Civil No. S241825

SUPREME COURT OF CALIFORNIA

VINCENT E. SCHOLES,

Plaintiff and Appellant,

vs.

LAMBRITH TRUCKING,

Defendant and Respondent.

APPLICATION TO SUBMIT AMICUS BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF VINCENT SCHOLES

Review from Judgment of the Third District Court of Appeal, Case No. C070770
Colusa County Superior Court, Case No. CV23759

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: December 6, 2017

_____
SHARON J. ARKIN

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT VINCENT SHCOLES

Consumer Attorneys of California hereby requests that its attached amicus brief submitted in support of plaintiff and appellant Vincent Scholes be accepted for filing in this action.

Counsel is familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief is very concise because it addresses two very precise, but critically-important, points regarding applicable legislative history not otherwise considered or argued by the parties and amicus believes the brief will assist this Court in its consideration of the issues presented.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The

organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent consumers in fire loss cases, Consumer Attorneys is interested in the significant issues presented in this case, especially with respect to preserving the effectiveness and application of Civil Code section 3346 with respect to loss of trees, timber and underwood resulting from negligently-caused fires.

Dated: December 6, 2017

THE ARKIN LAW FIRM

By:_____
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STATEMENT OF INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

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INTRODUCTION

Because the parties have thoroughly briefed many of the legal issues, this brief is focused on two narrow analyses: First, the brief discusses a very compelling aspect of the legislative intent issue, i.e., how the legislative intent underlying Health & Safety Code section 13009.2 compels the conclusion that Health & Safety Code sections 13007 and 13008 do not override or undermine the double damages provisions of Civil Code section 3346 when a negligently or intentionally-set fire destroys both real property and trees, timber and underwood.

Second the brief also discusses the meaning of the term "underwood" as used in section 3346, which demonstrates that, contrary to the Third District's analysis in *Gould v. Madonna* (1970) 5 Cal.App.3d 404, the statute was not intended to be limited to injury or damage to what are essentially commercially-viable interests.

LEGAL DISCUSSION

1.

THE LEGISLATIVE HISTORY OF SECTION 13009.2 MAKES CLEAR THAT, ABSENT OTHER LEGISLATIVE ACTION, SECTIONS 13007 AND 13008 DO NOT LIMIT RECOVERY UNDER SECTION 3346

As thoroughly explained in appellants' briefing, and contrary to respondent's assertions, Health & Safety Code section 13007 and 13008 provide recovery for damage to all property destroyed *by fire*. But those sections do not, in any way, expressly or impliedly limit either the *nature* of the property destroyed or the *type* of damages recoverable under their provisions.

Civil Code section 3346, in turn, expressly provides that damage resulting to injury to "trees, timber and underwood" may be doubled or tripled if the injury results from negligent or intentional wrongdoing. That statute does not, in any way, expressly or impliedly limit its application to any specific *cause* of the damages resulting from the wrongdoing. In other words, whether negligently caused by

fire, flood, or misappropriation, the statute permits recovery of doubled damages for damage to trees, timber and underwood.

As appellant's briefing also discusses, the Legislature's enactment of Health & Safety Code section 13009.2 in 2012 provides substantial support for the conclusion that sections 13007 and 13008 are not intended to limit application of section 3346 to the damage to trees caused by a fire loss – or else the Legislature would not have required a carve-out in section 13009.2.

First, subdivision (d) of section 13009.2 expressly provides that a "public agency plaintiff who claims environmental damages or any kind under subdivision (a) or (b) shall not seek to enhance any pecuniary or environmental damages under this section. This section is not intended to alter the law regarding whether Section 3346 of the Civil Code or Section 733 of the Code of Civil Procedure can be used to enhance fire damages, but this section does confirm that if a public agency claims environmental damages under subdivision (a) or (b), it shall not seek to enhance any damages recovered under this section for any reason, and shall not use Section 3346 of the Civil Code or Section 733 of the Code of Civil Procedure to do so, regardless of whether those sections might otherwise apply."

As appellant discussed in his Opening Brief on the Merits, at pages 22 and 27, there would be no logic or reason to add that provision unless the Legislature believed that section 3346 did, in fact, "otherwise apply" to a fire loss to trees, timber and underwood.

But in addition to that, the legislative history of section 13002.9 *itself* demonstrates that the Legislature understood that, absent enactment of a *specific statute providing to the contrary* (such as section 13009.2), section 3346 would, in fact, apply to damage to trees, timber and underwood caused by fire.

First, section was intended to enact "various changes related to Timber Harvest Plans (THPs) and revenues to implement the budget actions as part of the 2012-13 budget package." (See, 2011-2012 Legislative Bill Analysis on A.B. 1492, dated 8/7/12, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1451-1500/ab_1492_cfa_20120901_011730_asm_floor.html, "Summary;" emphasis added.)

To that end, the Legislature enacted several provisions, including subdivision (d) expressly excluding application of section 3346 from claims for fire losses *asserted by public entities*. In doing so, that Bill Analysis expressly acknowledged that section 3346

normally applies to fire losses to trees, timber and underwood: "With regard to *wildfire liability damages, California law allows for the doubling or tripling of damages for 'wrongful injuries to timber, trees, or underwood upon the land of another*.' (*Ibid*., at p. 2, "Comments," emphasis added.)

The legislative analysis then goes on to discuss a case in which various compensatory damages as well as enhanced damages under section 3346 were awarded to the federal government. (*Ibid*.) The Legislature then concluded that the bill under analysis would "reform wildfire liability," at least with respect to *public entity* claims, "by requiring damages to be reasonable and quantifiable" and by precluding double or triple damages as to "environmental damages" asserted by *a public agency*. (*Id.,* pp. 2-3.)

That legislative analysis makes two important points. First, it unequivocally acknowledges that under existing California law (i.e., section 3346), double and treble damages *are* available for "*wildfire liability damages."* (*Id.*, at p. 2.) That single statement demonstrates the fallacy of respondent's argument and the Court of Appeal's decision.

Second, the legislative analysis also makes it unequivocally clear that the changes enacted by A.B. 1492 were intended to apply *only* to public agency claims.

These two points coalesce to require application of two important statutory construction principles. First, when the Legislature enacts a statute, it is presumed that the Legislature knows of the existing laws and, absent an expressed intent to change them, the new enactment does not do so. (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 57 ["the Legislature is presumed to know about existing case law when it enacts or amends a statute."])

Thus, there is automatically a presumption that when the Legislature enacted section 13009.2, it was aware that section 3346 provided double and triple damages in wildfire liability cases. But, even more importantly, in *this* case, a *presumption* is not even necessary since the Legislature expressly articulated its knowledge that section 3346 applied to "wildfire liability" damage claims. Given that knowledge, the Legislature's decision to apply its limitation to *only public agencies* must be honored.

And that, in turn, triggers the second important rule of statutory construction applicable to this case, i.e., in construing a statute, a court

must not insert words that the Legislature did not use or ignore words the Legislature did use: "In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted. We 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 Federal Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal4th 342, 349, internal citation and quote marks omitted.)

The analyses by respondent and the appellate court in this case violate that rule by attempting to eliminate the "public agency" limitation in section 13009.2 and to read it as applying to all wildfire liability claims. Those analyses also violate that principle by attempting to *include* an unexpressed limitation for wildfire liability damages in section 3346 – which the Legislature did not intend.

Thus, both the existence of section 1309.2 and its legislative history prohibit the conclusion that section 3346 does not apply to negligently or intentionally set fires that destroy timber, trees or underwood on another's land.

One further point. Respondent makes much of the potential devastating impact the application of section 3346 would have due to massive wildfires that California periodically suffers. And while that is a concern, there are ameliorating factors. First, Cal Fire's own data confirms that many of the largest California wildfires since 1932 were caused by undetermined causes, lighting, unspecified human-related causes, illegal campfires, power lines or arson. (See http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Acres.pdf.)

Obviously, if a wildfire is caused by lightning or accident, section 3346 has no effect. And if a fire is caused by arson, there is no legitimate basis for not applying its provisions. Thus, the real focus is on situations where, for example, the fire results from power line failures by utility companies. Notably, that cause was found to be related to only three of the 20 worst California wildfires listed by Cal Fire. (*Ibid*.)

Most importantly, while application of section 3346 may involve penalties where a utility acts *negligently* in failing to maintain its power lines, those companies have the ability to, in fact, avoid any penalty *by acting reasonably to maintain their power lines and facilities in order to avoid triggering wildfires*. Thus, so long as the

utility acts *reasonably*, it will not be found negligent even if its power lines trigger a fire. That, in turn, means that no damages will be awarded and there will be no damages to double or triple under 3346. And if the utility does *not* act reasonably and, in fact, negligently causes a fire, it *should* bear that risk just like every other California citizen.

More significantly, this is not a public policy consideration this Court can base its decision on in this case for the simple reason that it is a legislative determination. Unlike claims brought by public agencies, the Legislature has not seen fit to exempt utility companies from the effects of section 3346 with respect to claims made by other citizens of the State. Since the Legislature has spoken, this Court may not alter the statutory dynamic based on public policy concerns that are delegated to the Legislature. (*California Federal Savings & Loan, supra*.)

2.

THE INCLUSION OF DAMGE TO "UNDERWOOD" AS COMPENSIBLE UNDER SECTION 3346 UNDERMINES RESPONDENT'S AND THE APPELLATE COURT'S ASSERTION THAT SECTION 3346 WAS INTENDED ONLY TO ADDRESS INJURY TO COMMERCIAL INTERESTS

Relying on language from *Gould*, respondent essentially argues at pages 46 to 48 of its brief that section 3346 was intended only to address the damage to commercial interests from unlawful cutting and removal of another's timber rather than loss or damage caused by wildfire.

First, of course, neither *Gould* nor respondent provide any reasonable basis for an assumption that the Legislature would prevent recovery for damage to commercial interests simply because the losses resulted from fire rather than timber cutting or other cause. Although the early cases applying section 3346 focused on situations involving such commercial interests impaired by the defendant's unlawful removal or cutting of timber, nothing in the statute requires or supports such a limitation.

Furthermore, the language of the statute does not support such a limitation. Indeed, because the statute specifically applies to damage to "underwood," the statute must necessarily be construed more broadly. "Underwood" is defined by Merriam-Webster's on-line dictionary as "undergrowth" or "underbrush." (https://www.merriam-webster.com/dictionary/underwood.) Those terms, in turn, are defined as including "low growth on the floor of a forest including seedlings and saplings, shrubs, and herbs" (https://www.merriam-webster.com/dictionary/undergrowth), "shrubs, bushes, or small trees growing beneath large trees in a wood or forest" or "a tangled, obstructing, or impeding mass" (https://www.merriam-webster.com/dictionary/underbrush).

Clearly, "shrubs," "brush," or "herbs" do not generally have any commercial value – yet section 3346 not only permits recovery of damages for such "underwood," it permits doubling and tripling of those damages. That being the case, the plain language of the statute precludes any analysis based on commercial injury. (*California Federal Savings & Loan, supra*.)

CONCLUSION

In addition to the compelling statutory interpretation principles discussed in appellant's briefs, these additional considerations further support the conclusion that the appellate court was in error and that, in fact, section 3346 applies to the facts in this case.

Dated: December 6, 2017

THE ARKIN LAW FIRM

By:_____
SHARON J. ARKIN
Attorneys for *Amicus Curie*
Consumer Attorneys of
California

CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 3,278 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: December 6, 2017

_____
SHARON J. ARKIN

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action; my business address is 1720 Winchuck River Road, Brookings, OR, 97415.

On **December 6 2017**, I served the within document described as:

APPLICATION TO SUBMIT AMICUS APPLICTION AND AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF APPELLANT VINCENT SCHOLES

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as set forth in the attached service list.

X	**By Mail**:	By depositing with the U.S. Postal Service on this day with postage thereon fully prepaid at Brookings, Or.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 6, 2017 at Brookings, Oregon.

_____
SHARON J. ARKIN

SCHOLES v. LAMBIRTH TRUCKING
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