CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Fulle v Kanani 1/31/17

Injury to Real Property; Annoyance and Discomfort; Damage Multiplier

Appellant Jeanette Fulle has resided at her home in a hillside neighborhood of Encino, California since 2001. Her property is located downhill from a home acquired by respondent Kaveh Kanani in October 2013. The contiguous properties are demarcated by a fence. Five mature eucalyptus trees and a black walnut tree were located near the fence on the Fulle property, which provided her home with aesthetic benefits, shade, and privacy. The trees also partially blocked Kanani's view of the San Fernando Valley. Shortly after acquiring his property, Kanani hired Carlos Salvador to trim several trees. On November 16, 2013, Salvador and several workers entered the Fulle property without her permission and cut down the limbs and branches of the six trees.

Fulle filed a complaint for trespass and negligence against Kanani in January 2014. She alleged that Kanani, without obtaining her consent, directed Salvador to "cut the trees down to less than half their height and denude them of all branches and leaves," leaving "bare tree trunks" and depriving her of the "beauty, shade and privacy that that trees afforded." Fulle sought treble damages for trespass and double damages for negligence under section 3346. She also sought damages for the "annoyance and discomfort she suffered from the loss of the shade and privacy . . . and for the annoyance and discomfort she will suffer as and when repairs are made" to the property. Kanani admitted in his answer that the trees partially blocked his view and that he did not have

Fulle's permission to cut them down. He admitted that the trees were cut but "denied that he did so or directed that it be done."

Fulle's brief before trial further explained the remedies she sought. Because Kanani allegedly acted "willfully and maliciously" when he ordered Salvador to cut the trees, Fulle asserted that the measure of damages should be three times the "actual detriment" under section 3346. Fulle argued that the eucalyptus trees were irreparably damaged and needed to be removed and replaced, which would require building a retaining wall to shore up the hillside. Her damages calculation included tree damage, loss of aesthetic benefits, and the costs of removing and replacing the eucalyptus trees, building a retaining wall, and aftercare of the trees. In addition, she sought annoyance and discomfort damages, costs of renting another house during construction, and interest.

The case was tried before a jury in November 2015. The jury found by special verdict that Kanani's agent, Salvador, cut or trimmed Fulle's trees and was acting within the scope of the agency when he did so. The jury also found that Kanani acted intentionally, willfully, and maliciously in causing Salvador to enter Fulle's property and cut or trim her trees. The jury awarded $27,500 for damage to the trees, $20,000 for the cost of repairing the harm, and **$30,000 for "past noneconomic loss including annoyance and discomfort, loss of enjoyment of the real property, inconvenience and emotional distress**."

After the verdict was read and the jury excused, **Fulle moved for treble damages, and the court requested briefing on the application of section 3346. Fulle contended that the term "actual detriment" as used in the statute includes both the damage to the trees and the harm that she personally suffered as a result, thus the multiplier applied to both economic and noneconomic damages.** Kanani argued that the damage multiplier should only apply to economic damages and maintained that only double damages were warranted.

The trial court entered a judgment on November 23, 2015. The judgment doubled economic damages under section 3346 but **declined to apply the multiplier to noneconomic damages** awarded by the jury. Fulle moved to vacate the judgment and enter an amended judgment seeking to treble all damages awarded by the jury.

Following briefing by the parties, the trial court granted the motion to vacate. The court stated that it had made an error and intended to exercise its discretion to impose treble damages under section 3346. The court entered an amended judgment in February 2016, which trebled economic damages. The court, however, declined to treble noneconomic damages under the statute. The court noted that "'detriment'" is generally defined by section 3282 as "a loss or harm suffered in person or property." But the use of the term "'actual detriment'" in section 3346, the court reasoned, suggested the Legislature intended to narrow recoverable damages to "actual economic damages as opposed to more intangible non-economic damages." This timely appeal followed.

This case presents an issue of first impression in California: whether annoyance and discomfort damages resulting from injuries to trees may be doubled or trebled under the timber trespass statutes. (§ 3346; Code Civ. Proc., § 733.)

The Second District Court of Appeal began its opinion by noting that section 733 of the Code of Civil Procedure (section 733) was originally enacted in 1851. (See Stats. 1851, ch. 5, § 251, p. 92.) The statute was incorporated into the Code of Civil Procedure in 1872, and since has read: "Any 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, or on the street or highway in front of any person's house, village, or city lot, or cultivated

grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction

When the Legislature adopted the Civil Code in 1872, it borrowed a similar timber trespass statute from the New York Field Code. Unlike section 733, which appears to mandate treble damages, former Civil Code section 3346 included two damage measures: "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, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment." (Former Civ. Code, § 3346, repealed by Stats. 1957, ch. 2346, § 2, p. 4076.)

Section 3346 remained unchanged until it was repealed, amended, and reenacted in 1957. (Stats. 1957, ch. 2346, § 2, p. 4076.) The new section 3346 preserved the original language regarding treble damages, but added a double damages provision. (See generally *Ghera v. Sugar Pine Lumber Co*. (1964) 224 Cal.App.2d 88, 89-91) Section 3346, subdivision (a) currently reads: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own . . . the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public

highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment."

Sections 733 and 3346 were construed and harmonized in *Drewry v. Welch* (1965) 236 Cal.App.2d 159. In that case, the court observed that the treble damages provisions in both statutes have been construed to be discretionary rather than mandatory. The court further noted that section 733 has been interpreted to apply only in situations where the cutting of trees or timber was done willfully and maliciously. The court concluded that "the effect of section 3346 as amended, read together with section 733, is that the Legislature intended . . . to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages . . . . There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court *may* impose treble damages but *must* impose double damages; (2) for casual and involuntary trespass, etc., the court *must* impose double damages; and (3) for trespass under authority actual damages."

The measure of damages to be doubled or trebled under sections 733 and 3346 is not limited to the value of the timber or the damage to the trees. The statutes have been interpreted to permit doubling or trebling the full measure of compensable damages for tortious injury to property. (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 643; *Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 861.) "**The measure of damages in California for tortious injury to property is 'the amount which will compensate for all the detriment proximately caused thereby . . . .' (Civ. Code, § 3333.) Such damages are generally determined as the difference between the value of the property before and after the injury."** (*Heninger*, at pp. 861-862.) But "diminution in market value . . . is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss." For example, a plaintiff may recover the costs of restoring the property to its condition prior to the injury—even if such costs

exceed diminution in value—so long as there is a valid "personal reason" to do so.

"Annoyance and discomfort" is another theory under which a plaintiff may recover damages for tortious injury to property in California. In *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 272**, the California Supreme Court recognized that "'an occupant of land may recover damages for annoyance and discomfort that would naturally ensue . . . .'" from a trespass on the plaintiff's land**. In that case, defendant operated a cotton gin on land adjacent to plaintiffs' property. Operating the gin caused the "lawns, flowers, shrubs, window screens, hedges and furniture" on the plaintiffs' property to be "covered with a thick coating of dust and lint and ginning waste." The court noted that defendant's trespass, while not of "the type to cause fright or shock or even physical illness," nevertheless caused the plaintiffs "much annoyance and discomfort." Even though plaintiffs had suffered no physical injury, the court concluded they were entitled to compensation because their annoyance and discomfort was the natural and proximate cause of defendant's trespass.

In *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, the court applied *Kornoff* in a case involving a negligently-started brushfire that destroyed dozens of trees on the plaintiff's property. (*Kelly*, at pp. 448-451, 456-459.) The jury awarded damages for the cost of restoring the property, lost rental income, tree damage, and plaintiff's annoyance and discomfort. The court of appeal reversed the damage award for annoyance and discomfort because plaintiff did not reside on the property at the time of the fire. Although the court indicated annoyance and discomfort damages may be available in trespass cases involving injury to trees, it held that **such damages are recoverable only by the "immediate and personal possessor" of the damaged property.**

Together, ***Kornoff* and *Kelly* stand for the proposition that a plaintiff may recover damages for annoyance and discomfort proximately caused by tortious**

injuries to trees on her property if she was in immediate and personal possession of the property at the time of the trespass. (See *Kornoff*, at p. 272; *Kelly*, at pp. 456-459.) However, *Kelly* did not address the question presented in this case: whether recoverable annoyance and discomfort damages are subject to the damage multiplier for timber trespass under sections 733 and 3346.

The Justices first turned to section 733, which provides that "any 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 . . . is liable to the owner of such land . . . for treble the amount of damages which may be assessed therefor . . . ." The plain language of this provision is not ambiguous. It permits trebling the "amount of damages which may be assessed" for cutting down or injuring trees on another person's land. "The measure of damages for tortious injury to property, including trees, 'is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.'" (*Salazar*, at p. 643, quoting Civ. Code, § 3333; see also *Heninger*, at p. 861.) Because it is established that annoyance and discomfort damages may be assessed for tortious injuries to trees (see *Kornoff*, at p. 272; *Kelly*, at pp. 456-459), it follows that such damages are subject to section 733's treble damages provision.

The language of section 3346 poses a greater interpretive challenge. It states in pertinent part: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment . . . ." (§ 3346, subd. (a).) According to Fulle, the term "actual detriment" includes both detriment to property and resulting personal harms such as annoyance and discomfort. She notes that the **word "detriment" is defined by section 3282, another Civil Code provision enacted in 1872, as a "loss or harm suffered in person or property."** Because annoyance and discomfort damages are recoverable for trespassory injuries to trees (see *Kelly*, at pp. 456-459), Fulle

reasons that such personal harms are therefore included within the "actual detriment" subject to doubling or trebling under section 3346. The trial court disagreed with her analysis. It reasoned the use of the term "actual detriment" suggests a narrower measure of damages, and concluded the damage multiplier is consequently limited to "actual economic damages as opposed to more intangible non-economic damages."

The 2nd DCA found no support for the proposition that the use of the term "actual detriment" in section 3346 was intended to limit the application of the damage multiplier to economic damages. The ordinary meaning of the word "actual" does not provide much guidance. It is generally defined as "existing in fact or reality" as opposed to "false or apparent." (Black's Law Dict. (10th ed. 2014) p. 44, col. 2) A similar legal term dating back to the 18th Century, "actual damages," is defined as an "amount awarded to a complainant to compensate for a proven injury or loss" and is generally synonymous with compensatory damages as opposed to nominal or punitive damages. (Black's Law Dict., p. 471, col. 2.) The Appellate Court was unable to discern whether the Legislature intended the term to carry such a technical meaning.

The general purpose of section 3346 and the limited legislative history do not provide clarity. Courts have noted the purpose of the statute is "to make timber appropriation unprofitable. 'The normal use of . . . section 3346 is in cases where timber has been cut from another's land, either with or without knowledge that the cutting was wrongful. It has been suggested that the purpose of the statute is to educate blunderers (persons who mistake location of boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner.'" (*Heninger*, at p. 868) When section 3346 was amended in 1957, the Legislature was primarily concerned with enhancing the statute's deterrent effect. Nowhere in the legislative history do we find any discussion of the term "actual detriment" or the appropriate measure of damages subject to doubling or trebling. Whatever

the Legislature meant by "actual detriment," we cannot conclude that it intended in 1872 or 1957 to prospectively bar recovery for annoyance and discomfort when this damage measure was not expressly recognized for tortious injury to trees in California until 2009 (see *Kelly*, at pp. 460-462).

Kanani argued for narrowly interpreting sections 733 and 3346. This is consistent with appellate courts' long-standing views that the timber trespass statutes are punitive in nature and therefore should be strictly construed. (*Ghera*, at p. 92) He notes the statutory language refers only to property damage. Section 3346 states that it applies to "wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof." Section 733 likewise refers only to damages which may be assessed against a person who cuts down or injures trees on another person's land. Because neither section mentions any type of personal harm or detriment, Kanani asserts the statutes should not be interpreted to extend to noneconomic damages such as those for annoyance and discomfort.

Fulle argues that the application of the rule of strict construction to civil penalty statutes has been called into question. In *Smith v. Superior Court* (2006) 39 Cal.4th 77, 92, the California Supreme Court declined to apply the rule when interpreting Labor Code sections 201 and 203, which subject employers to civil penalties for willful failure to pay wages to discharged employees. The court distinguished a prior decision, *Hale v. Morgan* (1978) 22 Cal.3d 388, which had adopted a narrow construction of a penalty clause that applies when a landlord cuts off a tenant's utilities (§ 789.3, subd. (b)). *Smith* noted that "the rule of strict construction of penal statutes 'has generally been applied . . . to criminal statutes, rather than statutes which prescribe only civil monetary penalties.' . . . *Hale* . . . 'did not purport to alter the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.'" (*Smith*, at p. 92.) Although *Smith* casts some doubt on the

continuing application of the strict construction rule to civil penalty statutes, the rule does not inform our decision in this case.

No matter how strictly the Justices construe section 733, the plain language of that statute explicitly authorizes trebling the "amount of damages which may be assessed" for cutting down or injuring trees on another person's land. The cases are similarly clear that annoyance and discomfort damages may be assessed for this type of tortious injury to trees. (See *Kornoff*, at p. 272; *Kelly*, at pp. 456-459.) On the other hand, the term "actual detriment" in section 3346 is ambiguous. This ambiguity lends itself to a potentially stricter construction. Because section 3346 refers only to "wrongful injuries" to timber or trees, a plausible interpretation is that "actual detriment" is limited to property harm and does not extend to personal harms such as annoyance and discomfort.

The Court must, however, harmonize these two statutes where reasonably possible, reconcile seeming inconsistencies between them, and construe them to give force and effect to all of their provisions. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.) It does not read into the plain language of section 733 any limitation based on a corresponding strict construction of section 3346. In order to harmonize these statutes and give full effect to each, the Justices conclude that annoyance and discomfort damages resulting from tortious injuries to timber or trees are subject to the damage multiplier under sections 733 and 3346. Where, as here, the jury finds willful and malicious conduct by the defendant, the trial court must award double damages and has discretion to award treble damages for annoyance and discomfort.

The judgment is reversed and the matter remanded to the trial court for further proceedings consistent with this opinion. Appellant shall recover her costs on appeal.

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