NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RUSSELL DILDAY, et al., Plaintiffs, Cross-defendants and Respondents, v. MIKAL JONES, et al., Defendants, Cross-complainants and Appellants; Pleasant Valley Canal Company, Cross-defendant and Respondent.	F077682 (Super. Ct. No. PCU261738) **OPINION** (Filed Jan. 12, 2022)

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Glade F. Roper, Judge.

Romaine Lokhandwala Law Group, William A. Romaine and Zishan Lokhandwala, for Defendants, Cross-complainants and Appellants.

Krase, Bailey, Reed-Krase and Alexander Reed-Krase; Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and Catherine E. Bennett, for Plaintiffs,

---

* Before Franson, Acting P. J., Peña, J. and De Santos, J.

Cross-defendants, and Respondents Russell Dilday, Tanna Dilday, and Mary Ann Ferrero.

Kahn, Soares & Conway, Jennifer E. Dunne and David W. Kahn, for Cross-defendant and Respondent Pleasant Valley Canal Company.

-ooOoo-

This litigation arises from a dispute over an easement for a water pipe running from a canal located on defendants' property to plaintiffs' property. After a court trial, plaintiffs were awarded a prescriptive easement, actual damages, and punitive damages. The threshold issue, which is dispositive, is whether defendants' appeal is timely. The notice of appeal was filed 79 days after plaintiffs served a notice of entry of judgment, not within the 60 days specified by California Rules of Court, rule 8.104(a)(1)(B).[1] Defendants filed a motion to reconsider after the final judgment, but such a motion does not extend the time to appeal. (Rule 8.108(e); see *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236 (*Ramon*) [motion to reconsider filed after the judgment was entered does not extend the time to appeal from the judgment].) Also, our review of the record showed the final judgment remained in effect from the time it was filed. The judgment was never revoked, vacated or modified, even though the trial court purportedly granted the motion to

[1] Subsequent references to a numbered "Rule" are to the California Rules of Court.

reconsider and heard argument on defendants' objections to the tentative statement of decision.

Therefore, the appeal was filed late and must be dismissed. (Rule 8.104(b).)

FACTS

The plaintiffs in this action are Mary Ann Ferrero, Tanna Dilday, and Russell Dilday. Tanna is Ferrero's daughter and Tanna and Russell are married.

The defendants and cross-complainants are Mikal Alex Jones, his spouse Angela Anderson, and Bi-Rite Auto Transport, Inc., a California corporation (Bi-Rite). The corporate shares of Bi-Rite are owned by a family trust established by Jones's grandparents. At the time of trial, Jones was the trustee and sole beneficiary of the trust and held all the corporate offices of Bi-Rite, except the office of corporate secretary held by Anderson.

The cross-defendants are plaintiffs and Pleasant Valley Canal Company, a California corporation ("Canal Company"). Canal Company's predecessor was organized in 1888. Canal Company is a mutual water company formed on December 19, 1924, with the issuance of 150 shares. Canal Company delivers water to its shareholders using a canal or ditch that is eight miles long.

The facts defining the parties' real estate and water rights are not material to our decision that the appeal was filed late. Therefore, those rights and the

events related to the parties' tort claims are not described in this opinion. (See Cal. Const., art. VI, § 14 [appellate decisions "shall be in writing with reasons stated"].)

PROCEEDINGS

In July 2015, shortly after an altercation between Jones and Russell Dilday, plaintiffs filed this lawsuit. In October 2015, plaintiffs filed a first amended complaint against defendants to establish a pipeline easement, to quiet title in a roadway easement, and to recover actual and punitive damages.

The court trial began in October 2016 and, after continuances, the last witness testified in May 2017. Closing arguments were presented in writing. In October 2017, the trial court issued a tentative statement of decision. Defendants filed objections to the tentative statement of decision and then filed a bankruptcy petition that stayed this lawsuit. Plaintiffs obtained relief from the bankruptcy stay and proceedings in this lawsuit resumed.

The hearing on defendants' objections to the tentative statement of decision was reset for February 21, 2018. On the morning of the hearing, defendants' attorney was not present when the matter was called and he had not notified the court or opposing counsel that he would be late. The court called the matter, overruled all of defendants' objections, adopted its tentative statement of decision as the statement of decision, and issued formal judgment. Subsequently,

defendants' attorney arrived at the courtroom and was informed of the court's actions.

Final Judgment

On February 26, 2018, the "FINAL JUDGMENT" was filed. It granted plaintiffs a ten-foot-wide prescriptive pipeline easement centered along the buried water pipe that ran from the edge of the Dildays' parcel across the property owned by Bi-Rite to a weir connected to the canal. The judgment also awarded Ferrero actual damages of $19,513.37 and punitive damages of $97,576.85 against all defendants for interfering with the pipeline; declared plaintiffs had a roadway easement to access the Dilday property and quieted their title to that easement against any adverse claims by defendants; awarded plaintiffs $50,000 in punitive damages against Jones and Bi-Rite for willful and malicious injury caused by their interference with the roadway; denied plaintiffs' claim of damages for loss of a sale of the Dilday property; and awarded actual and punitive damages against Jones for intentional infliction of emotional distress. The judgment rejected defendants' affirmative defenses, denied their causes of action against Canal Company for trespass and waste, denied Jones' claims against Russell Dilday for assault and battery, and denied defendants' cause of action against Russell Dilday and Ferrero for trespass. The judgment denied all requests for attorney fees.

On March 6, 2018, plaintiffs' attorney served and filed a notice of entry of judgment that attached a file-stamped copy of the final judgment filed on February 26, 2018. The act of serving and filing the notice of entry of judgment triggered a 60-day period to appeal from the judgment. (See Rule 8.104(a)(1)(B).) The 60-day period expired on Monday, May 7, 2018.

Motion after Judgment

On March 8, 2018, Defendants filed a "MOTION TO RECONSIDER/RELIEF FROM DEFAULT." The stated grounds for the motion were "that due to inadvertence of counsel, the judgment was entered against these moving defendants in the absence of argument [on defendants' objections to the tentative statement of decision] and further, that new or different facts would have been presented at the hearing on those objections to compel a result different from the judgment hereinabove entered." The attorney's declaration supporting the motion stated that heavy traffic had caused him to be about 10 minutes late for the hearing scheduled at 8:30 a.m. on February 21, 2018, and that when he arrived in the courtroom he was advised the case had been called twice and the court, not having been notified of counsel's delay, concluded the hearing and adopted the tentative statement of decision. The declaration also described newly discovered evidence in the form of a "Notice of Consent to Use of Land" relating to the real property on which the canal was located and stated the notice had been recorded by the Office of the Recorder of Tulare County on October 18, 2010. The

declaration asserted a proof of service showed the notice had been served on plaintiffs.

On April 12, 2018, the motion was argued to the trial court. On April 23, 2018, the court filed a "Ruling on Defendants' Motion for Relief from Default and for Reconsideration," which stated:

> "It would be manifestly unjust to deprive Defendants of the right to argue their objections simply because their attorney got inadvertently caught in traffic. The Court has the authority under Code of Civil Procedure § 473(b) to grant relief from an order or judgment 'upon any terms as may be just.' Accordingly, the Court will hold a hearing May 8, 2018 to allow Defendants to argue their objections to the Proposed Tentative Decision and Motion for Reconsideration."

The ruling also directed defendants' attorney to pay $750 each to the attorney for plaintiffs and the attorney for Canal Company who had attended the February 21, 2018 hearing and stated that if the amount was not paid three days before the scheduled hearing, the motions for relief and reconsideration would be denied and the hearing taken off calendar.

On May 8, 2018, the hearing was held as scheduled. On May 10, 2018, the trial court filed a "Ruling on Defendants' Objections to Proposed Tentative Decision and Statement of Decision and Motion to Reconsider." The court's ruling addressed 15 objections raised by defendants, denied a proposed modification on the ground there was not credible evidence that

Jones acted in self-defense during the July 14, 2015 altercation with Russell Dilday, and analyzed the "Notice of Consent to Use of Land" presented as the basis for the motion to reconsider. The court determined it would be procedurally unfair to reopen the evidence when defendants were aware of the notice of consent and had chosen not to present it as evidence during the trial. The court also gave three reasons why the notice of consent, if admitted, would not change the outcome. As a result, the court stated: "The request to modify, amend or revoke the judgment and Proposed Statement of Decision or reopen the trial because of the discovery of the Consent to Land Use is denied." The ruling's concluding paragraph stated:

> "The Court has modified that Proposed Statement of Decision as set forth above. None of the modifications change or alter the Judgment. The Court has issued its final Statement of Decision this date. *The Final Judgment issued February 26, 2018 will remain the judgment of the Court.*" (Italics added.)

As described in the foregoing paragraph, the trial court also filed a 33-page "Statement of Decision After Court Trial" on the same day as its ruling on defendants' motion.

Notice of Appeal

On May 24, 2018—that is, 79 days after the notice of entry of judgment was served and filed—defendants filed a notice of appeal stating they appealed "from the

final judgment entered in said action on May 10, 2018 and all orders, rulings, and decisions made by the court prior to the entry of said judgment."

In June 2019, defendants notified this court that Jones had filed a bankruptcy petition and asserted the automatic bankruptcy stay applied to this appeal. In July 2019, this court issued an order staying the appeal as to all parties and requiring periodic status reports. In October 2019, this court vacated its stay and set a date for filing the appellants' opening brief.

DISCUSSION

I. LEGAL PRINCIPLES DEFINING TIMELINESS OF AN APPEAL

The appeal process is initiated by filing a notice of appeal in the superior court. (Rule 8.100(a)(1); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 3:1, p. 3–1.) Pursuant to Rule 8.104, the notice of appeal must be filed before the earliest of (1) 60 days after the superior court clerk serves a notice of entry of judgment or a file-stamped copy of the judgment; (2) 60 days after a party files and serves a notice of entry of judgment or a file-stamped copy of the judgment on the person filing the notice of appeal; or (3) 180 days after entry of judgment. (Rule 8.104(a)(1)(A)–(C).) These deadlines are subject to statutory exceptions and the extensions of time set forth in Rule 8.108. (Rule 8.104(a)(1).) Under Rule 8.108, extensions result from valid motions (1) for new trial, (2) to vacate the judgment, (3) for judgment

notwithstanding the verdict, and (4) to reconsider an appealable order. (Rule 8.108(b)–(e); see Code Civ. Proc., §§ 629 [judgment notwithstanding verdict], 657 [new trial], 663 [vacate], 1008 [reconsider].)

"The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Rule 8.104(b) states that "[i]f a notice of appeal is filed late, the reviewing court must dismiss the appeal." Absent a public emergency, superior courts and appellate courts have no authority to grant extensions of time to file a notice of appeal. (Rule 8.104(b); see Rule 8.66.) We noted the unforgiving nature of these principles in *Baker v. Castaldi* (2015) 235 Cal.App.4th 218, stating the deadlines for filing a notice of appeal "are jurisdictional and will bar an appeal even where the trial court has arguably led a litigant astray." (*Id.* at p. 224, fn. 21.)[2]

Untimely appeals do not confer jurisdiction on the appellate court and, as a result, appellate courts have a duty to "raise the point sua sponte." (*Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 849.) The California Rules of Court impose requirements on appellants that assist the reviewing court in fulfilling

---

[2] The same principles apply in federal court. The United States Supreme Court has made it "clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and it "has no authority to create equitable exceptions to jurisdictional requirements." (*Bowles v. Russell* (2007) 551 U.S. 205, 214.)

their sua sponte duty to determine whether an appeal was filed late. First, appellants must file a completed civil case information statement on mandatory Judicial Council form APP-004 and attach "a copy of the judgment . . . that shows the date it was entered." (Rule 8.100(g)(1).) Second, the appellant's opening brief, which must "[s]tate that the judgment appealed from is final." (Rule 8.204(a)(2)(B).)

II. THE APPEAL WAS FILED LATE

A. Contentions of the Parties

Part I.B. of Judicial Counsel form APP-004 addresses the timeliness of the appeal by asking appellant to provide the date of entry of the judgment appealed from, the date a notice of entry of judgment was served, and whether "a motion for new trial, for judgment notwithstanding the verdict, for reconsideration, or to vacate the judgment [was] made and denied." Defendants' civil case information statement asserted the date of entry of the judgment appealed from was "2/26/2018" and answered "yes" to the question about motions. It also stated the motion was filed on March 8, 2018, the motion was denied on May 10, 2018, and the denial was served on May 10, 2018.

Defendants addressed the timeliness of their appeal in their opening brief's statement of appealability, asserting:

> "The judgment entered pursuant to the Superior Court's order granting judgment in favor of Plaintiffs on February 26, 2018 set aside by

> its order of April 23, 2018 and reinstated by its order of May 10, 2018, is an appealable final judgment in accordance with the provisions of Code of Civil Procedure sections 904.1 and 906."

Under this view of procedural events, defendants imply that the time for filing an appeal was reset on May 10, 2018, when the judgment was, in their view, "reinstated" by the court's order.

The question of the timeliness of defendants' appeal was raised by plaintiffs in their respondents' brief. Plaintiffs contend defendants' notice of appeal was filed late and, therefore, this court lacks jurisdiction and must dismiss the appeal. (Rule 8.104(b) ["If a notice of appeal is filed late, the reviewing court must dismiss the appeal"].)

Defendants' reply brief does not address plaintiffs' arguments about the untimeliness of the appeal. As a result, that brief did not address any of the case law discussing the legal effect of a motion to reconsider filed after the judgment is entered. Also, their reply brief did not address the legal principles applicable to an appellate court's interpretation of a trial court's orders and judgment.

Despite the lack of argument and citation to authority in the appellants' reply brief, we interpret the contents of defendants' civil case information statement and their opening brief as presenting two grounds for concluding the appeal was timely filed. First, the February 26, 2018 judgment was vacated and

subsequently reinstated and, as a result, the time period for filing the appeal ran from the date of reinstatement. Second, the motion filed on March 10, 2018, extended the time for filing an appeal from the judgment filed on February 26, 2018. We reject both grounds and conclude the appeal was filed late.

B. The Final Judgment Was Not Vacated and Reinstated

Defendants' contention that the February 26, 2018 judgment was vacated and subsequently reinstated requires us to interpret the orders of the trial court filed after the judgment was filed. It is well established that when an appellate court must determine the meaning of an order or judgment, it applies the same rules used in ascertaining the meaning of any other writing. (*Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1205; *Verner v. Verner* (1978) 77 Cal.App.3d 718, 724.) Interpreting the orders presents a question of law subject to our independent evaluation. (*Mendly, supra*, at p. 1205.)

Our interpretive process begins by addressing whether the trial court's postjudgment orders are ambiguous on the question of their legal effect on the February 26, 2018 judgment. (See *Estate of Careaga* (1964) 61 Cal.2d 471, 475–476 [generally, where language is clear and explicit, it governs the interpretation of the writing]; *Verner, supra*, 77 Cal.App.3d at p. 724 [where a judgment is ambiguous, courts may examine the entire record to determine its meaning].)

As described below, our review of the language in the orders filed on April 23, 2018, and May 10, 2018, and the surrounding circumstances leads us to conclude the language in those orders is not ambiguous. Those orders are not reasonably susceptible to being interpreted to mean the trial court revoked, vacated or suspended the February 26, 2018 judgment.

The April 23, 2018 order stated (1) it would be unjust to deprive defendants of the right to argue their objections to the tentative statement of decision; (2) the trial court had the authority under Code of Civil Procedure section 473, subdivision (b) to grant relief from an order or judgment upon any terms as might be just; and (3) the court would hold a hearing on May 8, 2018, to allow defendants to argue their objections. Thus, the only relief granted was to allow defendants to argue their objections. The order referred to the fact that the court had "issued formal judgment," but did not state the judgment was impacted in any way by the grant of a hearing. Thus, the order cannot be interpreted to mean the judgment had been revoked, vacated or suspended.

The May 10, 2018 order plainly states that defendants' "request to modify, amend or revoke the judgment . . . is denied." This language necessarily implies that the judgment was in effect when the order was filed. This implication was confirmed by the next and final paragraph of the May 20, 2018 order, which states none of the modifications to the statement of decision "change or alter the Judgment" and "[t]he Final Judgment issued February 26, 2018 will remain the

judgment of the Court." The reference to the absence of changes or alterations to the judgment and the words "will remain the judgment" plainly signify that the judgment continued in effect since it was filed on February 26, 2018, and was not modified or changed based on the arguments presented at the May 8, 2018 hearing.[3]

To summarize, the text of the April 23, 2018 order and May 10, 2018 order unambiguously establishes that the final judgment filed on February 26, 2018, was not revoked, vacated or suspended and, therefore, that it remained in effect from the date it was filed. Consequently, we reject the argument that defendants' appeal was timely because the final judgment had been revoked and was reinstated by the May 10, 2018 order.

C. Defendants' Motion Did Not Extend the Appeal Period

Next, we consider whether the "MOTION TO RECONSIDER/RELIEF FROM DEFAULT" that defendants filed on March 8, 2018, extended the time to appeal. Rule 8.108 identifies certain motions that

[3] If the judgment had been modified and if the modification had been substantial, the appeal period would have been restarted on the date the modified judgment was filed. (See *Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 765 [substantial modification test determines whether amendment to judgment restarts the period for filing a notice of appeal]; *CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1048 [substantial modification to a judgment starts a new appeal period that runs from the amended judgment].) However, there were no modifications in this case, substantial or otherwise.

extend the time to appeal. Motions for relief from default are not mentioned, but motions to reconsider are addressed:

> "If any party serves and files a valid motion to reconsider *an appealable order* under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first motion to reconsider is filed; or [¶] (3) 180 days after entry of the appealable order." (Rule 8.108(e), italics added.)

The text plainly states that the motion to reconsider must relate to "an appealable order." (Rule 8.108(e).) Based on this text and existing case law, one practice guide states: "A purported motion for 'reconsideration' of a *judgment* will *not* extend to time for appeal from the judgment." (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶3:94.7, p. 3–46.) As support, the practice guide cited several cases, including *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602 (*Passavanti*), which states:

> "A court may reconsider its order granting or denying a motion and *may even reconsider or alter its judgment so long as judgment has not yet been entered.* Once judgment has been entered, however, the court may not reconsider it and loses its unrestricted power to change the judgment. It may correct judicial error only through certain limited procedures such

> as motions for new trial and motions to vacate the judgment." (*Id.* at p. 1606, italics added; see *Ramon, supra*, 50 Cal.App.4th at p. 1236 [motion to reconsider filed after the judgment was entered does not extend the time to appeal from the judgment].)

In view of the trial court's April 23, 2018 order granted a hearing on defendants' motion, we note that the practice guide addressed the effect of granting a hearing on a motion to reconsider:

> "The trial court's mere *grant of a hearing* on a motion to reconsider an appealable order does not have the effect of vacating the order so as to cancel the running of the period within which to appeal. Thus, in such a case, the time to appeal the order begins to run from the date of its entry." (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶3:94.9, p. 3–47.)

Based on the text of Rule 8.108(e) that refers to a valid motion to reconsider an appealable order and the principles set forth in *Ramon* and *Passavanti*, we conclude that defendants' "MOTION TO RECONSIDER/ RELIEF FROM DEFAULT" did not extend the time to appeal from the February 26, 2018 final judgment. Therefore, defendants' notice of appeal filed 79 days after the notice of entry of judgment was served and filed was late and we lack the jurisdiction to consider the merits of the appeal.

DISPOSITION

The appeal is dismissed. Plaintiffs and Canal Company shall recover their costs on appeal.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

RUSSELL DILDAY et al., Plaintiffs, Cross-defendants and Respondents, v. MIKAL JONES et al., Defendants, Cross-complainants and Appellants; PLEASANT VALLEY CANAL COMPANY, Cross-defendant and Respondent.	F077682 (Super. Ct. No. PCU261738) **ORDER DENYING PETITION FOR REHEARING**

Appellant's petition for rehearing filed on January 26, 2022, in the above referenced case is hereby denied.

/s/ Franson
FRANSON, Acting P. J.

WE CONCUR:

/s/ PEÑA
PEÑA, J.

/s/ De Santos
DeSANTOS, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE
SOUTH COUNTY JUSTICE CENTER

RUSSELL DILDAY, TANNA DILDAY, and MARY ANN FERRERO, Plaintiffs, vs MIKAL JONES, ANGELA ANDERSON, BI-RITE AUTO TRANSPORT, INC, Defendants.	May 10, 2018 PCU261738 Dept. No. 23 Judge: Glade F. Roper Statement of Decision After Court Trial
MIKAL JONES, ANGELA ANDERSON, BI-RITE AUTO TRANSPORT, INC, Cross-Complainants, vs RUSSELL DILDAY, TANNA DILDAY, MARY ANN FERRERO and PLEASANT VALLEY CANAL COMPANY, INC., Cross-Defendants.	

The Court heard the trial of this matter beginning October 26, 2016 and ending May 18, 2017. Having

heard and considered all oral testimony and exhibits admitted into evidence, the Court rules as follows:

1. Plaintiffs' First Amended Complaint.

   A. First Cause of Action seeking prescriptive pipeline easement.

Plaintiffs own and lease property hereafter referred to as "Dilday property." Defendants Mikal Jones (Jones) and Angela Anderson (Anderson) own property to the south of the Dilday property, hereafter referred to as "Jones property." Defendant Bi-Rite Auto Transport, Inc. (Bi-Rite) owns property to the east of the Dilday property, hereafter known as "Bi-Rite property." The Bi-Rite property is open pasture land with some high hills, some flat areas and a pond. Pursuant to a Judgment of this court in case 09-232667 issued by Judge Paul M. Vortmann on June 18, 2013, Pleasant Valley Canal Company, hereafter referred to as PVCC, possesses an irrevocable license for the control, use, maintenance and repair of a water conveyance and delivery system consisting of a canal; canal banks 16.5 feet in width; syphons, pipes and associated weirs running through or situated on the Bi-Rite property. Plaintiffs' predecessor in interest, Virgil Rogers, installed a weir on Bi-Rite property connected to the PVCC canal and buried pipes running from the weir to the Dilday property. The purpose of the weir and pipes is to transport water from the PVCC canal to the Dilday property for irrigation. The pipe from the weir to the Dilday property is owned by the Dildays. Rogers told Russell Dilday (Dilday) that the sale of the property to

Plaintiffs included an easement to clean the screens at the weir. Jones testified that Rogers put in the pipes across Bi-Rite property without asking permission and that Jones considered it to be vandalism and "called the cops on him," contradicting other testimony by Plaintiffs that Rogers put the pipes in with permission.

Plaintiff Maryann Ferrero (Ferrero) leased the Dilday property from Rogers about 2000, and used the pipe to irrigate the property. From that time forward either she or someone acting on her behalf routinely went through a gate in the fence between the Dilday and Bi-Rite properties and walked across the Bi-Rite property to clean the screens in the weir, as they become clogged with vegetation and other debris that flows in the canal.

Plaintiffs purchased the Dilday Property in 2005. At that time Plaintiffs believed they had an easement across the Bi-Rite property for their pipeline and to clean the screens in their weir, which is located on the Bi-Rite property. The weir and pipes were installed some time prior to then. Because the PVCC canal is open running water in most places, it collects vegetation and debris. Screens have been installed where water leaves the canal and runs to the weir to prevent the debris from being transported to the Dilday property. From the time the weir and pipes were installed by Rogers, people have gone onto the Bi-Rite property to clean the screens frequently, often on a daily basis. Officers and employees of Bi-Rite were aware they were doing so. Dilday testified that he believes Jones began to object to Plaintiffs crossing the Bi-Rite property and

insisted that Plaintiffs ask permission to use the pipe and clean their screen in 2006. Plaintiff Ferrero sometimes crossed Bi-Rite property three or four times in a day to clean the screens in the weir. She acted under the belief that she had the legal right to cross Bi-Rite property and clean the screens, based on what the prior owner, Virgil Rogers, told her. No one crossing the Bi-Rite property to clean the screens has caused any harm or damage to the Bi-Rite property. After 2009 employees of PVCC have acted as the agents of Plaintiffs to cross Bi-Rite property to clean the screens.

Sometime in 2007 Defendant Jones put a lock on the gate that gave Plaintiffs access to Bi-Rite property to clean the screens. Rogers cut the lock on the gate and called the sheriff. Defendant Jones told Plaintiff Ferrero that she could not cross Bi-Rite property and he put a welded wire panel blocking the gate Plaintiffs used. Plaintiffs and PVCC filed a lawsuit against Defendants in 2009, and after that time Plaintiff Ferrero continued to climb over the fence to clean the screens. Other visitors and employees continued to clean the screens for her benefit, continuing to the time of trial, except for the time when the pipe was cut, as discussed below.

Plaintiff Russell Dilday first met Defendant Jones in 2006 or 2007. Sometime thereafter the two of them had "heated" arguments over the water from the PVCC ditch, culminating in a physical altercation July 14, 2015 on Bi-Rite property, in the area Dilday believed was an easement over the pipeline.

Between the time the pipe was installed by Rogers, around 2000, and 2006 or 2007 the owners of the Bi-Rite property, or their agents, were aware of Plaintiffs and their agents crossing the Bi-Rite property frequently to clean the screens in the weirs, and of the existence of the pipe. They did not complain or voice objection to this. Beginning in 2006 or 2007 Jones began to complain about the existence of the pipe and orally objected to its existence on the Bi-Rite property at annual PVCC meetings and to Plaintiffs. He first took adverse action against the use of Bi-Rite property by blocking the gate used by Plaintiffs in 2007, but did not take other action to prevent them from going on the property. He was aware that Plaintiffs routinely crossed the fence and walked to the weir and back. Jones took further action against the use of the pipeline in 2015 when he cut and capped the pipe. Plaintiffs continued to assert their rights in the pipeline and sought the assistance of PVCC to assist them. Acting at their behest, PVCC attempted to discover the cause of the interruption in the water flow, resulting in the confrontation between Jones and Water Master Rick Waller (Waller) July 14, 2015.

The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years. Further, the existence of a prescriptive easement must be shown by a definite and certain line of travel for the statutory period. *Warsaw v. Chicago Metallic Ceilings, Inc.*, 35 C3d

564 (1984). Plaintiffs proved by clear and convincing evidence that they have continuously and adversely used the pipeline from their weir located on Bi-Rite property to their property line since 2000 and that Defendants had actual knowledge of that use. Plaintiffs have acquired an easement to use and maintain a pipeline along the line which has a pipe currently in place to transport water from their weir to their property line. They also have an easement to use and maintain a weir at its current location to receive water from PVCC.

Plaintiffs have also proved by clear and convincing evidence that they have acquired the right to cross Bi-Rite property from the point that the pipe referenced above enters their property to the weir in order to clean the screens and perform other maintenance on the weir and pipes. Ferrero testified that the required easement is ten feet wide. In the absence of any other evidence, Plaintiff's easement is ten feet wide, with its center along the buried pipe. Plaintiffs have the right to cut a gate in the boundary fence between their property and Bi-Rite property to allow them to enter and exit their easement. Defendants are enjoined from erecting any barrier that would inhibit Plaintiffs from traveling along their easement to clean and attend to the weir. This easement runs with the land owned by Plaintiffs and is not personal to Plaintiffs.

Defendants cite Code of Civil Procedure §320 as authority that Plaintiffs have not commenced their action within the time allowed. That section says, "No entry upon real estate is deemed sufficient or valid as a

claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued." By its plain language, the section applies to a claim based on entry onto real estate.

In the case of *Kafka v. Bozio*, 191 Cal. 746 (1923) the plaintiff owned a parcel of real property. The defendant's building sagged and leaned onto the plaintiff's building, causing damage to it. The Supreme Court found that §320 was "inapplicable because the plaintiffs have at all times been seised and in possession of the premises, subject only to the encroachment of defendants building into the air space above a small portion thereof. This was not legally sufficient to interrupt the continuity of plaintiffs' possession." *Kafka v. Bozio*, 191 Cal. 746, 750 (Cal. Sept. 7, 1923). It is clear from that case that §320 was intended to apply to an action seeking damages or an abatement of a nuisance by a defendant going onto the plaintiff's property. In the case at bar, the plaintiffs are not seeking damages nor abatement of a nuisance from Defendant going onto their property. Plaintiffs are seeking confirmation of their prescriptive easement.

As set forth above, in order for Plaintiffs to prove a prescriptive easement, they have to show continuous use of the easement for a period of at least five years. Defendants' argument that the action to establish a prescriptive easement has to be brought within one year is inconsistent with this requirement. Under Defendants' interpretation of the statute, one would have to bring an action to establish a prescriptive easement

within one year of entering onto a property, yet would have to show continuous use for over five years. It would thus be impossible for anyone to ever prove that they own a prescriptive easement. This cannot be what the legislature intended.

B. Second Cause of Action seeking equitable easement.

Because the Court finds that Plaintiffs have a prescriptive easement to maintain the pipeline and to walk across the Bi-Rite property to maintain their weir and screens, this issue is moot.

C. Third Cause of Action seeking license.

Because the Court finds that Plaintiffs have a prescriptive easement to maintain the pipeline and to walk across the Bi-Rite property to maintain their weir and screens, this issue is moot.

D. Fourth Cause of Action for damages.

Sometime in April of 2015 Jones dug down to Dildays' pipe, cut it and capped it off. When Ferrero attempted to irrigate her property she had no water, although she continued to pay the PVCC water assessment. The lack of water to her property for 116 days during the summer caused her pastures to die and she was required to purchase feed for her animals. Her economic loss for 2015 from Jones' actions was $11,151.64. Ferrero testified that it takes three years

to reestablish a pasture after it dies. In the absence of any other evidence about the rate at which a pasture that has been deprived of water will recover, a reasonable assumption is that it would begin to return to its prior condition as soon as water was returned and would increase its recovery every year. Assuming that the second year it had returned half of its productivity and the third year another half, Ferrero's economic loss from Jones' actions will be $11,151.64 + $5,575.82 + $2,787.91 for a total of $19,515.37.

Jones testified that all of the directors of PVCC told him to cap the pipes. He offered no corroborating evidence. He specifically testified that Kibler, who Jones testified was a board member, gave him permission to cut the pipes. Kibler testified that she did not know what happened to cause her water to suddenly stop, and reported to law enforcement when she learned that Jones had cut her pipe. Her testimony contradicted Jones' testimony that every board member told him to cap the pipes. Jones testified that Waller, water master for PVCC, gave him permission to cut the pipes. Waller testified that he had never heard anyone say anything to Jones authorizing him to cut the pipes and was adamant that he never did so. He testified that he advised Jones not to cut the pipes, because he may get in trouble," and that Jones said he would not be satisfied with the pipes being lowered because he wanted the weirs removed. Witness Kay Meek testified that the board never authorized Jones to cut the pipes. Certainly if every member of the board had instructed him to cut the pipes, Jones would have presented at least

one witness to so testify. The Court finds that Jones' assertion that board members told him to cut the pipes is inherently unbelievable, unsubstantiated by any other evidence and contradicted by the great weight of evidence. In light of the efforts made by PVCC personnel to immediately remedy the lack of water to the Dilday and Kibler properties, the Court finds that Jones' claim that he was authorized by the board members to cut the pipes is false.

Jones testified that the reason he cut the pipes is because he wanted to cultivate his property, which he has never done before in over 20 years of ranching there, and because he was told that he had to cut a fire break but was unable to do so due to the pipe being there. It turned out that he was not required to cut a fire break because his cows ate the vegetation down. He testified that he wanted to cut a fire break all along the western boundary of the Bi-Rite property. Jones gave no reason why he could not just leave a narrow line above the pipe undisturbed and cultivate or "rip" the property on either side of the pipe. Ferrero testified that the space between the area described during the trial as "the lane," located on Bi-Rite property, and the road that runs contiguous to the western boundary of the Bi-Rite property constitutes a 40 foot fire barrier. Jones explanation of why he could not cut a fire break due to the pipe was, "but I ain't going to do part of it if I can't do all of it." The entire western boundary of the Bi-Rite property is hundreds of feet long. If he were required to cut a fire break, there does not appear to be any reason why Jones could not have cut a fire break

along the entire boundary, leaving a one or two foot by ten foot strip over the pipe. He could then have easily mowed down that strip. Although it would have been slightly more time consuming for him to mark the line over the pipe and rip the ground on either side of it, the burden on him of doing so would have been trivial, much less than the burden on Plaintiffs of going without water. He could have asked or demanded that Plaintiffs maintain the fire break above their pipe or on the entire width of their easement.

Jones speculated that driving equipment over the pipe would have crushed it, and gave as justification for this belief an example where his friend attempted to drive a crane over the pipe and heard a sound that he construed to be the pipe cracking. Waller testified that PVCC has driven equipment over the pipe without damaging it. Dilday testified that he offered to lower the pipe and told Jones to drive over the pipe and if it was damaged Dilday would repair it. The Court finds Jones' explanation to be contrived and not credible.

After the water line was cut by Jones, Plaintiffs attempted to mitigate their damages by asking Waller to discover why they had no water. Jones prevented Waller from doing so. Plaintiff then obtained a small amount of water from Virgil Roger's line but were unable to do so thereafter because Defendants complained that line leaked. Dilday then attempted to repair the capped line but was physically attacked by Jones. Plaintiffs pumped water and purchased feed for their animals. Finally Anderson informed Plaintiffs

that they would be allowed to repair the capped line. Plaintiffs exercised all reasonable efforts to mitigate their damages. Defendants' post-trial arguments that Plaintiffs were required to hire a third party to repair the line are unreasonable.

The Court finds that in cutting off Plaintiffs' water, Jones acted with malice and oppression, knowing that his actions would cause a serious hardship to Plaintiffs, for the sole purpose of injuring Plaintiffs. The evidence showed that Jones acted individually and on behalf of Bi-Rite. Jones testified that Anderson was with him when he cut and capped a pipe. Plaintiff Ferrero is entitled to punitive damages against all Defendants. Plaintiffs asked for five times the amount of the economic loss, being $97,576.85, which is a reasonable amount of punitive damages. Ferrero is therefore entitled to actual damages of $19,515.37 plus punitive damages of $97,576.85.

E. Fifth Cause of Action for declarative relief and quite title to the roadway.

Defendant Jones stipulated that the road easement to Plaintiff's property is not located on Bi-Rite property and that he has no standing to "object to the easement." Neither Anderson nor Bi-Rite introduced any evidence contradicting Plaintiffs' testimony that they have an easement for a road as described in Exhibit 8. Plaintiffs are therefore entitled to a judgment quieting title in them to the road easement.

F. Sixth Cause of Action for injunctions and damages.

Plaintiffs presented evidence that on numerous occasions Jones claimed that he owned the road easement and had the right to control who used the road. Witness Patterson described it as "constant threats on who owned the road, that nobody – he is going to decide who goes up it, so on and so forth." He testified that Jones said, "he's going to make the decisions on who comes up there, and it's his road, legally he can do whatever he wants, he can put whatever he wants to put in the road." Sheriff's deputy Crouch testified that numerous people complained to the Sheriff's Office that Jones "had slowed their access, yelled vulgarity at them, made some threats as they proceeded, and told them that he was going to lock the access off and deny access to anybody when he decides to [sic] that." Dilday testified that Jones has repeatedly interfered with Plaintiffs' use of the road easement by placing obstacles in the road and screaming at Plaintiffs and their invitees. Plaintiffs are entitled to an injunction against Jones and Bi-Rite from interfering with Plaintiffs' and Plaintiffs' invitees' use of the road easement, There was no evidence that Anderson had interfered with the use of the road.

As set forth above, there was un-refuted evidence that Jones, acting individually and as agent of Bi-Rite, interfered with Plaintiffs' use of their pipeline easement by blocking the gate, denying Plaintiffs the right to cross Bi-Rite property to clean their screens and cutting the pipe. He has repeatedly interfered with

Plaintiff's right to cross Bi-Rite property on their prescriptive easement to clean the screens. Plaintiffs are entitled to an injunction against Jones and Bi-Rite from interfering with Plaintiffs' use of the pipeline easement from Plaintiffs' weir to their property line as set forth above.

The Court finds by clear and convincing evidence that Jones, individually and as agent of Bi-Rite, acted with malice and oppression in interfering with Plaintiffs' use of their road easement and pipeline. Accordingly, all Plaintiffs are jointly entitled to punitive damages pursuant to Civil Code §3294 in the amount of $50,000.00.

G. Seventh Cause of Action for damages.

Plaintiffs claim damages from the loss of a sale of the property. The prospective purchaser Patterson testified that he and Burk entered into an oral agreement to purchase the property, but because of the dispute between Plaintiffs and Defendant regarding the use of the road and the water they decided not to complete the purchase. Jones told Patterson that he owned the road and would decide who used it. Years before Patterson considered purchasing Plaintiff's property, he was aware that Jones claimed ownership of the road. He testified:

> Q. Did he ever claim that he owned the road?
>
> A. Always.

Q. He did?

A. Always.

Q. Okay. Did he give you permission to use the roadway?

A. I never asked him.

Q. Why is that?

A. Because I had an easement.

Patterson testified that three events caused him to back out of the sale. The first was an altercation between Patterson's employee and Jones' son. That incident cannot be charged to Jones. The second occurred at a neighborhood meeting where Jones stated that he would decide who goes up the road. The third was when Patterson found a pole and two cones across the road. There was no proof of who put the pole across the road, although Jones later told Patterson that he could put whatever he wanted across the road and decide who could use the road. Patterson testified that Jones "argued with everybody that went up the road." Although Patterson testified that there were "problems" with other neighbors, he said that the reason he did not complete the purchase was "Absolutely, 100 percent" because of Jones. This conflicted with his earlier testimony wherein he stated:

Q. And what were the problems?

A. Just with Mike – Mike and neighbors, not just Mike, but Mike and neighbors.

There was no direct evidence that Jones had any intention of interfering with the sale of the property to Patterson and Burke. Although it could be inferred that he did, such an inference is contradicted by Patterson's testimony that Jones "argued with everybody that went up the road." A more reasonable inference, considering all the evidence introduced at the trial, is that Jones believed, albeit incorrectly, that he owned the road and intended to exclude anyone that he did not want to use it rather than specifically targeting Patterson and Burke. In the absence of any evidence that Jones intended to interfere with the contract to sell the property, Jones is not liable for intentionally interfering with Plaintiffs' prospective economic advantage.

Plaintiffs alternately allege that Jones negligently interfered with their prospective economic advantage.

> Infrequently invoked and often misunderstood, the tort has been described as "a relatively unsettled and developing legal phenomenon, the principles of which are still very vague." (*Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.*, supra, 116 Cal.App.3d at p. 125.) The elements of the tort include (1) the existence of a prospective business relationship containing the probability of future economic rewards for plaintiff; (2) knowledge by defendant of the existence of the relationship; (3) intentional acts by defendant designed to disrupt the relationship; (4) actual causation, and, (5) damages to plaintiff proximately caused by defendant's conduct.

(*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827). The general wrong inherent in this tort is the unlawful interference with a business opportunity through methods which are not within the privilege of fair competition. (See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 652, p. 740.) *Settimo Associates v. Environ Systems, Inc.*, 14 Cal. App. 4th 842, 845 (1993).

The cause of action is further explained:

The tort of interference with a prospective business relationship or advantage imposes liability for improper methods of diverting or taking business from another. The methods used are those that "are not within the privilege of fair competition." (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 392, p. 2643.) The tort of interference with a prospective economic advantage includes the narrower tort of interference with a contractual relationship. (*Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990.) In order to plead a cause of action for this tort, plaintiffs must allege the existence of either a contractual relationship or a prospective business relationship advantageous to them, that defendants had knowledge of the advantageous relationship, that defendants intentionally or negligently induced the breach of the relationship, that the acts or conduct of the defendants were wrongful, and proximately caused plaintiffs' injury and damage by interfering with the relationship causing a business loss.

> *Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393, 406-407.

The *Baldwin* and *Settimo* cases indicate that the gravamen of the tort of interference with a prospective economic advantage is for improper methods of diverting or taking business from another," which is not the situation here. In addition, the defendant must be the "proximate cause" of the loss.

There was no clear proof that Jones had knowledge of the pending sale from Dilday to Patterson. Plaintiffs assert that "Jones admitted he attended a meeting in which it was actually disclosed to him that the Plaintiffs were selling the Dilday Property to Patterson-Burke." They make reference to deposition testimony, but no such testimony was elicited at the trial.

Witness Lowder testified as follows the meeting attended by Dilday, Patterson and Jones:

> Q. Did he tell you anything about he was planning to buy Mr. Dilday's property?
>
> A. It's one of those verbal threats, well, I can do this, I can do this –
>
> THE COURT REPORTER: Sir, you need to slow down.
>
> THE WITNESS: I'm sorry. So, yes, there were possibilities of him buying property back there.

BY MR. ROMAINE:

Q. That was discussed at that meeting?

A. At that meeting.

Q. Did it sound to you like they had already reached an agreement and he was going to buy it for sure?

A. I couldn't say that, no. It was one of those hollering fits that was going on at the time that he had the right to do what he wanted to, he had gone through all the legal stuff when he bought the place up front and sold it, and he was interested, but I forgot to say with the hollering that came out of his mouth at that time.

Q. Did you have any independent information at the time that Eddie Patterson was buying Russell Dilday's property?

A. No, I had no idea.

* * * * *

Q. Did Mr. Patterson, Eddie Patterson, or Mr. Dilday, or anybody on their side say anything to the effect of, if this doesn't get settled I don't want to buy the place?

A. No, again.

Q. Did Mr. Dilday say, if you guys keep stopping us, or harassing us about driving on this road I am going to lose a sale?

A. No.

Patterson's explanation of the meeting was:

> But we all met together with Russell, Ty Burk, and tried to work it out. It was just constant threats on who owned the road, that nobody – he is going to decide who goes up it, so on and so forth.
>
> Q. When you say "he," that is Mikal Jones?
>
> A. Mikal, yes.

There was no clear testimony that indicated Jones was aware of the pending sale between Dilday and Patterson.

Considering all the evidence, Plaintiffs have not established the elements necessary to prove that Jones committed the tort of intentional or negligent interference with a prospective economic advantage. There is no proof that Jones knew of the agreement to sell the property to Patterson. Patterson was aware of Jones' claim to own the roadway long before he agreed to buy the property from Dilday. It would be unreasonable to find Jones liable for negligently interfering with the agreement between Dilday and Patterson when Patterson was aware of Jones' claim before the agreement was ever made. Testimony showed that Jones was not the only person who complained about the use of the road, and Patterson initially testified that his problems were not only with Jones, but with other neighbors as well. Patterson was an experienced buyer, indicating that he buys property every day, and as such should be aware of difficulties that arise in sales of real estate.

Plaintiffs are not entitled to any recovery on their Seventh Cause of Action.

H. Eighth Cause of Action for damages for intentional infliction of emotional distress.

Beginning in 2011 or 2012, Jones claimed to Dilday that he owned the roadway and had the right to control it. Prior to 2009 Jones threatened to "shut off [Plaintiffs] pipeline between the weir and the property . . . if he didn't get his way." The interference culminated in Jones severing the pipe in 2015 during what Ferrero testified "is a critical time in the pastures" The Court takes judicial notice that the months between April and September in Tulare County are almost always very hot months, and that without water plants are unable to grow in the heat during this time. Having lived many years in the area and grown pastureland, Jones knew that Plaintiffs depended on the water from the pipeline in order to feed and water their animals and that without water the pasture would be unable to grow. The Court concludes that Jones intentionally cut off the water in order to harm Plaintiffs. By refusing to allow Waller to discover what was preventing the flow of water and by preventing Dilday from repairing the line, including an unprovoked physical attack on him, Jones demonstrated his intention to deprive Plaintiffs of the ability to obtain water from PVCC and intentionally harm them.

April 12, 2015 Ferrero and Waller went to the Bi-Rite property in an attempt to learn why Plaintiffs'

water was not flowing. At that time Jones engaged in a heated disagreement with Waller, who was on Bi-Rite property. Ferrero said nothing to Jones, but Jones shouted obscene, demeaning and vulgar language at Ferrero, calling her opprobrious names.

On July 14, 2015 Dilday went onto the pipe easement over Bi-Rite property to repair the capped pipe. At that time Jones threatened to physically harm Dilday and then physically attacked Dilday by ramming him with his shoulder. Following the physical attack Jones continued to threaten to harm Dilday physically.

Deputy Crouch testified that beginning in January of 2015, he received numerous calls from residents of the area regarding threats, impeding their access to the road and shouted vulgarities by Jones. Witness Wood testified that Jones threatened him, "cussed" his kids, threatened to put a gate across the road and harassed him 150 times. He described it as "World War Ill." Jones ordered him off the road 10 or 11 years ago.

Around 2007 and again in 2008 Jones closed Plaintiffs' access through a gate they had used many years to clean the screens at their weir. As a result, Jones forced Ferrero, a woman he knew to be of advanced age, to endanger herself by using a truck and ladder to climb over the fence to clean the screen.

Ferrero testified that she suffered emotional distress as a result of Jones' actions. She described her condition as being tired and nervous and said there "is not enough money to account for how much he has

aged me since he has been here and what I have had to put up with." Her daughter described Ferrero as "agitated" and said Ferrero talked about her interaction with Jones all the time." Dilday testified that Ferrero is a "strong person," but that her interaction with Jones has caused her to be "an agitated, distraught person."

Defendants cite *Hughes v. Pair* to define what must be proved to establish intentional infliction of emotional distress. The Supreme Court affirmed the grant of summary judgment against the plaintiff in *Hughes*. The defendant was accused of making lewd and sexually explicit "comments . . . to plaintiff during a single telephone conversation and a brief statement defendant made to plaintiff in person later that day during a social event at a museum." This case is quite a different animal. Contrary to Defendants' assertion that the "complaints surround Jones' obstreperous use of his own property," the evidence showed that Jones repeatedly and over a period of many years interfered with Plaintiffs' use of *their* property rights on their road easement of record and their prescriptive easement for use of the pipe from their weir to their property, resulting in constant, continuous and pervasive harm to Plaintiffs. Jones demonstrated in the video admitted into evidence that his behavior was extreme, outrageous, uncivilized, unprovoked and unacceptable in any ordered society. The dictionary defines "obstreperous" as: "noisy, clamorous, or boisterous." Jones behavior was much more than that; it was vile, vulgar, threatening, demeaning and interfered with Plaintiffs'

use of their property, all without any justification. Witnesses testified that this behavior continued over many years, causing Plaintiffs extreme distress and unceasing anxiety. It is worlds away from the defendant in *Hughes* in one day calling plaintiff "sweetie" and "honey," saying he thought of her "in a special way, if you know what I mean," telling her, "You know everyone always had a thing for you. You are one of the most beautiful, unattainable women in the world. Here's my home telephone number and call me when you're ready to give me what I want," and even making an explicitly vulgar sexual remark to her later that same evening.

The *Hughes* court also recognized that "an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a physical assault or the threat thereof." In addition to his years-long non-physical harassment, Jones attacked Dilday physically without provocation while Dilday was attempting to repair his pipe that Jones had maliciously cut.

In citing *Yurick v. Superior Court*, 209 Cal. App. 3d 1116 (1989) Defendants correctly state the rule of law, which is that "there can be no recovery for mere profanity obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances. The plaintiff cannot recover merely because of hurt feelings." The facts in *Yurick*, however, are far removed from the facts in this case. The defendant in Yurick told the plaintiff, "'You are a liar. You are over forty and you are a liar." It bears no resemblance to Jones' behavior here.

Contrary to Defendants' assertions, Dilday, Tanna Dilday and Ferrero gave clear and un-refuted testimony about the nature of the emotional distress they suffered as a result of Jones' behavior.

Jones' actions were without justification and were intended to vex, harass and harm Plaintiffs. His actions were malicious and oppressive. Accordingly, Ferrero, who was harmed most by Jones' actions, is entitled to actual damages for emotional distress in the amount of $100,000.00. Because Jones actions were intended to cause injury to Ferrero, she is also entitled to punitive damages of $300,000.00.

Dilday testified that he suffered emotional distress as a result of Jones' actions. He described worrying about Ferrero as an element of his distress. He described Jones' "constant screaming" at him. Much of his testimony regarding emotional distress focused on the failure of the sale of the property; the Court does not consider this as an element of emotional distress. Jones' personal attack on him justifies an award of compensation for emotional distress. Dilday is entitled to actual damages for emotional distress of $25,000.00. Because Jones actions were intended to cause injury to Dilday, he is also entitled to punitive damages of $75,000.00.

Plaintiff Tanna Dilday gave no evidence regarding emotional distress.

I. Punitive Damages

Jones testified that Defendants have over 428.57 acres of property either in their names or in a trust for their benefit. He testified that it is worth approximately $3,619,000 and is not encumbered by any debts. The Court has considered Defendants' net worth in affixing punitive damages.

The Court is loath to impose punitive damages and believes that they should be reserved for the most egregious circumstances. This is such a case. Without any apparent justification or excuse Jones terrorized the neighbors over use of the road, claiming without any factual basis that he owns it and has the right to control who uses it, even though there is a recorded easement giving Plaintiffs the right to travel on the road. Not until after the trial began did Defendants concede that they have no right to interfere with Plaintiffs' use of the road.

Defendants' explanation for cutting Plaintiffs' pipeline just as summer approached was contrived and unbelievable. Jones' allegation that he was prevented from cutting a firebreak along his entire property because of a pipe four inches in diameter is ludicrous. His testimony that every member of the Board of Directors of PVCC gave him permission to cut the pipe is equally ludicrous and patently false. Defendants were aware that Ferrero was a woman of advanced years who relied heavily on the water from the pipeline to support her enterprise raising livestock. The video introduced as Plaintiffs' Exhibit 6 clearly demonstrated

Jones' personal animosity toward Ferrero. His personal attack against Dilday was without provocation or justification.

Punitive damages are warranted in this case in order to teach Defendants that they cannot impose their will on others by way of threats, intimidation, abuse, screaming, vulgarity and physical attack.

J. Defendants' Affirmative Defenses

Defendants assert that the issues in this case are res judicata because they were already decided in case 98-32667.

Without doubt there was no "judgment or final order" that encompassed both Plaintiffs and Defendants. The parties dismissed their claims against each other prior to a judgment being entered. Thus CCP§1908(a) does not apply.

Defendants argue that Plaintiffs "controlled the action in the earlier case" and thus are bound under CCP§1908(b). Ferrero testified that "in '09 Pleasant Valley filed the lawsuit, and they added us to the lawsuit, Emmy and myself, hoping to stop the fighting over the easements and that we didn't have the right to go up there and stuff. As the suit played out, Emmy and – we were taken out of the suit." Asked why she was "taken out" of the suit, she responded, "I believe it was when there was a gun involved in the other lawsuit. The ditch tender at that time was very nervous about

going up on the ditch, and I think when that all came about we were just dismissed out of it."

Defendants' attorney asked Ferrero, "And you said the canal company started that action, but brought you and Ms. Kibler in; is that right?" Her response was, "Correct, they added us." When he then asked if Dilday started the lawsuit, her response was, "No, I do not have information." When he asked her, "What did you understand that lawsuit was about?", she responded, They added us. They were having problems with Mikal and the maintenance of the ditch." Defense counsel then asked, "Did you understand part of the reason for the lawsuit was that the Court was going to decide whether or not you could go up there and clean the weirs?" Ferrero's response was, "No, I think the thing was to control him in his actions." When defense counsel followed up with, "So your understanding was that there was a lawsuit to control his aggressive behavior?", Ferrero replied, "And to straighten out – to establish the easements that were bought and paid for, or that the supplies and everything was paid for that were ours."

The next interchange between defense counsel and Ferrero was:

> Why did you drop out of that lawsuit?
>
> A. I do not know. We were just simply told that we were excused. We never even saw – I never saw – it was not even settled until 2013. I just saw that paperwork not very long ago.

Q. Okay, so you don't know why you didn't continue in that lawsuit?

A. No, I don't.

Q. And no one, other than a lawyer, told you why that lawsuit –

A. Exactly.

Defense counsel next inquired about Ferrero's understanding of the judgment in the prior lawsuit and this dialogue resulted:

Q. What did you understand the judgment – the settlement that you are talking about, the way this thing was settled in 2013, what did you understand that, if any requirements were put on you by that?

A. I did not understand that there was any requirements put on me by that.

Q. So it was your understanding that that didn't apply to you at all?

A. Exactly.

Q. And you have that understanding from a discussion with your attorney or from someone or somebody who wasn't an attorney?

MR. REED-KRASE: Objection, privileged.

THE COURT: Overruled.

THE WITNESS: I gained that from nobody contacted me.

From the above testimony, it is clear that Ferrero had little understanding of the prior lawsuit, did nothing to control it, and understood that it ultimately did not affect her in any way.

Dilday was asked about the prior lawsuit, and replied, "No – I mean, yes, we were in the – we were brought into the lawsuit with the canal company and then we were removed from it prior to judgment." When asked, "Do you know why you were removed?", he replied, "Not exactly. I believe that there was – that they, Mikal and them, were arguing over things that really didn't relate to us and that the lawyer felt like the judgment wasn't going to relate to us." He indicated he was not aware of any claims Jones had against him in the lawsuit, and did not know why Jones would have filed a dismissal of causes of action against him.

The following dialogue then occurred:

> Q. So you don't know why, but for some reason before the case went to trial you were at least dismissed from the lawsuit?
>
> A. I don't know. I feel like that we just weren't going to be a part of what they were arguing over. Our easement was not the part – my pipeline was not the Pleasant Valley Canal Company's property, therefore we didn't belong in their judgment. That's what I feel.
>
> Q. So do you recall what the 2009 lawsuit was about?
>
> A. The 2009 lawsuit?

Q. The 2009 –

A. It was about – I recall it being about Mikal basically trying to throw the canal company off of their right of way with the ditch, and him believing that they had been destructive to his property. And also on their part they were struggling with his behavior with their employees.

Q. Do you recall what claims were specific to you in that lawsuit, if any?

A. With me?

Q. Yeah.

A. Mikal was threatening to shut off my pipeline between the weir and the property.

Q. Did he make that threat to you?

A. I don't know that he did or did not. I would – I can't say that for sure. I would imagine that in the conversations that we had that he did. He said that he could and would if he didn't get his way.

The following day he was again asked what the prior lawsuit was about, and gave this answer:

That lawsuit was, once again – most of my understanding on that was through what the ditch company was saying. And that was Mikal saying that no one could go up there. My understanding is that he had the ability to throw them off of the easement for the ditch and also anyone else off of their easement for their lines. And the ditch company approached

> me with allowing us going into the case, the ditch company lawyer, and we said fine. And then somewhere before 2010 they said that, you know, we're not going to – we are going to put you out of the case. I never really got a deep explanation on that, so I don't really know why we were in or out.

He then testified that he was never billed by a lawyer nor asked to pay anything for the lawsuit. He said that the prior lawsuit never changed their behavior in going on Bi-Rite property.

Dilday's testimony proves that Plaintiffs did not finance or control the prior suit. Neither Dilday nor Ferrero had a clear understanding of the issues in the prior lawsuit, apparently did not discuss it with nor direct the attorneys nor pay the attorneys for representation. They did not believe they were controlled by the judgment nor does it appear it affected them in any way.

The judgment itself, considered in a vacuum, is subject to some interpretation. The only plaintiff mentioned in the judgment is Pleasant Valley Canal Company. It is specifically named in eight separately numbered paragraphs. On page 3 of the judgment, in paragraphs 4, 5, 6 and 7 the possessive word "plaintiffs" is used. Unfortunately, the judgment, which was prepared by Defendants' attorney, did not include an apostrophe in the word "plaintiffs." If it had used "plaintiff's," it would have been clear that it applies to a singular plaintiff. If it had used "plaintiffs" it would clearly apply to multiple plaintiffs. Nevertheless, the

dismissals filed almost three years earlier lead to the unavoidable conclusion that the judgment did not apply to Plaintiffs in this case, the Dildays and Ferrero, and the only reasonable interpretation is that the word used should have been "plaintiff's," referring to PVCC. Plaintiffs here did not litigate the issues in this case in the prior case, and Defendants consented to the dismissal of their claims from that case. Defendants err in claiming that "This court ruled against that claim" to quiet title in an easement and that "All of the issues presented in the first three causes of action in the instant Verified First Amended Complaint were presented to and ruled on by this court in the First Amended Complaint in case number 232667."

Defendants are incorrect in continuing to claim that the prior lawsuit controls this litigation. In the case *Lynch v. Glass*, 44 Cal. App. 3d 943 (1975) Glass sued two corporations and obtained a judgment that there was no *public* easement over his property. The Court of Appeal held, "The prerequisites for the application of collateral estoppel are an identity of issues decided in a prior case with those presented in subsequent litigation, a final judgment on the merits, and a determination that the party against whom the principle is asserted was a party or in privity with a party in the prior action. . . . A party cannot assert a prior adjudication against another who was not a party or in privity with a party to the prior action."

The court further instructed, "Thus, the question of privity has been restated in terms of whether a nonparty was "sufficiently close" to an unsuccessful party

in a prior action as to justify the application of collateral estoppel against the nonparty. Notwithstanding these developments, collateral estoppel may be applied only if the requirements of due process are met. Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action. The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication (citations omitted)."

The court also explained, "A nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance. Thus, collateral estoppel has been applied against nonparties who had a proprietary or financial interest in and control of, a prior action. Collateral estoppel has been given effect in a second category of cases against one who did not actually appear in the prior action. These cases involve situations where the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for a nonparty."

The court found that Lynch was not in privity with the two corporations in the prior suit and rejected the claim of collateral estoppel. Similarly, in this case none of the requirements to bind Plaintiffs by the prior suit were present. First, the issues are not identical. The first suit involved PVCC attempting to obtain an easement through a specific gate on the east side of Defendants' property to travel by vehicle west along the bank of the ditch. Plaintiffs claimed a separate, distinct

easement to enter by foot from the other side of Defendants' property to their weir. The complaint specifically makes a distinction between the two easements claimed. The ultimate judgment did not deal in any way with the easement claimed by Plaintiffs.

Second, there was no final judgment on the merits of Plaintiffs' claim because the parties agreed to mutual dismissals of their claims against each other without prejudice.

Third, there was no privity of the parties. No evidence has shown that Plaintiffs had any interest in the easement sought by PVCC, nor that PVCC had any interest in the easement sought by Plaintiffs. There was no evidence that Plaintiffs were officers, directors or employees of PVCC or that PVCC is or was an alter-ego of Plaintiffs.

Fourth, there was no identity or community of interest between PVCC and Plaintiffs. They sought separate and distinct easements.

Fifth, there was no evidence that Plaintiffs reasonably expected to be bound by the prior case. All the evidence was just the opposite, that they did not expect to be bound by the holding in the prior case.

For these reasons it would be manifestly unjust to bind Plaintiffs, who made no appearance at the trial, dismissed their claim by mutually agreement with Defendants and did not believe that the judgment issued therein, which had nothing to do with the easement they sought, by the prior judgment.

Contrary to Defendants' argument, it would be unreasonable for anyone to conclude that the prior judgment in any way determined the existence or non-existence of the easement claimed by Plaintiffs. No reasonable person could conclude from reading it that Judge Vortmann intended by his decision to hold that Plaintiffs did not have an easement. Certainly no reasonable person having knowledge that Plaintiffs and Defendants had, by mutual agreement, dismissed their causes of action against each other, could so conclude.

2. Cross Complaint

A. First Cause of Action against PVCC for trespass.

Jones testified that he saw employees of PVCC "climbing through my fence and cutting them" and that he had "photos" of them doing so. When asked in a follow-up question who had cut the fence, he listed Ferrero, Mrs. Kibler, Bo Davis, Blaine Woods, Bobby Kibler, Mr. Krase, Dilday and Virgil Rogers as either cutting the fence or taking it down. Other than Mrs. Kibler, who at one time was a member of the Board of PVCC, there was no evidence that any of the other people listed were employees or agents of PVCC. There was no evidence that Mrs. Kibler was acting on behalf of PVCC when she allegedly cut Cross-Complainants' fence. He testified that he did not believe Ramon Mora, ditch tender for PVCC, ever cut the fence. Anderson never testified that anyone from PVCC cut the fences. None of the multitude of photographs admitted into evidence show anyone connected with PVCC cutting or

breaking down a fence. To the contrary, the evidence showed that PVCC employees either went through existing gates, used ladders that were affixed to the fence or used portable ladders to climb over the fences. Use of the portable ladder is depicted in Defendants' Exhibit 45. No credible evidence was presented that any PVCC officer or employee cut any of Cross-Complainants' fences.

Jones testified that he believed someone poisoned his mule, but there was no corroborating evidence that the mule was poisoned or if it was, who administered the poison. No other evidence was offered regarding Cross-Complainants' allegations that PVCC applied or allowed chemicals onto Cross-Complainants property.

There was no disagreement at trial about the location of two of the four access points given to PVCC in the judgment issued June 18, 2013 in Tulare County Superior Court case 09-232667. The Court takes judicial notice of that judgment. All parties agreed that point 2.b. at the North West corner of Bi-Rite property and point 2.d. located at the Switzer gate are located approximately where Anderson placed them on Court Exhibit 1. Both Jones and Anderson testified that they believe point 2.a. is located where Anderson placed it on Court Exhibit 1, at the North West corner of parcel 22. Testimony during the trial repeatedly referred to a "cowboy gate," consisting of horizontal strands of barbed wire connecting wooden vertical posts that are not embedded in the ground, at that location. The "cowboy gate" is designed to be opened by detaching the most northerly post of the gate from the adjacent

embedded wooden post and swinging all the unembedded posts and the horizontal wires to the south.

Jones and Anderson testified that they believe point 2.a. is located at the "cowboy gate." Jones testified this is because "It's all that makes sense" and "It's all common sense, I would think." This interpretation is inconsistent with the language of the judgment, which provides that the point is located "along the easterly boundary" of the Bi-Rite property "where the Canal enters" the property. The "cowboy gate" is not located on the eastern boundary of Bi-Rite property, but according to the map, 950 feet to the west of the eastern boundary. The only reasonable interpretation of the judgment is that access point 2.a. is located at the point on the eastern boundary of Bi-Rite property indicated by the arrow pointing down from the words "EAST GATE" on Court Exhibit 1.

There was no dispute that access point 2.c. is located where Anderson placed it on Court Exhibit 1, approximately 400 feet north of Avenue 176. The disagreement was whether PVCC violated the terms of the judgment by entering not only the gate at point 2.c. running east and west, but by also entering the gate running north and south, attached to the same post and bearing a sign reading "POSTED" in Cross-Defendant's Exhibit 119. Cross-Complainants argue that by entering the property at the location designated as "EAST GATE" in Court Exhibit 1 and the north/south gate at point 2.c., PVCC exceeded the license granted to it by the 2013 judgment and committed trespass.

Cross-Complainants are wrong. There is no reasonable question about PVCC's right to enter the property at location 2.a., the "EAST GATE." It is expressly allowed to do so by the 2013 judgment. in addition, PVCC is expressly allowed to enter the property at point 2.c. for the purpose of controlling, using, maintaining and repairing the canal with its associated banks, pipes, weirs and siphons. The judgment does not restrict PVCC from crossing Bi-Rite property only on the 16.5 feet width of the canal banks. The canal is not located near point 2.c. The judgment grants PVCC access to the canal and it associated distribution system in the manner "that has the least amount of potential harm" to Bi-Rite property.

Waller testified that PVCC employees have traveled across Bi-Rite property in the manner that will cause the least amount of harm. He testified that they have avoided crossing a concrete pipeline providing water to the pond on Bi-Rite property, and that they take a route most likely to avoid damage to the foliage growing: "So we go the quickest way possible to try to cause less damage or less usage of the pasture." Cross-Complainants gave no credible evidence that PVCC employees and agents did not cross Bi-Rite property in the manner least likely to cause harm or that PVCC in any way exceeded the terms of its license.

The Cross-complaint alleges that by entering onto the Bi-Rite property PVCC diminished the value of the property. No evidence was presented to support this allegation. The numerous photographs of the property admitted into evidence show it to be undeveloped

pastureland, scattered with rocks of various sizes, covered at times with vegetation and completely bare at other times. No credible evidence was presented that anything PVCC did on the property diminished its value.

Cross-Complainants alleged in their Cross-Complaint that PVCC's agents acted for the purpose of intimidating, harassing and threatening Jones and Anderson and to cause them economic, emotional and physical injury. There was no evidence that PVCC employees and agents acted for any purpose other than that specifically granted them in the 2013 judgment. To the contrary, the video in evidence as Plaintiffs' Exhibit 6 proved that Jones acted in a manner intended to threaten, intimidate and harass PVCC employees, while the PVCC employees maintained composure and acted professionally and reasonably. Waller and Dilday testified that at PVCC meetings Jones shouted and made threats. Jones use of shouted obscenities and threats was unreasonable and unacceptable in civilized society. Waller and other PVCC employees acted reasonably and in accordance with acceptable standards of behavior.

Cross-Complainants' allegations that they suffered emotional distress by PVCC's actions is not credible and unsupported by the evidence. Their further allegations that PVCC acted with malice is completely contrary to the evidence.

Cross-Complainants mistakenly argue that PVCC is a "guest" on their property and has no "interest in

the property." They correctly state that they have the major right to possess the land, but do so subject to PVCC's right to enter onto the land in order to control, use, maintain and repair its canal. This is an "irrevocable" interest which is specifically delineated in the 2013 judgment. "An irrevocable license, such as the one the court found here, is for all intents and purposes the equivalent of an easement. (See *Noronha v. Stewart* (1988) 199 Cal.App.3d 485, 490.) 'It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance.' (*Burris v. People's Ditch* Co. (1894) 104 Cal. 248, 252.)" *Barnes v. Hussa*, 136 CA4th 1358 (2006). PVCC is not a "guest," but has the equivalent of an easement.

Cross-Complainants have interfered with PVCC's license by prohibiting its access through the fence running north from its entrance point 2.c. This violates PVCC's express right granted to it in the previous judgment. Not only does PVCC have the right to enter the property at point 2.c., but it then has the right to access the canal in the manner "that has the least amount of potential harm" to Bi-Rite property. Historically, that included passing through the gate located adjacent to the gate at entry point 2.c.

PVCC has the right to place a gate in any fences on Bi-Rite property to give them access to the four entrance points specified in the prior judgment, and in any fences across Bi-Rite property that would inhibit

its right to cross Bi-Rite property in the manner "that has the least amount of potential harm." Cross-Complainants may not erect additional fences or barriers on the property that would inhibit PVCC's right to cross Bi-Rite property in the manner "that has the least amount of potential harm." PVCC is not required to climb over fences or ladders to gain access to Bi-Rite property. All parties to the suit are aware that PVCC has used tractors and other heavy equipment to maintain the canal in the past and continues to do so. The only reasonable interpretation of the 2013 judgment is that PVCC has the right to being heavy equipment necessary to maintain the canal onto Bi-Rite property through the delineated access points. PVCC is therefore entitled to place gates wide enough for such necessary equipment to enter in any fences at the points of entry pursuant to the prior judgment, and in any other fences across Bi-Rite property at locations necessary to cause the least amount of potential harm to the property.

Jones expressed understandable and justifiable concern that PVCC employees not leave gates open, allowing cattle to wander from one fenced section to another. In the course of exercising its license PVCC is required to not create or allow a condition to exist with respect to the canal that presents an unreasonable risk of injury to [Cross-Complainants] and their real and personal property." He testified that "eight or ten" cattle escaped from one parcel into another where he did not want them when a gate was left open. Although he did not see who opened the gate, he did see Waller on

the property and believes that Waller left the gate open. He did not want the cattle there because a piece of wire had punctured his tire when he drove on that parcel. He estimated that the cattle were there for about two hours. Waller denied leaving the gate open. Viewing the evidence in the light most favorable to Cross-Complainants, there was no evidence of any damage, injury or loss as the result of Waller leaving the gate open. Despite Jones' concerns, there was no evidence that any of his fears were realized by injury to his cattle or that Cross-Complainants sustained any monetary loss because of the open gate.

Evidence was presented that PVCC employees entered at locations different from those expressly set out in the prior judgment, but their actions were necessary and reasonable because of Cross-Complainants' refusal to allow them reasonable access at the designated locations. They acted, as it were, of necessity to care for the canal. No evidence was presented that any entry onto Bi-Rite property by PVCC employees in any way harmed Bi-Rite property or diminished its value.

The Court disbelieves the testimony of Jones about damage done to his fence. The evidence shows that some of the fences on Bi-Rite property were neglected, old, dilapidated and falling down, including some that were damaged as the result of a heavy flood. There was testimony that the cattle damaged the fence. There was no credible evidence that PVCC employees harmed the fences in any way. Anderson testified that PVCC had damaged some fences, but her answers were without any explanation of who did the damage or

when it was done, and were simple conclusions. When Anderson was asked about damage to the fence, the following testimony was given:

> Q. How would you determine during that period of time that the cattle were getting out through those areas of the fence that PVCC was using to enter the property?
>
> A. Because when we would check the fence line after we brought the livestock back in we would check the fence line and those would be the areas that the wire was broke or separated, the clips were off, the staples were removed from the posts.
>
> Q. And had you seen PVCC do this to the fences in the past?
>
> A. I had seen them go through the fence.

Although Anderson assumed that PVCC employees broke the wire, took clips off and removed staples, there was no evidence that they did so. She did make reference to photographs, Exhibit 5-23 and 5-89, showing PVCC employees climbing over a fence. It is not persuasive evidence that they damaged the fence on that occasion or other times. As to the latter picture, Anderson testified that the fence in that area was broken down "from their work on the ditch." A later picture showed that this area was repaired by PVCC when they completed their work. Anderson estimated the cost of repairing the fences to be $60,000 but gave no basis for her estimate and her testimony was stricken. In any event, PVCC was forced to traverse the

fence because of Cross-Complainants unjustified refusal to allow it reasonable access to its easement.

Cross-Complainants argue that placing piles of debris from the canal on their property constituted trespass. Waller testified that the piles were left to dry out before they were removed. PVCC acted reasonably in doing so, and there was no credible proof that doing so harmed Cross-Complainants.

One of Cross-Complainants' main complaints was that PVCC spread sand on their property from the canal. The evidence showed that the sand and silt was washed down into the canal from heavy rainfall onto Cross-Complainants' property. Neither Cross-Complainants nor PVCC could have anticipated nor prevented this, and PVCC acted reasonably in removing the debris from the canal and spreading it onto Cross-Complainants' property, since that is where it came from, albeit from uphill. The pollution of Cross-Complainants' pond which resulted in the death of fish also resulted from the heavy rain and there was nothing PVCC could have done to avoid it.

Cross-Complainants also allege that PVCC failed to comply with the earlier judgment by allowing water to escape from the canal. The Court finds that PVCC has acted reasonably in attempting to prevent the escape of water from the canal. The evidence showed that regular maintenance is done to patch breaks in the concrete and fill holes created by animals. The argument that PVCC neglected the maintenance of the canal was unpersuasive. It has a significant motivation

to prevent water, a scarce commodity, from escaping from the canal. Cross-Complainants' testimony that the wet patches on their property came from water from the canal rather than normal rainfall or the excessive rainfall testified to was unpersuasive.

Anderson also testified that PVCC placed piles of debris on the property, including plastic. Waller testified that such piles are removed after the material has been allowed to dry out. The Court finds that allowing the piles to dry out before removing them is reasonable, and that PVCC acted reasonably in removing the trash, including plastic, which people may either throw into the canal or which ends up in the canal because it is discarded by other people. There was no evidence that PVCC intentionally or negligently placed or allowed plastic and debris to be placed in the canal.

Cross-Complainants introduced testimony that PVCC left chunks of concrete imbedded with pieces of reinforcing wire on the property. This testimony was bolstered by photographic evidence showing the pieces of concrete found next to the canal. Leaving such hazardous materials on the property was unreasonable and in derogation of PVCC's duty not to "create or allow a condition to exist with respect to the canal that presents an unreasonable risk of injury to defendants and their real and personal property," as set forth in the prior judgment. Depositing such materials on the property constitutes a trespass. The proper amount of damages is the lesser of either the diminution in value or the cost of removing the concrete. *Smith V. Cap*

Concrete, Inc., 133 CA3d 769 (1982). Cross-Complainants gave no evidence of diminution in value of the property.

Jones testified that it would take four or five people working ten hours a day for a month to clean the broken concrete with wire from each parcel. This estimate is unbelievable. Although there was obviously some concrete and wire left on the property, the vast quantities testified to by Anderson and Jones do not appear in any of the voluminous photographs that they introduced into evidence. Of the hundreds of pictures in evidence, there are only a few showing concrete and wire debris.

Photograph 3-1 introduced into evidence as part of Cross-Complainants' Exhibit 18 on the CD shows cement lying in the bottom of an abandoned ditch. Anderson testified that it is still there. Photograph 2-1 showed pieces of cement, which Anderson testified matched cement in the canal, with pieces of wire sticking out of it. She testified that the pieces of cement in photograph 2-3 were found partially sticking out of the ground. Photograph 2-4 shows wire sticking out of the ground along the canal bank. Photograph 2-7 shows cement with wire found on the canal bank, as do photographs 2-9, 2-12, 2-13, 2-17, 2-20, 2-21, 2-31, 2-33, 2-38, 2-40, 2-42, 2-43, 2-44, 2-47and 2-49. All of them were found on the canal bank with the exception of one found eight to ten feet away. Anderson testified that cement left on the canal banks by PVCC would migrate all over the property. Cross-Complainants failed to show any reason why pieces of cement and wire would

or could move. Certainly they would not move of their own volition, and no explanation of what would cause such pieces to move was proffered. The Court finds it highly unlikely that pieces of cement and wire would move from where they lay to all over" the property.

Waller testified that he has not seen concrete left on the Bi-Rite and when concrete was taken out it was removed from the property. Obviously some was missed, but it was could not have been nearly as much as Cross-Complainants testified. Cross-Complainants' testimony that the truckloads of chunks of concrete and wire from the canal spread over a wide area of the property was not believable. Cross-Complainants gave no explanation of how pieces of cement and wire would have traveled away from the canal bank to other areas of the property. Waller also testified that whenever the PVCC employees patrol the canal they remove any concrete or other debris. Jones confirmed that PVCC employees had picked up pieces of wire and cement and photographs were introduced showing them doing so.

Jones testified that it would take five people working 50 hours a week two months to clean up all the cement from the property. This estimate is unreasonable. The photographs show that at least half of the property consists of high, rocky hills. There was no testimony that any cement had migrated to that area. Viewing the evidence in the light most favorable to Cross-Complainants would mean approximately 100 acres of land would have to be cleaned of cement. One person could certainly walk an acre of property to look for such

debris in less than half an hour, meaning that at most it would take approximately 50 hours to clean the property. Jones testified that he could hire labor for ten to fifteen dollars an hour, meaning that the cost of labor would be approximately $750. Assuming that Jones would have to hire equipment to haul out whatever was found, the total cost of the process would not exceed $1000.

Both Anderson and Jones testified that they suffered mental and emotional distress from the debris on their property and the activities of PVCC. The Court finds that their testimony is not credible. The photographs of the property show it to be covered with rocks and dirt and surrounded by deteriorated fence posts and wire. No reasonable person would suffer mental or emotional distress from the piles of debris removed from the canal and left to dry or from the pieces of concrete left on their property. Credible testimony was given that at least part of the concrete left there was due to their cattle breaking up the ditch and other concrete items left there. Photographic evidence also was introduced showing that Defendants allowed chunks of broken concrete from sprinklers on their property to remain there. No reasonable person would, with such items scattered around the property, suffer any mental or emotional distress from whatever was caused by PVCC.

PVCC argues that Cross-Complainants are not entitled to any recovery because they acted with "unclean hands." This argument is persuasive. As set forth above, Cross-Complainants violated the right of PVCC

to enter onto the property and reasonably care for the canal. If any pieces of cement were left on the property, it is likely because the employees were forced to use ladders to go over the fence or to climb through the fences to carry out their duties. Had they the freedom to access the property under their license without the constant threat of retaliation from Cross-Complainants, they would have been more able to assure that all debris from the canal was fully removed. Because their potential damages would be minimal and in light of their actions toward PVCC, the Court finds that it would be manifestly unjust to grant Cross-Complainants any recovery.

PVCC is determined to be the prevailing party and Defendants are not entitled to attorney's fees.

B. Second Cause of Action against PVCC for Waste.

Jones testified that Cross-Complainants "slowly brought the – I don't know how you say it, brought the herd down because the drought, and PVC [sic] will not give us our water and haven't gave us our water since my grandpa died, since '99." He further testified, "I got a lot of water if the ditch company will give it to me. If they put in my other weir to the house. We been paying the bill since '94 and we don't get the water." He also testified, "I ain't got no water anyway, they won't turn it on. But I think got [sic] a problem with turning my water on. I don't have to call the light company to turn my lights on." When asked how many weirs are on the

property, he testified, "mine is supposed to go to the house but the ditch company wouldn't give us our water and hook it back up." When asked how much water Cross-Complainants receive, Jones testified, "I haven't gotten any water except for my pasture down by the orange grove. We just pay the bill and don't get it."

Anderson testified, "We've been asking for a very long time for that weir to be hooked back up to the flood irrigation to water that pasture." She testified that she did not know how much water should be delivered to the Bi-Rite property, but believed that it was less than the property was entitled to. She testified that the reason water was not being delivered is because a weir and valve that had been taken out were not replaced. She did not know how much water would be required to cultivate the property or how much water had actually been delivered. She believes PVCC employees and directors are intentionally depriving Cross-Complainants of water, but gave only the fact that water is not being delivered as the reason for her belief.

Anderson testified that she believes Dilday was an agent of PVCC and that he threatened to kill Jones. Her belief was based on her statement that "It was on a piece of paper that I had read." She testified that she did not know who works for PVCC.

Cross-Complainants presented no credible evidence in support of their allegation that they were deprived of the use of water because PVCC diverted water or that they had the right to more water than

they received. The Court finds Anderson's testimony to be no more than unsupported speculation that is not based on facts. Cross-Complainants alleged that they have the right to "extract such water from waterways transacting the Bi-Rite Property as may be reasonably necessary to carry out the activities Jones and Anderson would carry out as occupants under that lease agreement." Other than Anderson's unsupported opinion, they presented no evidence about how much water they were entitled to or how much they received.

Other than Anderson's statements, no evidence was presented to support Cross-Complainants' allegations that PVCC intended to cause harm to them and acted with malice. The Court finds that there was no credible evidence that PVCC employees, directors or agents intended to harm Cross-Complainants or that Dilday was an agent of PVCC. As discussed below, the Court finds no evidence that Dilday intended to harm Jones.

C. Third Cause of Action for assault.

Jones alleged that Dilday brandished a firearm at him in a threatening manner. Jones first testified that when he arrived at the scene Dilday pulled a gun out of his shirt pocket and pointed it at Jones, but that Jones grabbed the gun away from Dilday, threw it over the fence and went toward the Switzer residence to call the Sheriff. Dilday told him, "Go ahead and call the sheriff." Jones was pulled out of the fence, "spun around," one of his teeth fell out, he was hit in the head,

shoulder and arm. Jones testified that he screamed at Dilday and was "pissed off." He said Dilday hit him in the chest with either a shovel or fencing pliers. He gave inconsistent testimony about whether or not he went to the Switzer's trailer and whether Dilday attacked him when he was going to or coming from the trailer. He said he was "trying so hard not to get mad and hurt him because I would get in trouble," but that after Dilday was choking him he "was getting mad."

The essence of Jones' testimony is this sequence of events:

- Dilday went onto Bi-Rite property and began digging
- Jones went to his location and confronted him
- Jones told Dilday to get off his property
- Dilday pointed a gun at him and said he was going to continue digging
- Jones said he was going to call the sheriff
- Dilday told him to go ahead and call
- Jones turned and began to climb through the fence
- Dilday grabbed him from behind and hit him, knocking out two teeth and causing injury to Jones' chest
- Dilday threw Jones to the ground, then let him up
- Jones left and Dilday resumed digging

- When the sheriff's deputy arrived Jones said nothing about his injuries to his chest or his teeth being knocked out.

Dilday's testimony had some similarities but with marked differences. He testified that he went onto the Bi-Rite property to discover why no water was being delivered. He took a shovel and began to dig. Jones approached him angrily cursing at him, threw his phone at Dilday, threatened to physically harm him and hit Dilday in the chest with his shoulder. Dilday then grabbed Jones and threw him to the ground. He had an unloaded revolver in his shirt pocket but denied ever pointing it at Jones. The revolver fell out during the scuffle and Jones attempted to fire it. After holding him down for a time, Dilday let Jones up. Jones went to the Switzer trailer, returned to the scene making more threats, then left.

Deputy Franklin testified that Jones told him that during the confrontation Jones "said he hit his right shoulder against Russell's left shoulder causing Russell to step back." Jones had a small abrasion on his forehead but did not complain of pain or any other injuries nor ask for medical care. Franklin's testimony about what Dilday told him is essentially the same as Dilday's testimony.

Jones testified that Dilday pointed a gun at him and was the aggressor. Dilday testified that Jones was the aggressor. In resolving the disparity, the Court has considered the probable veracity of the testimony

regarding the altercation as well as the balance of the testimony given by each party.

Jones testimony requires a conclusion that Dilday, having left a message for Jones that he would be digging so that if Jones wanted to "call the cops" he would have advance notice, believing that he had an easement to repair the pipe and was acting within his rights, was interrupted in his digging, inexplicably pointed a gun at Jones (who cavalierly walked up like John Wayne to the pointed gun and took it away), told Jones to call the sheriff, waited until Jones left saying that he was going to call the sheriff, then for some enigmatic reason attacked Jones from behind as he was climbing through the fence rather than waiting for the deputy sheriff to arrive. He then hit Jones in the chest either with a shovel or fencing pliers as they wrestled against the fence and on the ground. He also hit Jones in the face several times, causing him to lose two teeth, but Jones never mentioned his chest injury or the loss of two teeth to Deputy Franklin.

Jones' testimony throughout the trial was inconsistent with that of the other witnesses. For example, he testified that Waller physically pushed him "with his face," with his chest, or with his hands and body or his legs or his belly or his face" "all the way down to the corner of the Boren property" on the day the video Exhibit 6 was made. He believed that the video would show such pushing. In fact the video shows that Waller never made physical contact with Jones, never "bullied" or attempted to intimidate him, and was remarkably restrained during Jones' tirades. Both Waller and

Ferrero testified that Waller never pushed Jones and that they never went further south than shown in the video. It is obvious that Jones' testimony was either mistaken or intentionally false.

Dilday's testimony was very believable. It is much more believable that Jones angrily attacked Dilday and that Dilday acted in self-defense by throwing him to the ground than that Dilday attacked Jones from behind for no apparent reason.

The Court disbelieves Jones' testimony that two of his teeth were knocked out in the melee. It is inconceivable that he would not have reported such an injury to Deputy Franklin at the time of the event. The Court also disbelieves Jones' testimony that he suffered a serious injury to his chest from the scuffle. Ferrero gave credible testimony that Jones was struck forcefully by a cow attempting to deliver a calf. She also testified that, contrary to Jones' testimony that he is unable to walk long distances or exert himself, she has seen him walk up a steep hill carrying a backpack and dig with a shovel. Jones introduced photographs of him digging with a shovel and carrying pieces of concrete. The Court disbelieves Jones testimony that Dilday hit him with a shovel or pliers. Jones' expert witness, Dr. Allyn, testified that his injury could have been caused by a fall, blow or simply by a hard cough. It is possible that Jones' chest injury could have been caused by falling to the ground during the altercation with Dilday, but if it was, it was because he was the aggressor and Dilday was acting in self-defense. Jones is not entitled

to any recovery against Dilday for his Third Cause of Action.

D. Fourth Cause of Action for Battery.

For the reasons set forth above regarding the Third Cause of Action, Jones is not entitled to any recovery against Dilday for his Fourth Cause of Action.

E. Fifth Cause of Action for Trespass to Land.

Cross-Complainants alleged that Dilday and Ferrero trespassed on their property and damaged or destroyed it. Without specifically naming Dilday, during his testimony about the altercation on July 14, 2015 Jones testified that he "thought it was pretty wrong, you know, to cut my fence and then take down the panel that we just went and got a judgment on" and made reference to "him cutting my fence and taking the panel down." Without specifying who, he said, "they cut a gate in my fence right after I fixed it." He gave very confusing testimony about "two green gates" disappearing and appearing at "my grandma's 53 acres." He testified that he told Dilday that "he was trespassing, get off the property, and he vandalized my fence." He testified that he "fixed that fence 586 times last time." Again without naming any perpetrator, he testified that they were cutting the fence every day, sometimes twice a day."

On Jones first day on the stand, he testified as follows:

THE WITNESS: I seen Mary Ann Ferrero cut my fence the last time, if you want to go there.

MR. REED-KRASE: Strike as nonresponsive –

THE WITNESS: – over 586 times, I have pictures of every time.

Again referring to Ferrero, Jones testified:

I mean, I don't think I met her until they were climbing through the fence, cutting the fence, and stuff. They cut the one on one side and crawled through the other one, and then they get stuck in there. I got video of them, all kinds, at the house, but they are not due to this, you know what I mean. They ain't got the 2013, January, or whichever it is, the judgment.

Q. So all that was way before 2013?

A. Yes.

Jones also claimed that PVCC employees cut his fences:

Q. Who is "they" that keeps climbing through your fences and cutting them?

A. Employees of Pleasant Valley.

On the fifth day of trial, Jones gave specific testimony about Dilday and Ferrero cutting his fences:

Q. Who did you see cut the fence?

A. I seen Mrs. Ferrero. I never seen Tanna do nothing to the fences. I've seen Mr. Dilday cut my wires and then undo the panel and dig on the property, and I asked him to leave and –

* * *

Q. What I'm asking is, what did you see Ms. Ferrero do that you described as "cutting the fence"?

A. I have seen her cut both the fences, the lane fence and the fence to the west.

* * *

Q. When is the most recent incident you saw – let's just stay with Ms. Ferrero. When is the most recent incident you saw Ms. Ferrero cutting the fence on what you describe as Virgil Rogers' property that they may or may not be leasing, and the Bi-Rite Property, when is the recent time you saw them?

A. Like in 2011.

Q. What did you see at that time?

A. I don't understand.

Q. For example, was it day or night?

A. Yeah, through the daytime.

Q. Where were you when you observed this happening?

A. Actually, I was setting on the couch watching TV.

When asked to clarify what he saw Ferrero doing to cut the fence, Jones responded: "I didn't see. With the camera that we had at the time, it's a video camera, and when you pull it in you can see something in her hands." He testified further:

> Q. Have you seen them use some kind of tool?
>
> A. No, sir. When I go down there I just see the wires were cut and the clips have been taken off and the wires been twisted around and –
>
> Q. So you actually saw severed fence, is that –
>
> A. Yes, sir. I had to fix the fence 586 times.

When asked further about the fences being cut, Jones testified:

> Q. What part was cut, the hog wire, the barbed wire, or both?
>
> A. The barbed wire most of the time, but the hog wire was old, and when you step on it it will break, you know.
>
> Q. When the barbed wire was cut was it all strands or just one strand or –
>
> A. It varied who was doing it, you know, who was going up there. The ladies, they usually – they like would cut one or two if it was tight so they could get through without getting hurt, you know. I mean, no one likes to get cut

by four barbed wires or red barbed stuff, it's sharp.

With regard to one specific fence which was not clearly identified, Jones testified:

A. – of 176, be easier to put it that way. They take the staples out and stuff, and I never seen Mrs. Ferrero or Mrs. Kibler cut that fence. I've seen –

Q. Have you seen that fence cut?

A. Yes, sir.

Q. Where along that fence line was it cut?

A. By the ditch, past the ditch, probably 20 or 30 feet up the hill, below it, below the ditch to the west.

Q. Did you ever learn who cut that fence?

A. Not really. Well, I mean, we got videos of them and pictures of them climbing through there and tearing it up, but I myself, I don't believe Ramon Mora, the ditch tender, would ever cut my fence intentionally. I've known him for 20 or 30 years, before he became a ditch employee.

Q. So you have no information as to who cut those fences?

A. No, sir, except when Virgil Rogers took it down.

When asked about the fence "on the northern perimeter," Jones testified:

A. Oh, it's that way right now.

Q. How long has it been that way?

A. Every time I fix it it gets – they take a post out, put a wire down. I tied it back with a piece of hay twine, I've tied it with vellum wire, I've tied it with – and they just keep climbing through the fence. But it really has nothing to do with the Dildays or the Ferreros on that.

In describing how he fixed the fence, Jones testified:

I had to fix the fence 586 times.

Q. When you say you had to fix the fence, what did you do to fix it?

A. I had to redo the fence and change cedar posts because after so many times they start splitting. I take out T posts, take out cedar posts for the barbed wire.

Q. Were the posts broken?

A. No, they like – they like split apart from putting the staples in them.

Q. So the post that was in the ground actually broke apart, split?

A. Not at the bottom, just up at the top where like you put the staples in, they wouldn't stay. I went all the way to two and a half to two inch staples. We used to use like inch staples.

Q. Did you – when you had to replace these posts, or fix these posts, did you actually have to dig them out of the ground or were you able to replace them or fix them some other way without digging?

A. No, some of them we dug out, some of them they were broke off at the bottom, some of the T posts were snapped from like trying to hold on to it and going through it. They were a little old and they would break and they rot, just like wood does.

* * *

Q. When you saw these problems with the fence that you are describing, and you looked at them, did it appear that somebody had been trying to go through the fence and inadvertently broke it or somebody had deliberately tried to break the fence to injure the fence?

A. I think they deliberately did it.

Q. What did it look like that made you think they were deliberately trying to injure the fence?

A. I don't know how you would put it. When I had to fix the same fence twice in one day, I think it's been deliberate.

Referring to the day of the altercation between Jones and Dilday, Jones testified:

Q. Did it appear that the fence had been cut?

A. Yes, sir.

Q. What did you see?

A. That's when I went through and I went – tried to go through Julie's to call, and I ended up going to –

Q. Before you go on, I want to know what you saw on the fence. Was it cut somewhere?

A. Yeah, all five or six wires. I don't remember how many wires of the fence it was. It was rolled up again, nice and pretty like they always do.

Q. Where was it cut?

A. Where the gate is. They didn't, Virgil did.

On day 6 of the trial Jones testified that Rogers had cut and knocked down a fence, reiterated that he had pictures to prove that his fence had been cut 586 times, then explained that cutting of the fence began well before" and finished before the 2009 lawsuit. The only other evidence regarding damage to Plaintiffs' property related to Dilday digging holes over the pipeline in order to find and repair the breach in the pipeline where Jones had capped it.

Considering this evidence in the light most favorable to Cross-Complainants, Jones has seen broken wires and posts in the fence which he considers to be caused intentionally. He saw Dilday cut the wires of the fence. He stated that he saw Ferrero cut the fence, but then testified that he has never seen Ferrero cut or break his fence, though he believes that she did. He never saw Tanna Dilday cut or break his fence. He has

seen Ferrero and Dilday cross the fence. There are numerous cattle on the property. The photographs introduced show fences that are old and decrepit with posts that are deteriorated.

Against this conflicting and uncertain testimony by Jones, both Dilday and Ferrero denied ever cutting Cross-Complainants' fences. It stretches credulity to believe that Jones would possess 586 photographs and video of Plaintiffs cutting his fences yet not introduce even one into evidence. At best, Cross-Complainants proved that Rogers cut a gate into the fence separating the Dilday and Bi-Rite properties although Jones and Bi-Rite opposed it, and that Dilday, Ferrero and their agents climbed over or through the fence at other locations in order to attend to their weir and pipe. There was no credible proof that Plaintiffs have caused any monetary damage or loss to Cross-Complainants. There was no evidence that Plaintiffs have engaged in any conduct that would justify an award of punitive damages.

3. Costs

As between Plaintiffs and Defendants, Plaintiffs are the prevailing party and are entitled to recover costs.

As between, Cross-Complainants and Cross-Defendants Dildays and Ferrero, Cross-Defendants are the prevailing party and are entitled to recover costs.

As between Cross-Complainants and Cross-Defendant PVCC, Cross-Defendants were the prevailing party on all issues. PVCC is therefore the prevailing party and entitled to recover costs.

4. Attorneys Fees

Plaintiffs have requested attorneys fees pursuant to Code of Civil Procedure §532(b). The language of that section makes it clear that it applies only when an injunction has been granted or may be granted "pending the litigation." In this case no temporary restraining order or preliminary injunction was issued by the Court, therefore §532(b) does not apply.

Cross-Complainants have requested attorney fees under Code of Civil Procedure §1021.9, however because they are not the prevailing party they are not entitled to an award of attorney fees.

Dated: 5-10-18 /s/ Roper

Court of Appeal, Fifth Appellate District - No. F077682

S273289

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RUSSELL DILDAY et al., Plaintiffs,
Cross-defendants and Respondents,

v.

MIKAL JONES et al., Defendants,
Cross-complainants and Appellants;

PLEASANT VALLEY CANAL COMPANY,
Cross-defendant and Respondent.

(Filed Apr. 20, 2022)

The petition for review is denied.

CANTIL SAKAUYE
Chief Justice