S241825

COPY

IN THE SUPREME COURT OF CALIFORNIA

VINCENT E. SCHOLES,
Plaintiff and Appellant,

v.

LAMBIRTH TRUCKING COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, THIRD APPELLATE DISTRICT
CASE NO. C070770

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY IN SUPPORT OF RESPONDENT LAMBIRTH TRUCKING COMPANY

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY IN SUPPORT OF RESPONDENT LAMBIRTH TRUCKING COMPANY

Under California Rules of Court, rule 8.520(f), Pacific Gas and Electric Company (PG&E) respectfully requests permission to file the attached amicus curiae brief in support of defendant and respondent Lambirth Trucking Company.

PG&E is a combination natural gas and electric utility that was incorporated in California in 1905. Based in San Francisco, the company is a subsidiary of PG&E Corporation. The company supplies natural gas and electric services to approximately 16 million people throughout a 70,000 square-mile service area in northern and central California. To serve this area, PG&E operates

over 18,000 circuit miles of interconnected electric transmission lines and over 106,000 circuit miles of electric distribution lines. PG&E also operates over 42,000 miles of natural gas distribution pipelines and over 6,000 miles of transportation pipelines.

Counsel for amicus curiae have reviewed the briefs on the merits filed in this case and believe this Court will benefit from additional briefing regarding the interpretation of Civil Code section 3346, which authorizes a damages multiplier for trespass causing injury to trees, and Health and Safety Code sections 13007 and 13008, which control the measure of damage for fire losses and do not authorize a multiplier. The parties have not fully addressed the legislative history of these statutes. As the proposed amicus curiae brief explains, that history demonstrates that the Legislature specifically amended these statutes to eliminate a multiplier for fire damage to trees. Because the primary task of statutory construction is determining the Legislature's intent, the statutes should not be construed to impliedly authorize a damages multiplier that the Legislature specifically repealed.

No party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Other than the amicus curiae and its counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Accordingly, PG&E respectfully requests that this Court accept and file the attached amicus curiae brief.

December 6, 2017

HORVITZ & LEVY LLP
ROBERT H. WRIGHT
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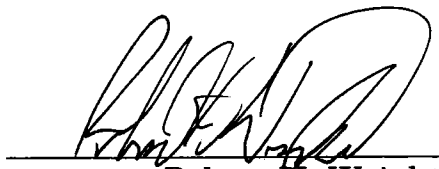
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Civil Code section 3346 authorizes heightened damages for trespass causing injury to trees. A different statutory scheme, Health and Safety Code sections 13007 and 13008, controls the measure of damage for fire losses. The Court of Appeal correctly construed these statutory schemes in holding that Civil Code section 3346 does not authorize a multiplier for fire damage to trees because those losses are controlled by Health and Safety Code sections 13007 and 13008. Indeed, the Legislature specifically amended these statutes to eliminate a multiplier for fire damage to trees.

In 1872, the Legislature created separate multipliers for injury to trees from trespass and injury to trees from fire. The Legislature later amended the statutes governing injury to trees from fire to repeal the multiplier for such damages. By doing so, the Legislature *rejected* the multiplier that plaintiff would have this Court read into Civil Code section 3346.

When the Legislature later amended Civil Code section 3346 to add a damages multiplier for casual and involuntary trespass, the Legislature stated that the section's purpose was to address "*wrongful injuries to or removal of timber.*" (Stats. 1957, ch. 2346,

§ 2, p. 4076; 2 MJN 411.)[1] The legislative history confirms that the Legislature amended the statute for the purpose of deterring "timber appropriation." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1315, fn. 6 (*Fulle*).)

Plaintiff Vincent Scholes does not address the significance of this legislative history. Instead, he argues that Civil Code section 3346 should be construed in isolation without considering the statutory scheme. He also argues that the words of that statute should be understood in the abstract and regardless of how they would have been understood when first enacted. As we explain, the courts have repeatedly rejected similar arguments that seek to construe legislation without regard to the Legislature's intent.

A half-dozen different courts have recognized that the multiplier in Civil Code section 3346 for trespassory tree damage is aimed at those who personally enter onto another's property and cause damage to the trees there. A special multiplier penalty is needed for nonfire harm to trees because, unlike the burning of timber, the cutting and theft of timber can itself be profitable. When applied to fire damage, such a penalty would likely be far more ruinous than the penalty applied in nonfire loss cases.

Because the Legislature specifically repealed a damages multiplier for fire damage to trees, and because the Legislature had good reason for doing so, this Court should refuse plaintiff's request

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[1] Citations to the legislative history are to the consecutively-paginated exhibits to the concurrently-filed motion for judicial notice (MJN).

to extend Civil Code section 3346 to include a multiplier that the Legislature has rejected.

LEGAL ARGUMENT

THE LEGISLATURE HAS REJECTED A MULTIPLIER FOR FIRE DAMAGE TO TREES.

A. Health and Safety Code sections 13007 and 13008 govern the measure of damages for fire loss and preclude use of a multiplier.

1. The primary task of statutory construction is determining the Legislature's intent.

The court's " 'primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose.' " (*John v. Superior Court* (2016) 63 Cal.4th 91, 95-96, quoting *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.)

The court interprets 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, quoting *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 293; accord, *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1246 (*Weatherford*) ["We

examine the ordinary meaning of the statutory language, the text of related provisions, and the overarching structure of the statutory scheme"]; *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489 [a statute is "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"].)

Under these established principles of statutory construction, the Court of Appeal correctly held that Civil Code section 3346[2] does not apply to fire damage to trees. As we explain, a different statutory scheme, Health and Safety Code sections 13007 and 13008, controls the measure of damage for fire losses.

2. The Legislature in 1872 created separate multipliers for injury to trees from fire and injury to trees from trespass.

In 1872, the Legislature enacted section 3346 governing injury to trees from trespass. It stated that "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 § 3346 (1872), emphasis added; 1 MJN 79.) The section also contained an exception to the multiplier that applied "where the wood was taken by the authority of highway officers for the purposes of a highway." (*Ibid.*)

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[2] All further statutory references are to the Civil Code unless otherwise indicated.

The Civil Code of 1872 included headings for chapters, articles, and sections that were "parts of the statute limiting and defining the sections to which they refer." (*Sharon v. Sharon* (1888) 75 Cal. 1, 16; see also *Bettencourt v. Sheehy* (1910) 157 Cal. 698, 702; *Keyes v. Cyrus* (1893) 100 Cal. 322, 325.) The Code also contained Commissioners' Notes that are entitled to substantial weight. (*People v. Chun* (2009) 45 Cal.4th 1172, 1187; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 817 & fn. 10.) This Court has observed that "the whole question of the true meaning and intent" of a provision in the Civil Code of 1872 could not "proceed without reference to the Code Commissioners' Note." (*Chun*, at p. 817.)

The heading for section 3346 was "Injuries to trees, etc." (2 Ann. Civ. Code (1st ed. 1872, Haymond & Burch, Commrs.-annotators) pp. XXXV, 411-412; 1 MJN 73, 78-79.) The Code Commissioners' Notes confirm that the section addressed injury to trees from trespass, not from fire. The Notes addressed "damages for *cutting down* growing trees," "entry to *cut and to sell* the trees," and "*cutting* down trees." (Code Commrs., note foll. 2 Ann. Civ. Code, § 3346 (1st ed. 1872, Haymond & Burch, Commrs.-annotators) pp. 412-413, emphases added; 1 MJN 79-80.) The Notes did not mention fire damage to trees.

In the same year that it enacted Civil Code section 3346, the Legislature also enacted a multiplier for damage from fire that spreads to adjoining property. The Legislature enacted Political Code section 3344 stating, "Every person negligently *setting fire to his own woods*, or negligently suffering any fire to extend beyond his own land, is liable in *treble damages* to the party injured."

(Former Pol. Code, § 3344 (1872), emphases added; 2 MJN 295.) The heading for Political Code section 3344 was "Setting *woods on fire*" and it was included under the chapter heading "Fires and Firemen." (Rev. Laws of the State of Cal., Pol. Code (1872) pp. lxx, 472, 475, emphasis added; 1 MJN 16, 20-21; accord, 1 Ann. Pol. Code (1st ed. 1872, Haymond & Burch, Commrs.-annotators) pp. lxviii-lxix, 33-34, 614-615, 618; 1 MJN 29, 33-34.)

This Court recognized that the multiplier for fire damage at Political Code section 3344 was intended in part to prevent fires from destroying timber. (*Garnier v. Porter* (1891) 90 Cal. 105, 108 ["When the law 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."]; see also *Galvin v. Gualala Mill Co.* (1893) 98 Cal. 268, 270 [citing with approval *Garnier*'s "construction of section 3344 of the Political Code"].) The Legislature is presumed to have been aware of this Court's decisions. (See *People v. Cruz* (1996) 13 Cal.4th 764, 775 (*Cruz*) [legislators are presumed to be aware of "judicial decisions interpreting the language they chose to employ"].)

In 1905, the Legislature added the identical multiplier that had been contained in Political Code section 3344 to Civil Code section 3346a. (Former Civ. Code, § 3346a (1905); 1 MJN 248.) The Journal of the Assembly noted that the "new section incorporates into this Code the principle now declared in Section 3344 of the Political Code." (Assem. J. (1905 Reg. Sess.) p. 688; 1 MJN 240.) The Code Commissioners Report described the multiplier as

addressing "Liability for *setting fire to woods*; negligence." (Code Commrs. Rev. Civ. Code (1898) p. 544, emphasis added; 1 MJN 248.) The Legislature described the multiplier as "relating to damages for *negligently firing woods*." (Assem. Final Hist. (1905 Reg. Sess.) p. 402, emphasis added; 1 MJN 228; accord, Assem. Bill No. 514 (1905 Reg. Sess.) as introduced Jan. 18, 1905, ch. CDLXIV; 1 MJN 226.)

Because the Legislature in 1872 created separate multipliers for injury to trees from fire and injury to trees from trespass, the Legislature necessarily understood these multipliers to apply in distinct circumstances. (See, e.g., *Weatherford, supra*, 2 Cal.5th at p. 1246 [the court takes account of "the overarching structure of the statutory scheme"].) The multiplier in Civil Code section 3346 addressed the cutting of trees and other injury to trees from trespass. The multiplier in Civil Code section 3346a and Political Code section 3344 addressed fire damage to trees.

3. The Legislature enacted the Fire Liability Law and repealed the multiplier for injury to trees from fire.

In 1931 the Legislature enacted the Fire Liability Law and repealed the multiplier for injury to trees from fire. (Stats. 1931, ch. 790, p. 1644; 2 MJN 332; see *County of Ventura v. So. Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 531, 537-538 (*Ventura County*).)

The title to the act read "An act *defining* the civil liability for failure to control fire." (Stats. 1931, ch. 790, p. 1644, emphasis omitted; 2 MJN 332; see *Ventura County, supra*, 85 Cal.App.2d at p. 537.) The act repealed the fire damage multiplier part of both Political Code section 3344 and Civil Code section 3346a. (Stats. 1931, ch. 790, §§ 5-6, p. 1644; 2 MJN 332.)

In place of a multiplier, the Fire Liability Law imposed liability for only actual damages and defined those damages to include the expenses of both private and public entities in fighting fires. (Stats. 1931, ch. 790, § 4, p. 1644; 2 MJN 332.) Section 1 of the Fire Liability Law stated:

> Any person who: [¶] (1) Personally or through another, and [¶] (2) Wilfully, 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, emphasis added; 2 MJN 332.) Section 2 of the Fire Liability Law stated:

> Any person who allows any fire burning upon his property to escape to the property, whether privately or publicly owned, of another, without exercising due diligence to control such fire, is liable to the owner of such property *for the damages thereto caused by such fire.*

(Stats. 1931, ch. 790, § 2, p. 1644, emphasis added.) The Statutes and Amendments to the Codes for 1931 describe these sections as "*defining the civil liability for failure to control fire.*" (Stats. 1931,

ch. 790, p. 1644, emphasis added; 2 MJN 332; accord, Sen. Final Hist. (1931 Reg. Sess.) p. 186; 2 MJN 334.)

Section 3 of the Fire Liability Law authorized recovery of fire suppression expenses. (Stats. 1931, ch. 790, § 3, p. 1644; 2 MJN 332.) The expenses could be recovered by a litigant or public or private agency incurring the expenses. (*Ibid.*)

By these amendments, the Legislature repealed the multiplier for fire damage to trees. As the Court of Appeal recognized, the Legislature enacted an "additional liability for fire suppression expenses" in place of "the treble damages formerly recoverable for injuries due to negligent fires under section 3344, Political Code, and section 3346a, Civil Code." (*Ventura County, supra,* 85 Cal.App.2d at p. 534.)

4. The Legislature has retained the wording of the Fire Liability Law with only minor changes.

In 1953, the Legislature codified the Fire Liability Law, with minor changes, as Health and Safety Code sections 13007, 13008, and 13009. (Stats. 1953, ch. 48, §§ 1-3, p. 682; 2 MJN 383.) The codification was the product of the California Code Commission. (Assem. Final Hist. (1953 Reg. Sess.) p. 636; 2 MJN 385.) The California Code Commission and Office of the Attorney General both reported to Governor Earl Warren that the codification did not make a substantive change in law. (Cal. Code Com., letter to Governor Earl Warren re Assem. Bill No. 1874 (1953 Reg. Sess.) Mar. 27, 1953; 2 MJN 397; Off. of Cal. Atty. Gen., letter to Governor

Earl Warren re Assem. Bill. No. 1874 (1953 Reg. Sess.) Mar. 27, 1953; 2 MJN 398.)

Health and Safety Code sections 13007 and 13008 authorize only actual damages for fire. Since 1953, the Legislature has not amended these sections. Health and Safety Code section 13007 states:

> Any person who personally or through another wilfully, 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.*

(Emphases added.) Health and Safety Code 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.*

(Emphases added.) The Statutes and Amendments to the Codes for 1953 describe these sections as governing "*Liability for fire damage.*" (Stats. 1953, ch. 48, §§ 1-2, p. 682, emphasis added; 2 MJN 383.)

Consistent with section 3 of the Fire Liability Law, Health and Safety Code section 13009 authorizes recovery of fire suppression expenses, including those incurred by a litigant or a public or private agency. (Stats. 1953, ch. 48, § 3, p. 682; 2 MJN 383.)

Health and Safety Code section 13009 has been amended on several occasions but continues to create liability "for the fire suppression costs incurred in fighting the fire." (Health & Saf. 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.)

5. The Legislature amended Civil Code section 3346 to add a double multiplier for casual and involuntary trespass, for the purpose of deterring timber appropriation.

In 1957, the Legislature repealed, amended, and reenacted section 3346. (Stats. 1957, ch. 2346, §§ 1-2, p. 4076; 2 MJN 411.) The Legislature added to section 3346 a statute of limitations and a double multiplier that applied in certain situations in which "the trespass was casual or involuntary." (Stats. 1957, ch. 2346, § 2, p. 4076; 2 MJN 411.) The Legislature left unchanged the provisions of section 3346 governing treble damages. Thus, the Legislature did not amend the language 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 § 3346; see *Drewry v. Welch* (1965) 236 Cal.App.2d 159, 171 (*Drewry*) [prior to its 1957 reenactment, section 3346 read "so far as pertinent here, *the same*

as the new, except that for the injuries mentioned the damages now provided to be twice the amount of the actual damages were there provided to be only 'a sum equal to the actual detriment' " (emphasis added)].)

The purpose of the 1957 amendment was "to more effectively *deter timber appropriation.*" (*Fulle, supra*, 7 Cal.App.5th at p. 1315, fn. 6, emphasis added.) Assemblyman Frank P. Belotti introduced the bill. (Assem. Final Hist. (1957 Reg. Sess.) p. 930 [discussing Assembly Bill No. 2526]; 2 MJN 413.) His bill addressed the problem of the unlawful taking of timber by those "who carelessly or negligently fail to accurately determine a boundary line." (*Fulle*, at p. 1315, fn. 6.) Thus, Assemblyman Belotti "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." (*Ibid.*, citing BLM Area Administrator James Doyle, letter to Assemblyman Frank Belotti, July 26, 1957; 2 MJN 460; BLM State Supervisor R.R. Beal, letter to Assemblyman Frank Belotti, July 31, 1957; 2 MJN 465; G. Kelton Steele, letter to Assemblyman Frank Belotti, Feb. 12, 1957; 2 MJN 427-429.)

This legislative history 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, emphasis added; 2 MJN 411.)

6. The statutory scheme demonstrates the Legislature's rejection of a multiplier for fire damage to trees.

Health and Safety Code sections 13007 and 13008 and their history "demonstrate[ ] 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 v. Madonna* (1970) 5 Cal.App.3d 404, 407 (*Gould*); see *Scholes v. Lambirth Trucking Co.* (2017) 10 Cal.App.5th 590, 602, review granted June 21, 2017, S241825 (*Scholes*) [the legislative history demonstrates an "intention that only actual damages be recoverable for injury caused by negligently set fires"].)

The *Gould* holding reflects established principles of statutory interpretation. "[I]t 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 (*County of Los Angeles*), internal quotation marks omitted; *People v. Valentine* (1946) 28 Cal.2d 121, 142 (*Valentine*); see *People v. Dillon* (1983) 34 Cal.3d 441, 467 (*Dillon*) ["the Legislature's decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850"]; *Sanford v. Garamendi* (1991)