No. S241825

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

VINCENT E. SCHOLES

Plaintiff and Appellant,

vs.

LAMBIRTH TRUCKING COMPANY,

Defendant and Respondent.

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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Having failed to file any answer to the petition for review, Lambirth Trucking Company ("Lambirth") now urges this Court to decide the case without resolving the issue on which it granted review—whether the multiple damages provisions of Civil Code section 3346 apply to fire damage to trees. According to Lambirth, the Court should avoid resolving this issue by deciding that plaintiff Vincent Scholes did not allege facts sufficient to state a cause of action for wrongful injury to trees under Civil Code section 3346, and that the gravamen of his complaint is injury to real property subject to a three-year statute of limitations. (Code Civ. Proc., § 338(b).)

In this reply, Scholes will first discuss the issue on which this Court actually granted review. Lambirth has misconstrued Scholes' argument on this issue, as well as the holding of *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442. As *Kelly* concluded, the plain language of Civil Code section 3346 applies to fire damage to trees, and the statute authorizes doubling or tripling of the damages otherwise recoverable for tree damage under Health & Safety Code sections 13007 and 13008. Contrary to Lambirth's belief, *Kelly* did not rule that Civil Code section 3346 is an *exception* to the Health & Safety Code provisions, nor has Scholes made any such argument. Health & Safety Code sections 13007 and 13008 recognize liability for fire damage to all types of property, and Civil Code section 3346 enhances the damages otherwise recoverable for injuries to trees. These statutes are "easily harmonized" without treating the latter as an exception to the former. (*Kelly*, *supra*, 179 Cal.App.4th at p. 461.)

As for Lambirth's alternative arguments, Scholes specifically alleged in his third amended complaint that he was entitled to enhanced damages

under Civil Code section 3346 for the damage to his walnut trees. Although the statute of limitations for trespass is normally three years (Code Civ. Proc., § 338, subd. (b)), Civil Code section 3346, subdivision (c), creates a longer, five-year statute for claims seeking enhanced damages for wrongful injuries to trees. Scholes filed his third amended complaint within five years of the fire that destroyed his walnut orchard. Thus, his claim for multiple damages under Civil Code section 3346 was properly alleged and filed within the applicable five-year statute of limitations.

ARGUMENT

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

A. Lambirth Has Misconstrued Scholes' Argument and the Holding of *Kelly*

Lambirth states the issue before the Court as being "whether Civil Code § 3346 provides *an exception* to California's comprehensive fire liability rules." (Op. Br. at p. 13, emphasis added.) Lambirth seems to have understood Scholes to be arguing that Health & Safety Code sections 13007 and 13008 do not apply to fire damage to trees, and that the Court of Appeal in *Kelly* so held in ruling that Civil Code section 3346 applies. (Ans. Br. at pp. 50, 55-56.)

This is not accurate. *Kelly* did *not* hold that Civil Code section 3346 is an exception to Health & Safety Code sections 13007 and 13008, nor is Scholes making any such argument. What *Kelly* held is that *both* statutory schemes apply. Health & Safety Code sections 13007 and 13008 recognize liability for fire damage to all types of property, including trees, and Civil Code section 3346 authorizes doubling or tripling of the damages otherwise recoverable for wrongful injuries to trees. (*Kelly*, *supra*, 179 Cal.App.4th at

p. 461.) As *Kelly* explained, "[i]f the fire ... damages trees ... then *the actual damages recoverable under section 13007* may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) *pursuant to section 3346*." (*Ibid.*, emphasis added; accord *United States v. Sierra Pacific Industries* (E.D. Cal. 2012) 879 F. Supp. 2d 1096, 1116 (*Sierra Pacific*).)

Because Lambirth has misconstrued Scholes' argument and the holding of *Kelly*, much of its answer brief shoots down arguments no one has made. For example, Lambirth argues at some length that Health & Safety Code sections 13007 and 13008 apply broadly to all types of property damaged by fire, including trees. (Ans. Br. at pp. 37-39.) Nobody has ever disputed this point. The only question is whether Civil Code section 3346 *also* applies. As *Kelly* recognized, the two are not mutually exclusive. (*Kelly*, *supra*, 179 Cal.App.4th at p. 461.) They are "easily harmonized" by applying them both together. (*Ibid.*)

On the same note, Lambirth claims Scholes has argued that Civil Code section 3346 "impliedly preempts" Health & Safety Code sections 13007 and 13008. (Ans. Br. at pp. 55-56.) This is not accurate either. What Scholes has argued is that the two statutory schemes should be reconciled by applying them *both* to fire damage to trees, as the court did in *Kelly*.[1] (Op. Br. at pp. 23-24.) Again, Health & Safety Code sections 13007 and 13008 recognize liability for damages to property caused by fire, including trees, and Civil Code section 3346 allows doubling or tripling of the damages otherwise recoverable under sections 13007 and 13008 for

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[1]In the opening brief, Scholes only argued in the alternative that *if* the statutes could not be so reconciled, then the conflict would have to be resolved in favor of Civil Code section 3346 as the more specific and later-enacted statute. (Op. Br. at 29-30.)

wrongful injuries to trees. (*Ibid.*)

Lambirth seems to be assuming that both statutory schemes could not apply to trees because Health and Safety Code sections 13007 and 13008 somehow *forbid* the recovery of anything more than actual damages. But they do not say that at all. These statutes merely authorize *liability* "for damages to the property caused by fire." (Health & Saf. Code, §§ 13007, 13008.)[2] Multiple damages *are* a form of damages. The word "damages" simply refers to the monetary compensation recoverable by a party for loss suffered through the acts of another. (Civ. Code, § 3281; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 825-826.) "Damages constitute the relief which the law affords for the invasion of the right" under "the measure of the damage which the law prescribe[s]." (*Hartzell v. Myall* (1953) 115 Cal.App.2d 670, 677.)

Civil Code section 3346 by its terms governs "the measure of damages" for wrongful injuries to trees (Civ. Code, § 3346, subd. (a)), and its title includes the terms "treble damages" and "double damages." Thus,

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[2]These Health & Safety Code provisions govern *liability* for fire damage, not the measure of damages. They are part of Chapter 1 of Part 1 of Division 12 of the Health & Safety Code, entitled "Liability in Relation to Fires." (Health & Saf. Code, §§ 13000-13100.) Section 13007 is entitled, "*Liability* to Owner of Property Damaged by Fire." (Emphasis added.) Section 13008 is entitled, "Allowing Fire to Escape to Another's Property; *Liability*." (Emphasis added.) With the sole exception of a 2012 amendment governing civil actions by a public agency (Health & Saf. Code, § 13009.2), none of the provisions in this chapter address the measure of damages. Because there is no provision in this chapter governing the measure of damages for claims asserted under sections 13007 and 13008, the Legislature must have intended other generally applicable laws to govern the measure of damages, such as Civil Code sections 3333 and 3346. The latter provisions are part of a chapter of the Civil Code entitled "Measure of Damages." (Civ. Code, div. 4, pt. 1, ch. 2, § 3300 et seq.)

the provisions of the Health and Safety Code authorizing liability for "damages to the property caused by fire" do not expressly or impliedly preclude recovery of multiple damages under Civil Code section 3346. (Health & Saf. Code, §§ 13007, 13008.) These Health & Safety Code provisions merely recognize liability for fire damage, while Civil Code section 3346 more specifically prescribes the "measure of damages" for injuries to trees. (Civ. Code, § 3346, subd. (a).) *Kelly* correctly ruled that these statutes are "easily harmonized." (*Kelly*, *supra*, 279 Cal.App.4th at p. 461.)

Moreover, Lambirth's assumption that the Health & Safety Code provisions forbid recovery of anything more than actual damages cannot be reconciled with its own position that punitive damages may still be imposed for causing a fire. (Ans. Br. at pp. 48-49.) If Lambirth were correct that the Legislature intended to create a separate statutory scheme exclusively governing "the measure of damages for fire losses" in Chapter 1 of Part 1 of Division 12 of the Health & Safety Code (Ans. Br. at p. 27), then punitive damages could *not* be imposed. Chapter 1 of Part 1 of Division 12 of the Health & Safety Code does not authorize punitive damages for fire damage. (Health & Saf. Code, §§ 13000-13011.) Only Civil Code section 3294 authorizes punitive damages. Thus, Lambirth's argument that the Health & Safety Code is the exclusive remedy for fire damage would not only preclude imposition of multiple damages under Civil Code section 3346, but it would also preclude imposition of punitive damages under Civil Code section 3294, even for deliberate acts of arson. (Op. Br. at p. 28.)

B. Lambirth Has Failed to Demonstrate Any Ambiguity in the Plain Language of Section 3346

Lambirth points to nothing in the actual text of Civil Code section

3346 which supports its argument that the statute's multiple damages provisions do not apply to fire damage to trees. By its terms, the statute applies to any "wrongful injuries to timber, trees or underwood upon the land of another." (Civ. Code, § 3346.) Lambirth does not explain how this language could be construed to exclude intentionally or negligently inflicted fire damage to trees. Applying the ordinary meaning of the words used in the statute, such fire damage *is* a form of wrongful injury to trees. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 463.)

"When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature." (*People v. Statum* (2002) 28 Cal.4th 682, 689-690.) In *Statum*, for example, the defendant tried to advance an interpretation of a statute that was "not supported by its plain language" by relying on "the interrelationship" between it and another statute. (*Id.* at p. 690.) This Court held that because the plain language of the statute was clear, there was "no need to refer to extrinsic materials." (*Ibid.*) The same holds true here.

Lambirth apparently takes the position that the statutory language is ambiguous because "neither Code of Civil § 733 nor Civil Code § 3346 defines 'wrongful injuries to timber, trees, or underwood.'" (Answer Br. at 40.) But the absence of a statutory definition does not make the language ambiguous if its ordinary meaning is clear. "We must look to the statute's words and give them their usual and ordinary meaning. [Citation.] The statute's plain meaning controls the court's interpretation unless its words are ambiguous." (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.) Courts "may not, under the guise of construction, rewrite the law or give the words an effect different from the

plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) Based on the plain and direct import of the language used in Civil Code section 3346, it applies to fire damage to trees. (*Kelly*, *supra*, 179 Cal.App.4th at p. 463.)

Moreover, as noted in the opening brief, the word "detriment" as used in Civil Code section 3346 *is* defined elsewhere in the Civil Code. (Civ. Code, § 3282 ["Detriment is a loss or harm suffered in person or property"].) Lambirth does not discuss this part of the statute or dispute that this definition encompasses fire damage to trees on a landowner's property. (Op. Br. at p. 23.)

For such wrongful injuries to trees, Civil Code section 3346 allows the landowner to recover double or triple the damages "as would compensate for the actual detriment." (Civ. Code, § 3346, subd. (a).) This parallels the "substantially identical" language of Civil Code section 3333. (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 869.) "Civil Code section 3333, applicable to breaches of obligation other than contract, including negligent injury to real property, similarly provides for recovery of 'the amount which will compensate for all the detriment proximately caused thereby.'" (*Id.* at pp. 868-869 [holding that the damages to be doubled or trebled under Civil Code section 3346 are those constituting just and reasonable compensation under Civil Code section 3333].) Notably, Civil Code section 3333 applies to fire damage. (See, e.g., *Willard v. Valley Gas & Fuel Co.* (1915) 171 Cal. 9, 15, disapproved on other grounds in *Showalter v. Western Pac. R. Co.* (1940) 16 Cal.2d 460; *Safeco Ins. Co. v. J & D Painting* (1993) 17 Cal.App.4th 1199, 1204.)

Lambirth claims that "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." (Answer Br. at p. 45.) But the statute by its terms extends to *all* "wrongful injuries" to trees and *all* "actual detriment"—without qualification or exception. (Civ. Code, § 3346, subd. (a).) "When a statute is written in plain English and without qualification, we are supposed to interpret it according to the natural import of its language—for the simple reason that, to do otherwise, would be to judicially rewrite the statute." (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1458.) "A court is not authorized to create an exception not contained in the statutory language." (*University of Southern California v. Superior Court* (1996) 45 Cal.App.4th 1283, 1290.)

Finally, Lambirth's contrary interpretation of Civil Code section 3346 finds no support in either the statutory language or case law. Lambirth asserts that the statute "was intended to apply only to cases in which the injury *was directed at the trees themselves*." (Ans. Br. at p. 26, emphasis added & citing *Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1315.) Nothing in the statutory language or the *Fulle* opinion supports this novel interpretation, and courts may not "rewrite an unambiguous statute by inserting qualifying language." (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495.) Moreover, this interpretation would effectively require intentional conduct directed at trees—but Civil Code section 3346 by its terms authorizes double damages even for a "casual or involuntary" trespass resulting in injuries to trees. (Civ. Code, § 3346.)

In sum, *Kelly* correctly held that the plain language of Civil Code section 3346 authorizes double or treble damages for wrongfully inflicted fire damage to trees. (*Kelly, supra*, 179 Cal.App.4th at pp. 462-463.) Lambirth has failed to identify any ambiguity in the language of the statute with respect to its application to fire damage. "When there is no ambiguity

or absurdity on the face of the statute, we may not manufacture one by resort to legislative history." (*Id.* at p. 463.)

C. The Fire Liability Law Did Not Repeal the Damages Multipliers for Wrongful Injuries to Trees

Lambirth claims that the Legislature eliminated any multiplier for fire damage to trees when it enacted the Fire Liability Law and repealed former Political Code section 3344 and former Civil Code section 3346a in 1931. (Stats. 1931, ch. 790, p. 1644.) However, this ignores the fact that the Legislature left in place the existing multiplier for wrongful injuries to trees in Civil Code section 3346. (*Ibid.*) Moreover, the Legislature later repealed, amended, and reenacted Civil Code section 3346 to add the double damages provision in 1957, without exempting fire damage. (Stats. 1957, ch. 2346, § 2, p. 4076.) Thus, although the Legislature in 1931 did decide to repeal the statutes allowing multiple damages for *all* forms of fire damage to property, it did *not* eliminate the separate statute allowing multiple damages for wrongful injuries to trees.

What Lambirth is really arguing is that the Fire Liability Law *impliedly* amended Civil Code section 3346 to make it inapplicable to fire damage to trees. (Ans. Br. at p. 32 [arguing that 1931 statutes "*amounted to* a repeal of the authorization for a multiplier for fire damage to trees"].) But, as Lambirth itself acknowledges elsewhere in its brief, "'[a]n implied amendment or repeal of a code section is generally disfavored.' [Citation.]" (*People v. Galvan* (2008) 168 Cal.App.4th 846, 854.) Having left Civil Code section 3346 in place without change in 1931, the Legislature cannot be deemed to have amended it to create an implied exception for fire damage to trees. Before and after 1931, Civil Code section 3346 had no exception for fire damage to trees. Moreover, the Legislature did not create

any such exception when it added the double damages provision in 1957. "'We must assume that the Legislature knew how to create an exception if it wished to do so.' [Citation.]" (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

Lambirth also argues that the Legislature must have intended to change the law when it repealed former Political Code § 3344 and former Civil Code section 3346a. (Op. Br. at pp. 32-33.) Once again, nobody is disputing that this was a change in the law. Before 1931, these provisions authorized treble damages for fire damage to *all* types of property. By repealing them, but leaving Civil Code section 3346 in place, the Legislature limited the recovery of treble damages to wrongful injuries to trees, whether by fire or otherwise. The 1931 legislation *was* a change in the law—it just wasn't the one Lambirth claims it was.

D. Civil Code Section 3346 Does Not Apply Only to Those Situations Originally Contemplated by the Legislature

Lambirth also maintains that Civil Code section 3346 "should be construed narrowly to apply to only those situations originally intended by the Legislature." (Ans. Br. at p. 47.) According to Lambirth, "the section was aimed at those who personally enter onto another's property and cause damage to the trees there." (*Ibid.*)

"Whatever the original policy behind Civil Code section 3346 and the context in which it is normally used, the language of the statute is broad-sweeping." (*Heninger, supra*, 101 Cal.App.3d at p. 868 [rejecting argument that the statute "is applicable only to injuries to trees that are valuable as timber"].) The statute applies to *any* type of "wrongful injuries" to trees. (Civ. Code, § 3346, subd. (a).) As argued in the opening brief, the statute

must be construed and applied according to its plain meaning, even if the Legislature did not contemplate every possible application of its broad language. (Op. Br. at pp. 30-32.) Lambirth simply ignores the authorities cited on this exact point in the opening brief. The broadly worded text of the statute cannot reasonably be construed to apply only to "those who personally enter onto another's property and cause damage to the trees there." (Ans. Br. at p. 47.) The provisions of the Civil Code must be "liberally construed," not "strictly construed." (Civ. Code, § 4.)

Furthermore, Civil Code section 3346 "must be construed together" with Code of Civil Procedure section 733 (both first enacted in 1872) and "they must, in so far as any reasonable construction will permit, be construed to be consistent and not in conflict." (*Swall v. Anderson* (1943) 60 Cal.App.2d 825, 829.) Code of Civil Procedure section 733 broadly applies to "[a]ny 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." (Code Civ. Proc., § 733, emphasis added.) Lambirth's narrow construction of these statutes would read the language "or otherwise injures any tree or timber" right out of existence.

E. Civil Code Section 3346 Applies to All Forms of "Trespass" Causing Injury to Trees, Including Fire Damage

If anything, Lambirth's brief suggests that when the Legislature repealed, amended, and reenacted Civil Code section 3346 in 1957, it would have understood the word "trespass" as used in the statute to include fire damage. (Op. Br. at pp. 29-30.) Lambirth acknowledges that "this court first recognized that an intentionally set fire which traveled to another's property could constitute a trespass in 1887." (Ans. Br. at p. 52, citing *Gale*

v. McDaniel (1887) 72 Cal. 334.) Lambirth also acknowledges that in 1928, "this court held that 'trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries.'" (Ans. Br. at p. 52, quoting *Coley v. Hecker* (1928) 206 Cal. 22, 28.) Thus, Lambirth maintains "it was settled that courts had the authority to apply the trespass doctrine to fires long before the *Elton v. Anheuser Busch* decision." (Ans. Br. at p. 52.)

It is unclear how this advances Lambirth's position. If the word "trespass" was already understood to extend to consequential and indirect injuries as of 1957, including fire damage, then the Legislature's use of the word "trespass" in the 1957 legislation only confirms that the statute applies to fire damage to trees. (*Sierra Pacific, supra*, 897 F. Supp. 2d at p. 1115.) Under Lambirth's reasoning, the 1970 decision in *Gould* was wrong in questioning whether the spreading of a fire could constitute a "trespass" within the meaning of Civil Code section 3346. (*Gould v. Madonna* (1970) 5 Cal.App.3d 404, 406.) Thus, Lambirth's own arguments undermine the rationale of the *Gould* decision.

F. The Legislature Did Not Create Mutually Exclusive Multiplier Schemes in 1872

Lambirth also argues 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." (Ans. Br. at p. 41.) From this premise, Lambirth concludes that when the Legislature repealed the multiplier statutes for fire damage in 1931, it must have intended to disallow any multiplier for fire damage to trees, notwithstanding its retention of Civil Code section 3346.

The premise of this argument is incorrect. By their terms, the statutory schemes enacted in 1872 were overlapping, not mutually exclusive. Former Political Code section 3344 authorized treble damages for *any* type of fire damage to property caused by the negligent spread of fire. Code of Civil Procedure section 733 and Civil Code section 3346 authorized treble damages for *any* type of wrongful injury to timber, trees, or underwood. Thus, damage to trees caused by the negligent spread of a fire fell squarely within the defined scope of each of these statutory provisions.

There is nothing unusual about overlapping statutes. (See, e.g., *In re P.A.* (2012) 211 Cal.App.4th 23, 36 [referring to "overlapping reaches of the two statutes"]; *Board of Medical Quality Assurance v. Superior Court* (1988) 203 Cal.App.3d 691, 699 [referring to "overlapping provisions" of statutes].) "Where the issue involves two potentially overlapping statutory schemes, 'we must read the two statutes together and construe them so as to give effect, when possible, to all the provisions thereof.' [Citation.]" (*Santa Clara Valley Transp. Authority v. PUC* (2004) 124 Cal.App.4th 346, 360; accord *Los Angeles Unified School Dist. v. County of Los Angeles* (2010) 181 Cal.App.4th 414, 426.) That is exactly what the Court of Appeal did in *Kelly* by giving effect to the overlapping provisions of both Civil Code section 3346 and Health and Safety Code sections 13007 and 13008. (*Kelly, supra*, 179 Cal.App.4th at p. 461.)

Lambirth cites no legislative history to support its assertion that the Legislature intended these statutory schemes to be mutually exclusive, nor is there any doctrine of statutory construction that would favor such an interpretation. As enacted in 1872, the plain language of both statutory schemes applied to fire damage to trees, as do the successor statutes on the

books today.

G. Lambirth's Public Policy Arguments Are Properly Directed to the Legislature

Lambirth also argues that Civil Code section 3346 should not be applied to fire damages for public policy reasons. (Ans. Br. at pp. 58-59.) But it is not a proper function of the courts to create public policy exceptions not written into the statute. (*Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 476 ["If the statute announces a general rule and makes no exception thereto, the courts can make none"].) Such public policy arguments are "'best directed to the Legislature, which can study the various policy and factual questions and decide what rules are best for society. Our role here is to interpret the statute[s] [as they are written], not to establish policy. The latter role is for the Legislature.'" (*Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1112, quoting *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1140.)

The "obvious purpose" of Civil Code section 3346 was "to protect trees and timber on private land." (*Swall, supra*, 60 Cal.App.2d at p. 828.) The "broad-sweeping" language of the statute makes clear it is *not* limited "to injuries to trees that are valuable as timber." (*Heninger, supra*, 101 Cal.App.3d at p. 868.) The Legislature intended to give broad protection to trees as a unique resource with both economic and personal value to private landowners. Unlike other forms of property, mature trees cannot quickly or easily be replaced. They have "personal value to their owner," not just for economic reasons, but also "for their aesthetic qualities." (*Id.* at pp. 865, 866; see also *Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 644-646 [affirming treble damages for injury to trees pursuant to Civil Code section

3346 and noting "the personal value placed on the trees by plaintiffs" who "clearly valued the property in its natural state"]; *Kallis v. Sones* (2012) 208 Cal.App.4th 1274, 1280-1281 [affirming double damages for injury to tree pursuant to Civil Code section 3346 and noting "the unique, personal benefits the tree provided"].) Thus, the Legislature had legitimate policy reasons for giving trees special protection by allowing enhanced damages for any type of wrongful injury to trees. In the absence of any statutory exception for fire damages created by the Legislature, the Court should not manufacture one by effectively rewriting the broad language of the statute.

II. Scholes Properly Asserted a Claim for Multiple Damages Under Civil Code Section 3346, Which is Subject to a Five-Year Statute of Limitations

As an alternative ground for affirming the Court of Appeal's judgment, Lambirth asserts that Scholes "did not allege facts sufficient to state a cause of action for wrongful injury to trees" under Civil Code section 3346. (Ans. Br. at p. 24.) But Civil Code section 3346 does not create a separate cause of action; it merely governs the "measure of damages" for claims alleging any type of "wrongful" injuries to trees. (Civ. Code, § 3346, subd. (a).) Specifically, section 3346 allows "enhanced damages" for such injuries. (*Fulle*, *supra*, 7 Cal.App.5th at p. 1307 [allowing treble damages under Civil Code section 3346 for trespass and nuisance claims].)[3] The statute is itself part of a chapter of the Civil Code

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[3]Lambirth claims that this Court in *Stewart v. Sefton* (1895) 108 Cal. 197, 205-207, "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." (Ans. Br. at p. 42.) Although the plaintiff/appellant did indeed make such an *argument* (*Stewart*, *supra*, 108 Cal. at p. 205), the Court never agreed with it, and it resolved the appeal in

entitled, "Measure of Damages." (Civ. Code, div. 4, pt. 1, ch. 2, § 3300 et seq.)

In his third amended complaint, Scholes stated causes of action for negligence, trespass, and strict liability, alleging that the fire had damaged and destroyed property including his walnut orchard (AA 51-75), and specifically alleging that he was entitled to "[t]rebling of the damage to trees and timber as alleged herein pursuant to C.C. § 3346 and C.C.P. § 733." (AA 52; see also AA 53 [alleging that "[s]aid fire also damaged and destroyed a walnut orchard of Plaintiff in an amount according to proof and trebling pursuant to California Civil Code § 3346 and C.C.P. § 733"].) Thus, Scholes properly alleged a claim for the "enhanced damages" authorized by these statutes. (*Fulle*, *supra*, 7 Cal.App.5th at p. 1307.)

Civil Code section 3346, subdivision (c) explicitly states: "Any action for the damages specified in subdivisions (a) and (b) of this section must be commenced within five years from the date of the trespass." Even though the statute of limitations for a trespass is *ordinarily* three years (Code Civ. Proc., § 338, subd. (b)), the Legislature has provided for a longer five-year statute for trespass claims seeking multiple damages for wrongful injuries to trees under Civil Code section 3346. Thus, even if Scholes' other damages claims are barred by the three-year statute, his claims for multiple damages for the destruction of his walnut trees are not.

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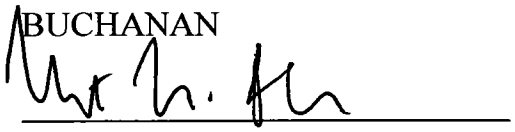
favor of the defendant/respondent. (*Id.* at pp. 205-210.)

CONCLUSION

Kelly was correctly decided. Civil Code section 3346 applies to wrongful injuries to trees, including fire damage. Scholes properly alleged a claim for multiple damages under Civil Code section 3346, and his third amended complaint was timely filed within five years of the fire damage to his walnut trees. (Civ. Code, § 3346, subd. (c).) Thus, *Gould* should be overruled and the judgment of the Court of Appeal reversed.

Dated: Oct. 5, 2017

LAW OFFICES OF MARTIN N. BUCHANAN



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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I certify that the foregoing Reply Brief on the Merits was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 4,814 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: Oct. 5, 2017

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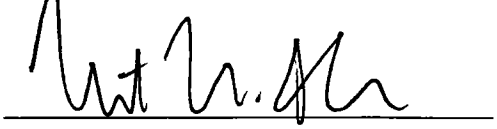

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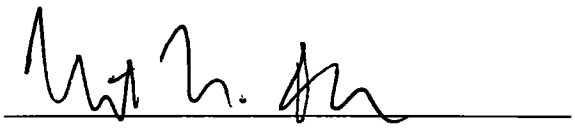
CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 655 W. Broadway, Suite 1700, San Diego, California 92101. On Oct. 5, 2017, I served the **REPLY BRIEF ON THE MERITS** by mailing a copy by first class priority mail to each of the following:

California Court of Appeal Third Appellate District 914 Capitol Mall Sacramento, CA 95814	Lynn A. Garcia Spinelli, Donald & Nott 815 S Street, Second Floor Sacramento, CA 95811 (Counsel for Respondent Lambirth Trucking Company)
Hon. Jeffrey Thompson Colusa County Superior Court 547 Market Street Colusa, CA 95932	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Oct. 5, 2017, at San Diego, California.



Martin N. Buchanan