CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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W&W El Camino Real LLC v Fowler 5/16/14

Pleading Amendment at trial; Nuisance; Trespass

Fowler owned real property in Rancho Santa Fe, which included an avocado grove. In the late 1980's, she paid a company to pull out the avocado trees and plant 450 lemon trees on about 4 acres of her property. That company, Badger & Son, subsequently installed drainage and an erosion control system designed by a soils engineer. The drainage system consisted of a 121 inch corrugated plastic pipe that exited about 3 feet from plaintiff W&W's property line. Badger managed and operated the lemon grove, with no complaints from any adjoining landowners.

In about 2005, W&W purchased the vacant land to the east and downhill from the lemon grove. W&W purchased the land to construct a new home to sell, and hired a contractor to complete the construction. The house sold in 2008 for $8.2 million. The purchaser fell behind in the payments and W&W took it back. On a day in 2010, the area experienced heavy rainfall. Witnesses described a massive sudden rainfall of over 3 inches in just a few hours. A substantial amount of water was released through the outlet pipe as a result. As W&W later alleged, "water traveled

at great force and at a high velocity, taking dirt and landscaping with it, ultimately rushing onto the W&W property," damaging the property and the new house and its contents.

No previous incidence of water or debris flowing onto the property had been recorded. Water and mud completely filled the pool and sauna, entered the home and flowed into all of the rooms on the first floor. Furniture, flooring and drapes were ruined, and the occupants were forced to abandon the premises. W&W's engineering expert testified the soil from the lemon grove filled the "brow ditch" below the pipe, and then flowed onto the property and into the home. He indicated the pipe was placed too close to the W&W property, and should have been at least 15 feet away to slow down or take the "energy out of the water in the pipe." The expert explained that large rocks should have been placed at the end of the pipe to slow the water as it exited.

Fowler's expert explained that Badger's work on the lemon grove site minimized the onsite erosion, but W&W built its house "right in the middle of the drainage swale from the Fowler grove." The expert said W&W's brow ditch was too small, not lined with the correct material, and was inadequately sloped to convey water offsite. W&W sought more than $900,000 in damages for cleaning the house and property, which took several months. The jury awarded W&W about $350,000 in damages, but also found that the "Right to Farm Act" applied, pursuant to Civil Code section 3482.5. As a result the jury's damage award was nullified.

On appeal, W&W contended the trial court erred by allowing Fowler to amend her answer on the day trial began to assert the defense of section 3482.5, which holds that a commercial activity conducted for more than 3

years consistent with accepted standards is deemed not to be a nuisance due to any changed condition if the activity did not constitute a nuisance when the activity began. W&W also contends section 3482.5 does not apply, and that the jury's findings are contradictory and irreconcilable.

The Fourth Appellate District, Division One, noted the trial court granted Fowler's motion to amend her answer only after W&W had filed a written opposition. After granting the motion, the trial court vacated the trial date and reopened discovery. W&W conducted additional discovery, including a second deposition of Fowler, and new experts were designated and deposed. Motions to amend are appropriately granted as late as the first day of trial or even during trial if the defendant is alerted to the charges by the factual allegations, no matter how framed and the defendant will not be prejudiced. (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960) The Justices found that W&W had failed to make an adequate showing of prejudice, particularly given the court continued the trial for more than 90 days and afforded W&W an opportunity to conduct discovery and expert discovery. As a matter of policy the ruling of the trial court in the matter of amendments will be upheld unless a manifest or gross abuse of discretion is shown. (See, *Berman v. Bromberg* (1997) 56 Cal.App.4th 936)

Subdivision (a)(1) of section 3482.5 provides: "No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the

locality, after it has been in operation for more than three years if it was not a nuisance at the time it began."

"For section 3482.5, subdivision (a)(1) to apply, defendants must satisfy seven requisites: The activity alleged to be a nuisance must be (1) an agricultural activity (2) conducted or maintained for commercial purposes (3) in a manner consistent with proper and accepted customs and standards (4) as established and followed by similar agricultural operations in the same locality; the claim of nuisance arises (5) due to any changed condition in or about the locality (6) after the activity has been in operation for more than three years; and the activity (7) was not a nuisance at the time it began." (*Souza v Lauppe (1997) 59 Cal.App.4th 865*.)

The Fourth DCA, in *Rancho Viejo v. Tres Amigos Viejos* (2002) 100 Cal.App.4th 550 (*Rancho Viejo*) upheld the grant of summary judgment in favor of the defendant avocado farmer after irrigation water from its farm allegedly caused property damage to the plaintiff residential developer. There, a landowner owned 500 acres of real property in North San Diego County. In 1997, the landowner sold to the plaintiff a portion of his real property for residential development (lower property). The landowner retained ownership of the adjacent property, which contained an orange grove and an avocado grove consisting of about 6,600 trees that, since the mid-1970's, had been commercially farmed on a continuous basis (upper property).

In 1998, the landowner sold the upper property to the defendant, whose business consisted only of commercial avocado farming. The defendant continued to irrigate the upper property "in a manner identical to the way it was irrigated before its purchase." (*Rancho Viejo*, 100

Cal.App.4th at p. 557.) However, in mid-1999, after the plaintiff had completed grading on the lower property, the plaintiff "discovered water cascading and seeping from the cut slopes in various lots as a result of the defendant's irrigation of the upper property, causing damage to and destabilization of the slope. The plaintiff requested the defendant solve the problem by either reducing its irrigation or installing water control systems to prevent the runoff. When the defendant refused, the plaintiff installed a subdrain system and sued the defendant for trespass and nuisance, seeking damages and injunctive relief.

Relying in part on *Souza*, the *Rancho Viejo* court concluded that section 3482.5 barred the plaintiff's nuisance and trespass causes of action. (See *Rancho Viejo*, 100 Cal.App.4th at p. 557.) In so doing, the court recognized that the owner of the lower property "does not, nor could it reasonably, argue that irrigation is not an agricultural activity or operation." "Reasonableness of the encroaching urban landowner's conduct is not an element of section 3482.5, and therefore whether appellant's conduct was reasonable is not material to application of the statute. The pertinent question under the statute is whether the commercial agricultural activity at issue—respondent's irrigation—is an accepted and customary practice followed by similar operations in the locale. If respondent's watering practices are unreasonable it would tend to show that they are not accepted or customary. But appellant's evidence fails to support its assertion. No evidence contradicts respondent's expert's conclusion that respondent's irrigation practices are customary for avocado farmers in the locale who use well water. Appellant's evidence provides no basis for us to reverse the trial court's ruling." (*Rancho Viejo*, 100 Cal.App.4th at p. 570.)

Although the issue in *Rancho Viejo* involved irrigation water flowing onto the property of another that the owner of that property claimed was a nuisance and/or a trespass, while the instant case involves heavy rainwater from a storm that caused soil and water allegedly from the lemon grove to run onto and damage the W&W property, the Justices nonetheless concluded certain principles from *Rancho Viejo* provided guidance.

First, the DCA agreed with *Rancho Viejo* that the conduct of an "encroaching" landowner (i.e., W&W here) is *not* an element of section 3482.5. (*Rancho Viejo*, 100 Cal.App.4th at p. 570.) Thus, whether W&W acted unreasonably in not installing a concrete drainage ditch to protect the home it built from storm water damage is irrelevant to the issue of whether section 3482.5 applies in this case.

Second, unlike the issue in *Rancho Viejo* where there was no dispute that "irrigation is an ongoing operation in commercial farming generally, and was regularly conducted . . . according to the undisputed testimony of respondent's irrigation worker", in this case there is a dispute between the parties regarding whether the "activity" on and/or "operation" of the lemon grove by Fowler that led to the damage on the W&W property was an "agricultural activity, operation, or facility or appurtenance thereof" for purposes of section 3482.5. Thus, on remand the activity and/or operations alleged to be the nuisance should be defined for the jury in order for it to determine whether section 3482.5 applies.

The Court also noted that in *Rancho Viejo* the court defined the nuisance not as the existence of the avocado grove itself, but rather as the intrusion of water onto the plaintiff's graded property from the defendant's irrigation of the avocado groves. (See *Rancho Viejo*, 100 Cal.App.4th at p.

566.) However, in the present case the nuisance was *not* defined for the jury, and the record shows there was substantial disagreement between the parties throughout the trial, including in closing argument, regarding what exactly was the nuisance in this case. On remand, the nuisance should be defined for the jury in connection with its determination of whether section 3482.5 applies.

Third, the *Rancho Viejo* court specifically noted that the "pertinent question" under section 3482.5 was "whether the commercial agricultural activity at issue—respondent's irrigation—is an accepted and customary practice followed by similar operations in the locale. If respondent's watering practices are unreasonable it would tend to show that they are not accepted or customary." (See *Rancho Viejo*, 100 Cal.App.4th at p. 570.)

Here, as noted, the jury expressly found in the special verdict that Fowler was unreasonable in the ownership and control of her property (i.e., the lemon grove) and that her unreasonable conduct caused W&W to incur damages of about $350,000. As recognized by *Rancho*, that finding suggests Fowler did *not* operate and maintain her agricultural operation or facility (i.e., the lemon grove) "in a manner consistent with proper and accepted customs and standards" (§ 3482.5, subd. (a)(1)) as required by the statute.

To avoid what the Court determined amounts to an inconsistent special verdict requiring reversal (see *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287), on remand the issue of whether section 3482.5 applies should be decided *first*, before the jury reaches the issue of negligence/comparative fault of the parties. The judgment is reversed, and the matter is remanded for a new trial on the issue of liability and

damages. In the interests of justice, both parties shall bear their own costs on appeal.

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