicated on the facts alleged in the TAC is that damage which resulted from the fire damage to Scholes' real property. Thus, the scope of Lambirth's liability in

this case is governed by Health and Safety Code §§ 13007 and 13008. That damage is necessarily subject to the three-year statute of limitations contained in Code of Civil Procedure Section 338(b) which applies to both injuries to, and trespass upon, the real property to which the fire traveled in this case. Because Scholes failed to allege facts giving rise to any viable claim whatsoever until long after the three-year period had expired, the trial court correctly sustained the demurrer to the TAC. Thereafter, the court of appeal correctly affirmed that decision. Therefore, this court should affirm the judgment in its entirety.

DATED: September 14, 2017

Respectfully submitted,

SPINELLI, DONALD & NOTT

By: /s/ Lynn A. Garcia
LYNN A. GARCIA
Attorneys for Respondent
LAMBIRTH TRUCKING
COMPANY

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 13,457 words as counted by the Microsoft Word version 2010 word processing program used to generate the Respondent's Brief.

DATED: September 14, 2017 SPINELLI, DONALD & NOTT

By: /s/ Lynn A. Garcia
LYNN A. GARCIA
Attorneys for Respondent
LAMBIRTH
TRUCKING COMPANY

PROOF OF SERVICE

COURT: Supreme Court of California
CASE NO.: S241825 (Appellate Case No. C070770)
CASE NAME: *Vincent E. Scholes, Plaintiff and Appellant v. Lambirth Trucking Company, Defendant and Respondent*

I am a citizen of the United States, employed in the County of Sacramento, State of California. My business address is 815 S Street, Second Floor, Sacramento, CA 95811. I am over the age of 18 and not a party to the above-entitled action.

I am readily familiar with Spinelli, Donald & Nott's practice for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to said practice, each document is placed in an envelope, the envelope is sealed, the appropriate postage is placed thereon and the sealed envelope is placed in the office mail receptacle. Each day's mail is collected and deposited in a U.S. mailbox at or before the close of each day's business. (Cal. Rules of Court, 8.25; Code Civ. Proc., § 1013a(3), 2015.5.)

On September 14, 2017, I caused the within **RESPONDENT'S BRIEF**, the original of which was produced on recycled paper, to be served via

☒ MAIL--
Placed in the United States Mail at Sacramento, California in an envelope with postage thereon fully prepaid addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 14, 2017, at Sacramento, California.

/s/ Lori Newberry
Lori Newberry

SERVICE LIST

COURT: Supreme Court of California
CASE NO.: S241825 (Appellate Case No. C070770)
CASE NAME: *Vincent E. Scholes, Plaintiff and Appellant v. Lambirth Trucking Company, Defendant and Respondent*

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EXHIBIT A

COURT OF APPEAL OPINION

C070770 – March 7, 2017

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk/Administrator
Electronically FILED on 3/7/2017 by J. Swartzendruber, Deputy Clerk

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Colusa)

VINCENT E. SCHOLES, Plaintiff and Appellant, v. LAMBIRTH TRUCKING COMPANY, Defendant and Respondent.	C070770 (Super. Ct. No. CV23759)

In 2007 a fire spread from defendant Lambirth Trucking Company's (Lambirth) storage site to plaintiff Vincent Scholes' property. Scholes' third amended complaint alleged negligent trespass, intentional trespass, and strict liability against Lambirth. Lambirth demurred 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. The trial court sustained the demurrer without leave to amend. Proceeding in pro per,

Scholes appeals, arguing the trial court erred in finding his claims barred by the statute of limitations and by failing to grant Scholes leave to amend. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Fire

Since 2003, Lambirth has operated a soil amendment and enhancement company adjacent to Scholes' real property. Lambirth's company grinds wood products and stores wood chips, sawdust, and rice hulls, the remnants of which have blown onto Scholes' property.

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

Original Complaint

Scholes filed his original complaint on May 21, 2010, three years after the fire. The complaint named as defendants Lamberth [*sic*] Trucking Company and its insurer Financial Pacific Insurance Company (Financial Pacific) and stated it was for a "dispute compensation on insurance claim." Scholes alleged "[d]efendants have accepted liability, dispute amount of damages from fire." The complaint alleged Scholes lost use of his property and suffered general and property damages.

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. In his complaint, Scholes sought compensation for property lost in the fire, loss of crops, and loss of use of property. Scholes did not assert any additional causes of action in the form complaint.

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. The trial court granted the motion with leave to amend.

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. 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." 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." In October 2011 Scholes agreed to dismiss with prejudice his action against Financial Pacific and its officers and directors.

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 the first cause of action.

Third Amended Complaint

Subsequently, on November 10, 2011, Scholes filed a third amended complaint alleging three causes of action: negligent trespass, intentional trespass, and strict liability (trespass through unnatural activity). 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. The storage of combustible materials violated Civil Code section 1014 and was "unnatural."

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. Nineteen 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." Scholes requested triple damages under Civil Code section 3346 and Code of Civil Procedure section 733 for the damage to the walnut orchard.[1]

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. 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.

The trial court sustained the demurrer without leave to amend and dismissed the action. Following entry of judgment, Scholes filed a timely appeal.

DISCUSSION

I.

The function of a demurrer is to test the sufficiency of the complaint by raising questions of law. We give the complaint a reasonable interpretation and read it as a whole with all parts considered in their context. A general demurrer admits the truth of all material factual allegations. We are not concerned with the plaintiff's ability to prove the allegations or with any possible difficulties in making such proof. We are not bound

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise designated.

by the construction placed by the trial court on the pleadings; instead, we make our own independent judgment. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 824.)

Where the trial court sustains the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff can cure the defect with an amendment. If we find that an amendment could cure the defect, we must find the court abused its discretion and reverse. If not, the court has not abused its discretion. The plaintiff bears the burden of proving an amendment would cure the defect. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.)

II.

On appeal, a party challenging an order has the burden to show error by providing an adequate record and making coherent legal arguments, supported by authority, or the claims will be deemed forfeited. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.) The rules of appellate procedure apply to Scholes even though he is representing himself on appeal. (*Leslie v. Board of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121.) A party may choose to act as his or her own attorney. We treat such a party like any other party, and he or she " 'is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

III.

In his third amended complaint, Scholes alleged three causes of action: negligent trespass, intentional trespass, and unnatural activity trespass. All three causes of action stemmed from damage caused by the fire on May 21, 2007.

The negligence cause of action alleged Lambirth stored combustible material on its land over the repeated objections of Scholes, and despite the warnings of fire authorities. After the fire erupted, Lambirth failed to control or suppress it due to

inadequate water supplies and other fire suppression equipment which resulted in damage to Scholes' property in the amount of $204,277.82. Lambirth's act violated Civil Code section 1014. Scholes requested triple damages under Civil Code section 3346.

In his intentional trespass cause of action, Scholes alleged Lambirth's storage of combustible materials and its failure to mitigate the risk of fire was the "equivalent of a conscious disregard of said risk and therefore rendered said conduct of defendant willful." In his final cause of action for strict liability (unnatural activity trespass) Scholes alleges simply: "The accumulation and storage of said combustible materials was unnatural and was done and performed by Defendant such it is strictly liable under the common-law doctrine of *Wintergreen v. Winterbottom* for said damages."[2]

IV.

Lambirth argues section 339, subdivision (1) sets forth the applicable statute of limitations: "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code." Lambirth contends the statute of limitations for trespass, three years pursuant to section 338, subdivision (b), does not apply.

According to Lambirth, the two-year limitations period applies to actions in which the damage to a plaintiff's property is consequential only and arises from a defendant's lawful act not done on a plaintiff's property, but committed elsewhere "and causing as a consequence thereof some injury to plaintiff's property not arising from an entry thereon by the defendant or his agencies." (*Porter v. City of Los Angeles* (1920) 182 Cal. 515, 518.) Lambirth argues the Supreme Court has held that the three-year period allowed for maintenance of an action for trespass on real property, section 338, subdivision (b),

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[2] Neither party references *Wintergreen v. Winterbottom.*

applies only where there is an actual entry on the property or direct injury amounting to trespass. In support, Lambirth cites *Crim v. City & County of San Francisco* (1907) 152 Cal. 279 (*Crim*) and *Denari v. Southern California Ry. Co.* (1898) 122 Cal. 507 (*Denari*).

Lambirth is mistaken. In *Elton v. Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1301, 1305-1306 (*Elton*), the appellate court reviewed the history of the distinction between direct and consequential damages in determining whether a trespass had occurred. Although older cases, including *Crim* and *Denari,* concluded a consequential trespass was not a trespass within the meaning of section 338, the Supreme Court in *Coley v. Hecker* (1928) 206 Cal. 22, 28 stated: " 'The trend of the decisions of this court is generally in accord with the doctrine whenever the question has come before it, that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries.' " In 1982 the Supreme Court reiterated that the rule has evolved in California that trespass may be committed by consequential and indirect injury as well as by direct and forcible injury. (*Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 232.)

The *Elton* court concluded: "Thus, we need not decide whether the damages to the plaintiffs' property were an indirect consequence of the defendant's act of lighting the fire or a direct result of the defendant's negligence in allowing the fire to escape, or whether the common law would classify an action to recover compensation for such damages as an action for trespass or on the case. [Citation.] The distinction between direct and consequential damages having been abandoned, the possibility that the damages may have been only an indirect consequence of the fire does not prevent the escape of that fire from constituting a trespass." (*Elton, supra*, 50 Cal.App.4th at p. 1306.)

V.

Therefore, the three-year statute of limitations under section 338, subdivision (b) applies to Scholes' causes of action for trespass. The fire took place on May 21, 2007, and Scholes filed his original complaint on May 21, 2010. However, Scholes did not allege trespass until his second amended complaint filed in August 2011, over three years after the fire.

Unless an amended complaint relates back to a timely filed original complaint, it will be barred by the statute of limitations. (*Barrington v. A.H. Robins Co.* (1985) 39 Cal.3d 146, 150.) Under the relation-back doctrine, in order to avoid the statute of limitations, the amended complaint must: rest on the same general set of facts as the general complaint, refer to the same accident and same injuries as the original complaint, and refer to the same instrumentality as the original complaint. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.)

A complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language. (§ 425.10, subd. (a)(1).) This requirement obligates the plaintiff to allege ultimate facts that, taken as a whole, apprise the defendant of the factual basis of the claim. (*Lim v. The.TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 689-690.) The requirement that the complaint allege ultimate facts forming the basis for the plaintiff's cause of action is central to the relation-back doctrine and the determination of whether an amended complaint should be deemed filed as of the date of the original pleading. (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415 (*Davaloo*).)

The relation-back doctrine requires us to compare the factual allegations in the original and amended complaints. (*Davaloo, supra*, 135 Cal.App.4th at p. 416.) "Just as a plaintiff who changes the essential facts upon which recovery is sought is not entitled to the benefits of the relation-back doctrine, so too a plaintiff who files a complaint containing no operative facts at all cannot subsequently amend the pleading to allege

facts and a theory of recovery for the first time and claim the amended complaint should be deemed filed as of the date of the original, wholly defective complaint: Going from nothing to something is as much at odds with the rationale for allowing an amended pleading to relate back to the filing of the original documents as changing from one set of facts to a different set." (*Ibid.*)

Here, Scholes' original complaint alleges a cause of action for "[d]ispute compensation on insurance claim." The relief sought is "compensation for property loss." Finally, the complaint alleges "[d]efendants have accepted liability, dispute amount of damages from fire." Nothing else is listed in or attached to the original complaint.

The original complaint, devoid of factual allegations, fails to meet section 425.10, subdivision (a)'s minimal fact pleading requirement. The original complaint does not identify the property at issue or specify the damages suffered; it merely lists "loss of use of property" and "property damage". The complaint fails to specify the date, origin, or scope of the fire. The original complaint does not set forth the relationship between the parties or any duties owed to Scholes by Lambirth. Nor does the original complaint specify any causes of action except for checking the box for "Property Damage". Nothing in the original complaint sets forth any factual basis for Scholes' subsequent claims for negligent trespass, intentional trespass, or unnatural activity trespass. It is impossible to even infer the nature of any dispute between Scholes and Lambirth.

In finding the amended complaint does not relate back, we rely on the totality of the deficiencies in the original complaint, rather than any single defect. The totality of these material deficiencies leave nothing to which the first amended complaint can be compared to or to which they can relate back. "Although there can be no bright-line rule as to when a complaint is so deficient to preclude relation back (any more than there is a bright line rule when an amended set of facts is too dissimilar to the originally pleaded

set), the original complaints here—with all their deficiencies—are plainly insufficient." (*Davaloo, supra*, 135 Cal.App.4th at pp. 417-418.)

In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, we consider whether the defendant had adequate notice of the claim based on the original pleading. The policy behind statutes of limitations is to put a defendant on notice of the need to defend against a claim in time to prepare an adequate defense. This requirement is met when recovery under an amended complaint is sought on the same basic set of facts as the original pleading. (*Pointe San Diego Residential Community L.P. v. Procipio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 277 (*Pointe San Diego*); *Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1678.)

Here, we find the lack of facts in the present case in stark contrast to the facts found sufficient in *Pointe San Diego* to invoke the relation-back doctrine. In *Pointe San Diego,* plaintiffs brought a malpractice action against a law firm in a complex multi-party real estate litigation that resulted in multiple appeals. (*Pointe San Diego, supra*, 195 Cal.App.4th at pp. 269-270.) The trial court sustained the law firm's demurrer without leave to amend on the plaintiffs' fourth amended complaint, finding the claims barred by the statute of limitations and the relation-back doctrine inapplicable. (*Id.* at p. 273.)

The appellate court reversed. The court noted the original complaint named the plaintiffs and the law firm. It was a form complaint with the box marked "General Negligence" checked and with an attachment alleging the law firm was the legal (proximate) cause of damage to the plaintiffs and by " 'the following acts or omissions to act, defendants negligently caused the damage to plaintiff.' " (*Pointe San Diego, supra*, 195 Cal.App.4th at p. 277.) In the description of reasons for liability section, the plaintiffs stated their attorneys failed to use due care in the handling of the underlying lawsuit. (*Ibid.*) The court found, because there was a single litigation matter in which

the law firm had represented the plaintiffs, the firm was put on notice that the professional negligence claim was based on its representation of the plaintiffs "and of the need to gather and preserve evidence relating to this representation." (*Id.* at p. 278.)

The court concluded: "Procopio had represented these plaintiffs for several years in this precise litigation, controlled the litigation strategy, participated in numerous client conversations and meetings, and produced or had immediate access to the documents that would inevitably become relevant in the malpractice action. Although the original complaint did not detail *how* the firm had allegedly breached the standard of care, the form complaint and the fourth amended complaint rested on the same general set of facts (Procopio's prosecution of the Pointe I litigation), involved the same injury (monetary damages sustained as a result of alleged professional negligence), and referred to the same instrumentality (alleged professional negligence)." (*Pointe San Diego, supra*, 195 Cal.App.4th at p. 278.)

In finding the amended complaint related back to the original complaint, the *Point San Diego* court distinguished *Davaloo.* In *Davaloo,* two plaintiffs filed identically worded complaints against State Farm, alleging breach of contract and bad faith causes of action relating to property damage from the Northridge earthquake. The complaints stated in general terms that the plaintiffs had suffered insured losses as a result of the earthquake and had timely contacted the insurer regarding damages. Aside from the caption, the complaints did not mention the defendants or plaintiffs by name and did not provide any information about the insurance policies or the claims being made by the plaintiffs. (*Davaloo, supra*, 135 Cal.App.4th at pp. 411-412; *Pointe San Diego, supra*, 195 Cal.App.4th at p. 280.) The *Davaloo* court found the relation-back doctrine was inapplicable because of the complete lack of factual allegations. Even after liberally construing the pleadings, the court explained "the body of each of the original complaints at bottom alleges nothing more than the Northridge earthquake caused harm to a resident

or residents of Los Angeles County. Such an allegation falls far short of apprising State Farm of the factual basis of their claim." (*Davaloo, supra*, 135 Cal.App.4th at p. 417.)

The court in *Pointe San Diego* agreed with the reasoning of *Davaloo*: "If an original complaint lacks facts sufficient to provide notice to the defendant of the essential nature of the claim, it would defeat this policy to permit the plaintiff to remedy this error by filing a new amended complaint beyond the limitations period. In *Davaloo,* State Farm could not have known what facts it needed to gather and preserve during the one-year limitations period. State Farm had *no* information about the insureds, their property, the claimed damages, the nature of their bad faith claims, or any of the relevant conduct or activities undertaken by State Farm." (*Pointe San Diego, supra*, 195 Cal.App.4th at pp. 280-281.) It distinguished *Davaloo,* noting that in its case, the original complaint placed the law firm on notice of the identity of the plaintiffs and the nature of their claims, referring to the specific litigation and alleging a failure to use due care in handling the litigation. (*Ibid.*)

We find the case before us more akin to *Davaloo* than *Pointe San Diego.* Scholes' original complaint fails to put Lambirth on notice of any cause of action against it. This void prevents the amended complaint from relating back to the original complaint.

VI.

For the first time on appeal, Scholes argues the first cause of action for negligence is for "damage to trees" under Civil Code section 3346 and section 733 and is subject to a five-year statute of limitations. Civil Code section 3346, subdivision (a) states in pertinent part: "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." Civil Code section 3346, subdivision (c) states: "Any action for the damages specified by subdivisions (a) and (b) of this section must be commenced within five years from the date of trespass." Therefore, Scholes contends,

since the fire took place on May 21 through May 30, 2007, he could file suit no later than May 2012 and his November 10, 2011, complaint was timely filed.

However, we previously held that Civil Code section 3346, which authorizes double damages for wrongful injuries to timber, trees or underwood, where the trespass causing the injuries was casual or involuntary, did not apply to damage to property resulting from fires negligently set. (*Gould v. Madonna* (1970) 5 Cal.App.3d 404, 406-407 (*Gould*).)

In *Gould* a construction company negligently set and maintained fires on a highway it was constructing. An uncontrolled fire burned extensive areas, including timber, trees, and land of the plaintiff. After defendant's liability was established, the trial court refused to award double damages. We affirmed the judgment, holding Civil Code section 3346, which authorizes double damages did not apply to fires negligently set. (*Gould, supra*, 5 Cal.App.3d at pp. 405-407.)

Instead we found that Health and Safety Code sections 13007 and 13008, which cover liability in relation to fires, applied. Section 13007 states: "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 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." Section 13008 states: "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 the damages to the property caused by the fire."

In coming to this conclusion we considered the legislative history of Civil Code section 3346 and Health and Safety Code sections 13007 and 13008. We concluded this history demonstrated 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." (*Gould, supra*, 5 Cal.App.3d at p. 407.) We noted Civil Code section 3346 provides double damages, a provision penal in nature. "There are no penal provisions in the section dealing with fires. 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,* at pp. 407-408.)

Finally, we also distinguished the legislative purpose behind Civil Code section 3346: "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 location of boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner. [Citation.] We have found no indication anywhere that anyone has considered that the double damages provisions of section 3346 are applicable to fire damage caused by negligence. . . . Section 3346 is irrelevant to the damage in this case." (*Gould, supra*, 5 Cal.App.3d at p. 408; see also *McKay v. State of California* (1992) 8 Cal.App.4th 937, 939.)

As Scholes points out, the court in *Kelly v. CB & I Constructors, Inc.* (2009) 179 Cal.App.4th 442 (*Kelly*) disagreed with our analysis in *Gould* and found that section 3346 does apply to fire damage to trees. (*Id.* at pp. 459-463.) *Kelly* determined the plain language of the statute authorizing an award of double damages " '[f]or wrongful injury to . . . trees . . . upon the land of another, . . . where the trespass was casual or involuntary' " includes damage from a negligently set brush fire. (*Id.* at p. 463.) *Kelly* did not consider the legislative history or purposes behind the two sets of statutes. (*Ibid.*)

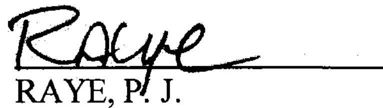
Despite *Kelly's* disagreement with our analysis, *Gould* remains viable and controlling here.[3]

VII.

Finally, Scholes must demonstrate both a reasonable probability that the third amended complaint can be amended; and the manner in which it may be amended to cure the defect of failing to file the action within the applicable limitations period. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) Scholes fails to demonstrate how his third amended complaint could be amended to avoid the statute of limitations bar.

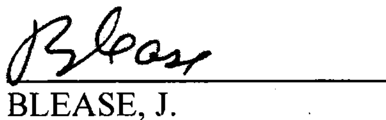
DISPOSITION

The judgment is affirmed. Lambirth shall recover costs on appeal.

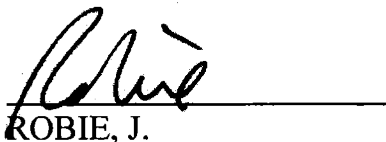


RAYE, P. J.

We concur:



BLEASE, J.



ROBIE, J.

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[3] The federal district court adopted *Kelly's* analysis in *United States v. Sierra Pac. Industries* (E.D.Cal. 2012) 879 F.Supp.2d 1096.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Scholes v. Lambirth Trucking Company
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