

S241825



SUPREME COURT
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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

Lynn A. Garcia (Bar No. 131196)
SPINELLI, DONALD & NOTT
815 S Street, Second Floor
Sacramento, CA 95811
Telephone: (916) 448-7888
lynng@sdlaw.com

Attorneys for Defendant/Respondent
LAMBIRTH TRUCKING COMPANY

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lynng@sdlaw.com

Attorneys for Defendant/Respondent
LAMBIRTH TRUCKING COMPANY

Table of Contents

SUMMARY OF ARGUMENT 12

ISSUE PRESENTED 13

STANDARD OF REVIEW 14

FACTUAL BACKGROUND 15

PROCEDURAL BACKGROUND 16

 I. ORIGINAL COMPLAINT..... 16

 II. FIRST AMENDED COMPLAINT..... 16

 III. SECOND AMENDED COMPLAINT..... 16

 IV. THIRD AMENDED COMPLAINT. 17

 V. DEMURRER TO THIRD AMENDED COMPLAINT
 GRANTED..... 19

 VI. THIRD DISTRICT COURT OF APPEAL AFFIRMS
 JUDGMENT. 19

ARGUMENT 21

 I. SCHOLLES NEVER CLAIMED ENTITLEMENT TO A
 FIVE-YEAR LIMITATIONS PERIOD AT THE TRIAL COURT
 LEVEL. 21

 II. CODE OF CIVIL PROCEDURE § 338(b) PROVIDES THE
 CORRECT STATUTE OF LIMITATIONS FOR PLAINTIFF’S
 CLAIMS..... 22

 A. THE GRAVAMEN OF THIS ACTION IS INJURY TO
 SCHOLLES’ REAL PROPERTY..... 22

 B. THE APPLICABLE STATUTE OF LIMITATIONS FOR
 GROWING TREES WHICH ARE DAMAGED BY FIRE
 TRESPASS IS CODE OF CIVIL PROCEDURE §338(B)..... 25

 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..... 26

 A. 1872 28

 B. 1893 28

C. 1905.....29

D. 1928.....30

E. 1931.....31

F. 1934.....34

G. 1949.....35

H. 1953.....35

IV. COURTS HAVE CONSISTENTLY INTERPRETED THE
FIRE LIABILITY LAW BROADLY TO APPLY TO ALL TYPES
OF FIRE DAMAGE.....37

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.....39

 A. 1872.....41

 B. 1895.....42

 C. 1935.....42

 D. 1957.....43

VI. NEITHER CODE OF CIVIL PROCEDURE SECTION 733
OR CIVIL CODE SECTION 3346 WERE INTENDED TO APPLY
TO TREES DAMAGED BY AN ESCAPING FIRE.....46

VII. SCHOLLES' REMAINING ARGUMENTS ARE NOT
PERSUASIVE.....49

 A. *Kelly v. CB & I* was incorrectly decided.....49

 B. Scholles misunderstands the holding of *Elton v.
Anheusser-Busch*.....52

 C. The incorrect reasoning of *U.S. v. Sierra Pacific* has no bearing
on this case.....53

 D. The amendment of portions of Section 3346 did not impliedly
preempt the provisions of sections 13007 and 13008.....55

 E. Civil Code § 3346 is not “more specific” than Health & Safety
Code §§ 13007 and 13008.....56

 F. Punitive damages cannot be recovered concurrently with the
multiplier damages of § 3346.....57

VIII. POLICY REASONS DEMAND THAT SECTION 3346 NOT
BE EXPANDED TO INCLUDE FIRE LOSSES58
CONCLUSION59

TABLE OF AUTHORITIES

Cases

<i>Aubry v. Tri–City Hospital Dist.</i> (1992) 2 Cal.4th 962.....	12
<i>Basin Oil Co. v. Baash-Ross Tool Co.</i> (1954) 125 Cal.App.2d 578.....	56
<i>Bowland v. Municipal Court</i> (1976) 18 Cal.3d 479.....	25
<i>Brandwein v. Butler</i> (2013) 218 Cal.App.4th 1485.....	19
<i>California Teachers Assn. v. Governing Board of Rialto Unified School District</i> (1997) 14 Cal.4 th 627.....	37, 38
<i>Clements v. T. R. Bechtel Co.</i> (1954) 43 Cal.2d 227.....	31
<i>Coley v. Hecker</i> (1928) 206 Cal. 22.....	50
<i>Collection Bureau of San Jose v. Rumsey</i> (2000) 24 Cal.4th 301.....	24, 53
<i>Commodore Home Systems, Inc. v. Superior Court</i> (1982) 32 Cal.3d 211.....	55
<i>County of Los Angeles v. State of California</i> (1987) 43 Cal.3d 46.....	49
<i>County of Sacramento v. Lackner</i> (1979) 97 Cal.App.3d 576.....	13
<i>Davies v. Krasna</i> (1975) 14 Cal.3d 502.....	20
<i>Denham v. Superior Court</i>	

(1970) 2 Cal.3d 557.....	12
<i>Drewry v. Welch</i>	
(1965) 236 Cal.App.2d 159.....	41, 42, 45, 46
<i>Dunn-Edwards Corp. v. Bay Area Air quality Management Dist.</i>	
(1992) 9 Cal.App.4th 644.....	49
<i>Elton v. Anheuser-Busch Beverage Group, Inc.</i>	
(1996) 50 Cal.App.4th 1301.....	50
<i>Estate of de Laveaga</i>	
(1958) 50 Cal.2d 480.....	56
<i>Fulle v. Kanani</i>	
(2017) 7 Cal.App.5 th 1305.....	passim
<i>Gale v. McDaniel</i> (1887) 72 Cal. 334.....	50
<i>Garnier v. Porter</i>	
(1891) 90 Cal. 105.....	26, 28
<i>Gavaldon v. DaimlerChrysler Corp.</i>	
(2004) 32 Cal.4th 1246.....	42
<i>Gavin v. Guatala Mill Co.</i>	
(1893) 98 Cal.268.....	26, 28
<i>Gould v. Madonna</i>	
(1970) 5 Cal.App.3d 404.....	passim
<i>H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.</i>	
(1979) 99 Cal.App.3d 711.....	21
<i>Hassoldt v. Patrick Media Group, Inc.</i>	
(2000) 84 Cal.App.4 th 153.....	47, 55
<i>Haverstick v. So. Pacific Co.</i>	
(1934) 1 Cal.App.2d 605.....	32, 57
<i>Hensler v. City of Glendale</i> (1994) 8 Cal.4th 1.....	21

<i>Hensley v. San Diego Gas & Electric Co.</i> (2017) 7 Cal.App.5 th 1337.....	37
<i>In re Jose D.</i> (1990) 219 Cal.App.3d 582.....	43
<i>In re R.T.</i> (2017) 3 Cal.5th 622.....	25
<i>Kelly v. CB & I Constructors, Inc.</i> (2009) 179 Cal.App. 4 th 442.....	36, 47, 48
<i>Kennedy v. Minarets & Western Ry. Co.</i> (1928) 90 Cal.App. 563.....	28, 29
<i>Kodani v. Snyder</i> (1999) 75 Cal.App.4th 471.....	31
<i>Lolley v. Campbell</i> (2002) 28 Cal.4th 367.....	52
<i>Lungren v. Deukmejian</i> (1988) 45 Cal.3d 727.....	49
<i>McCoy v. Gustafson</i> (2009) 180 Cal.App.4th 56.....	21
<i>McKay v. State of California</i> (1992) 8 Cal.App.4 th 937.....	35, 36, 55
<i>Mejia v. Reed</i> (2003) 31 Cal.4th 657.....	38
<i>Ostling v. Loring</i> (1994) 27 Cal.App.4th 1731.....	44
<i>People v. Cruz</i> (1996) 13 Cal.4th 764.....	27
<i>People v. Dillon</i> (1983) 34 Cal.3d 441.....	31

<i>People v. ex rel Girjalva v. Superior Court</i> (2008) 159 Cal.App.4 th 1072.....	34
<i>People v. Salazar</i> (183) 144 Cal.App.3d 799.....	31
<i>People v. Southern Pacific Co.</i> (1983) 139 Cal.App.3d 627	36
<i>People v. Valentine</i> (1946) 28 Cal.2d 121.....	31
<i>People v. Wade</i> (2016) 63 Cal.4th 137.....	52
<i>People v. Wells</i> (1996) 12 Cal.4 th 979.....	51
<i>People v. Yartz</i> (2005) 37 Cal.4th 529.....	43
<i>Pesce v. Department of Alcoholic Beverage Control</i> (1958) 51 Cal.2d 310.....	38
<i>Ram v. OneWest Bank, FSB</i> (2015) 234 Cal.App.4th 1, 10.....	12
<i>Richardson v. Allstate Ins. Co.</i> (1981) 117 Cal.App.3d 8.....	21
<i>Sampson v. Hughes</i> (1905) 147 Cal. 62.....	27, 28
<i>Scholes v. Lambirth</i> (2016) 10 Cal.App. 5 th 590.....	18, 25
<i>Sierra Club v. Superior Court</i> (2013) 57 Cal.4th 157.....	30
<i>Smith v. Rae-Venter Law Group</i> (2002) 29 Cal.4th 345.....	37, 47

<i>Thomson v. Canyon</i> (2011) 198 Cal.App.4th 594.....	20
<i>Ventura County Nat. Bank v. Macker</i> (1996) 49 Cal.App.4th 1528.....	21
<i>Ventura County v. Southern California Edison Co.</i> (1948) 85 Cal.App.2d 529.....	29, 30, 31
<i>Weatherford v. City of San Rafael</i> (2017) 2 Cal.5th 1241.....	39
<i>Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.</i> (1989) 49 Cal.3d 408.....	54

Federal Cases

<i>U.S. v. Sierra Pacific Industries</i> (E.D. Cal. 2012) 879 F.Supp.2d 1096.....	51, 52
--	--------

Civil Code

Civil Code § 3294	47, 55
Civil Code § 3346	passim
Civil Code § 658	21
Civil Code § 660	21
Civil Code §1014	16

Code of Civil Procedure

Code of Civil Procedure § 338(b)	passim
Code of Civil Procedure § 1021.9.....	16, 22, 51
Code of Civil Procedure § 733.....	passim

Government Code

Government Code § 5560033

Health & Safety Code

Health and Safety Code § 13009.....33, 34, 49, 52

Health and Safety Code § 13007.....passim

Health and Safety Code § 13008.....passim

Political Code

Political Code § 3344.....26, 27, 30, 32

Other Authorities

Exemplary Damages in the Law of Torts (1957) 70 Harv. L.Rev. 517
.....45

McCormick Handbook on the Law of Damages (1935 ed., § 126, p. 499
.....40

Stats. 1851, ch. 5, § 251, p. 9238

Stats. 1931, ch. 790, p. 1644 (Deerings Gen. Laws, 1944, Act 2586)
.....28, 29

Stats. 1953, ch. 48, § 3, p. 68233

Stats. 1957, ch. 2346, §§ 1-2, p. 4076.....40, 52

Stats. 1971, ch. 1202, § 1, p. 229732, 41

Stats. 1978, ch. 1118, § 1, p. 342232

Stats. 1980, ch. 525, § 1, p. 146232

Stats. 1981, ch. 976, § 1, p. 3800	32
Stats. 1982, ch. 668, § 1, p. 2738	32
Stats. 1987, ch. 1127, § 1, p. 3846	32
Stats. 1992, ch. 427, § 91, p. 1627	32

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.

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 §1014², 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.

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 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.”

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] 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

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
INJURY TO 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