

Law Offices of
TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101
website: tosdalsmith.com

Thomas L. Tosdal
Ann M. Smith
Fern M. Steiner
Michael K. Wax
Jon Y. Vanderpool
James M. Stern*
Angela M. Jae
Georgiana D'Alessandro

Telephone: (619) 239-7200
Facsimile: (619) 239-6048
Email: tosdal@tosdalsmith.com

*Certified Specialist Workers' Compensation Law
State Bar of California Board of Legal Specialization

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Honorable Ronald M. George, Chief Justice
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

**Re: Opposition to Requests by SDG&E and Tree Trimming Contractors for
Depublication of *Kelly V. CB&I Constructors, Inc.* (Nov. 18, 2009, Court of
Appeal Docket No. B205735) 179 Cal.App.4th 442, 102 Cal.Rptr.3d 32**

Dear Chief Justice George and Associate Justices:

We write to the Supreme Court on behalf of over a thousand private parties, the County of San Diego and the City of San Diego to oppose the requests by San Diego Gas & Electric ("SDG&E") and various tree trimming contractors for depublication of Kelly v. CB&I Constructors, Inc. 179 Cal.App.4TH 442, 102 Cal.Rptr.3d 32.

Opposing Parties' Interest

The Malone, Maddock, San Pasqual Academy, Bandy Canyon Ranch, Waldon, Bain, Evergreen and Nemish plaintiffs, among others, and the County of San Diego and City of San Diego are plaintiffs in lawsuits against SDG&E and Davey arising from the October 2007 fires caused by SDG&E power lines. These private and government entity plaintiffs seek compensation for, variously, among other things, private homes and government land destroyed by the fires, including rebuilding and remediation costs for structures and trees.

SDG&E notes that the impact of the fire on SDG&E has been “substantial,” as SDG&E’s insurance costs have “skyrocketed.” The impact on the thousands of people who lost their homes has been not merely “substantial,” but devastating. One couple died in their home in the inferno. Their next door neighbors survived in their swimming pool overnight while the fire burned around them. Others escaped with lesser but still serious injuries. Most discovered after the fires that they were underinsured and many had no insurance at all and have been unable to rebuild. People without insurance or other means lived in sheds, horse trailers and other makeshift living quarters for days, weeks and in some instances months after the fires. The County of San Diego and the City of San Diego sustained tens of millions of dollars in losses to government land and in fire fighting costs. These private and government litigants all have an interest in the remediation and tree damages issues addressed in Kelly.

The Supreme Court Should Deny the Requests for Depublication Because the Opinion Meets the Criteria for Publication, which SDG&E and the Tree Trimming Contractors, Who Lack Standing, Do Not Address

The Opinion in Kelly clarifies the application of the personal exception rule, establishes that the double damages statute for injury to trees applies to trespass by fire in light of Elton, and resolves the apparent conflict that existed because of Gould, as well as providing guidance on an issue of continuing public interest, thus meeting various criteria for publication. Rule 8.1105(c)(1)-(6). SDG&E and the tree trimming contractors do not address the publication criteria in their decertification requests. This is reason enough to deny the requests.

Worse, SDG&E’s and the tree trimming contractors’ requests for decertification are a thinly-veiled attempt at appellate review. But SDG&E and the tree trimming contractors are not parties to *Kelly* and thus lack standing to appeal the decision. This backdoor attempt at review on the merits by non-parties should not be countenanced and is additional reason to deny the requests.

For both the above reasons, the Court should summarily deny the requests. Nonetheless, Kelly is addressed below on the merits and, as explained, was correctly decided.

The October 2007 Fires Were Caused by SDG&E Power Lines

There were three fires: the Witch Creek Fire; the Guejito Fire; and the Rice Canyon Fire. The Witch Creek Fire was caused by high voltage transmission lines, which were too close together and had too much sag, blowing into one another and sparking. The lines blew together and tripped a relay (which is like a home circuit

breaker) twice before the fire started. However, SDG&E automatically re-energized the lines without checking to see what caused the outage instead of turning off the automatic re-closer that re-energized the lines. This was despite the acknowledgment in the 2001 Power Line Fire Prevention Field Guide that “reclosers re-energizing the line into the fault may cause repeated arcing and increase the probability of igniting vegetation” and that this may lead to “conflagrations” during Santa Ana winds. The evidence suggests that SDG&E did this to keep meters running and revenues flowing for a corporate utility reaping record profits of over \$300 million per year.

The Guejito Fire was caused by a power line and cable company communication line, which were too close together, sparking and igniting vegetation. The Rice Canyon Fire was caused by the limb of a tree immediately next to the power lines breaking and falling on the power lines after SDG&E neglected to trim the tree as recommended by its tree trimming contractor, Davey.

SDG&E was charged by the California Public Utilities Commission for violating regulations on the spacing of power lines to prevent the lines from blowing together in the wind and violating inspection regulations which would have revealed power lines being too close to one another and, in the case of the Guejito Fire, too close to a cable company communication line. SDG&E was also charged by the CPUC for not merely withholding evidence during the investigation, but actually destroying physical evidence at the scene of the Rice Canyon Fire, as well as withholding documents and witnesses. SDG&E agreed to pay a \$17 million fine to resolve the charges of concealing evidence.

These fires are just the most recent devastating fires driven by Santa Ana Winds and/or caused by power lines in Southern California in the last forty years. In San Diego County, the 1970 “Laguna Fire” killed eight people and destroyed 175,000 acres and nearly 400 homes; an earlier Guejito Fire, in 1993, burned 20,000 acres and destroyed 18 homes, including those of some plaintiffs in the 2007 SDG&E Fire Litigation who lost their homes again in the 2007 Guejito Fire; the 1996 “Harmony Grove Fire” destroyed 100 homes; in 2002, the “Gavilan Fire” burned 5,700 acres and destroyed 43 homes; and, a year later, the 2003 “Cedar Fire,” the largest in recorded California history, destroyed 250,000 acres and 2,500 homes. Each of these five fires was driven by Santa Ana winds, and the Laguna Fire, forty years ago, and 1993 Guejito Fire were caused by SDG&E power lines. Santa Ana winds have, of course, driven fires elsewhere in Southern California and have combined with power lines spaced too close together and with too much sag to cause wildfires. E.g. Barham v. Southern California Edison Company (1999) 74 Cal.App.4th 744 [holding that electric utilities may be held liable in inverse condemnation for fires caused by power lines].

The Court in *Kelly* Did Not Disregard the Diminution Rule But Rather Correctly Applied the 30-Year Old “Personal Reason” Exception, Holding That the Award of Remediation Costs in That Case Was Not Unreasonable as a Matter Of Law

SDG&E asserts that, “For at least ninety-five years, it has been the law in California that the proper measure of damage to property is the diminution in its fair market value” and that “The Kelly standard of restoration costs totally divorced from value diminution conflicts with the years of precedent cited above.” SDG&E’s Request for Depublication, pp. 2 and 3. However, SDG&E’s assertion ignores: 1) the “personal reason” exception, discussed in Kelly, which has been the law for thirty years; 2) the court’s discussion in Kelly of the requirement under the personal reason exception that the cost of remediation must be reasonable in light of the diminution in value and overall value; and 3) the issue on which Kelly turned was the comparison of remediation costs to overall value, not diminution.

The court began its analysis of the reasonableness of the remediation costs in Kelly with a discussion of “General Damages Principles” and noted that, notwithstanding the general limitation that recovery is limited to diminution in value, “if a plaintiff has a personal reason to restore the property to its former condition, he or she may recover the restoration costs even if such costs exceed the diminution in value.” Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 38. “This rule is sometimes referred to as the ‘personal reason exception.’” Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 38. The court cited Orndorff v. Christiana Community Builders (1990) 217 Cal.App.3d 683, 687, in which the court applied the personal reason exception to homes, and Heninger v. Dunn (1980) 101 Cal.App.3d 858, 863-864, the seminal California case on the personal reason exception, in which the court applied the exception to trees. The court also cited authorities in accord from other jurisdictions, as well as 6 Witkin, Torts, § 1728, pp. 1264-1265; Rest.2d Torts, § 929, com. b; 2 Real Property Remedies and Damages (Cont.Ed.Bar 2d ed. 2002) § 12.31, pp. 784-787; and 1 Dobbs, Law of Remedies (2d ed. 1993) § 5.2, pp. 713-721. Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 38. Contrary to SDG&E’s assertion, the court in Kelly did not, therefore, ignore “at least ninety-five years” of precedent under the diminution rule; rather the court correctly followed thirty years of precedent under the personal reason exception—which SDG&E ignores.

Citing Orndorff, Heninger, and Housley v. City of Poway (1993) 20 Cal.App.4th 801, 810 [on which SDG&E relies], the court in Kelly also noted that the cost of remediation must be reasonable considering both the diminution in value and the overall value:

Even when this exception applies, however, restoration costs “are allowed only if they are reasonable in light of the value of the real property before

the injury and the actual damage sustained.” . . . Whether the restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant.

Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 39.

Contrary to SDG&E’s assertion, therefore, the court in Kelly did not ignore the rule that diminution be considered.

The defendant’s challenge in Kelly was not to remediation costs compared to diminution in value but rather to remediation being 67 percent more than the value of the property: “Defendant asserts, in essence, that the restoration costs were unreasonable in this case because, when stated as a percentage of the property’s value, they far exceeded any other award approved by a court in California. In particular, defendant points out that the restoration costs awarded in this case exceeded the value of the property by 67 percent.” Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 40. Addressing this contention, the court noted that remediation was necessary not only for the total devastation wrought by the fire but also for resulting flooding and mudslides and “conclude[d] that there was substantial evidence that a person in plaintiff’s position reasonably could choose to restore the property to its prefire condition and that the damages awarded by the jury reasonably were necessary for such restoration. Accordingly, the damage award was not unreasonable or excessive as a matter of law.” Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 42.

The Court in Kelly Correctly Concluded That the Plain Language of the Double Damage Statute for Damage to Trees in Trespass Applies to Trespass by Fire

Civil Code § 3346 provides for double damages for injury to trees caused by “trespass” (treble damages for intentional trespass). In Gould v. Madonna (1970) 5 Cal.App.3d 404, 406, on which SDG&E and the tree trimmers rely, the court noted that, “There is no California case in which section 3346 of the Civil Code has been applied to the negligent spreading of a fire, and we have found no case determining that such spreading is a trespass.” However, in Elton v. Anheuser-Busch Beverage Group, Inc. (1996) 50 Cal.App.4th 1301, 1305-1307, the court held that a negligently set fire to the land of another does constitute trespass. Consequently, as the court wrote in Kelly:

At the outset, we note that it is now established that the spread of a negligently set fire to the land of another constitutes a trespass. [citing Elton.] Defendant does not argue otherwise. Gould, *supra*, 5 Cal.App.3d 404 was decided more than 20 years before the decision in Elton.

Accordingly, to the extent the court in Gould based its conclusion on the fact that no prior case had held that the spread of a fire could be a trespass (*id.* at p. 406), that factor no longer applies.

Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 46.

The court in Kelly then explained how under the plain language of the statute trespass by fire may not be excluded. To overcome this, the tree trimming contractors argue, as did the defendant in Kelly, that the plain language of a statute may be ignored if it is contrary to clearly manifested legislative intent. Elton, they argue, was not decided until 1996 and “when the trespass statute was initially enacted, fire was not considered a trespass, so the Legislature obviously did not intend to allow a multiplier for damage to trees resulting from trespass by fire.” Tree trimming contractors Request for Depublication, p. 6.

However, this is a nonsequitur. If the legislature had listed the kinds of invasions of real property to be deemed a trespass under the statute, the argument might hold. But the statute is silent on what constitutes a trespass. Consequently, the failure to list fire as a means of trespass does not manifest an intent to exclude fire and courts may not judicially carve out an exception for trespass by fire but instead must follow the plain language of the statute. See, Schweitzer v. Westminster Inv. (2007) 157 Cal.App.4th 1195. [“A court may not add to or alter the clear language of the statute to insert conditions or exceptions not included by the legislative enactment. [‘In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.’]”]. Schweitzer, 157 Cal.App.4th at 1205, quoting Code of Civil Procedure § 1858. As the court correctly observed in Kelly, “The fundamental problem with the decision in Gould, *supra*, 5 Cal.App.3d 404— quite apart from its speculation and assumptions as to the intent of the Legislature—is that the court essentially ignored the *best* indicator of the Legislature’s intent: the plain language of the statutes.” Kelly, 179 Cal.App.4th at ____, 102 Cal.Rptr.3d at 48 (*italics in opinion*).

Nor, contrary to the assertion of SDG&E and the tree trimming contractors, does Civil Code § 3346 conflict with Health & Safety Code § 13007. As the court explained in Kelly:

Based on their plain language, these statutes are easily harmonized. Under section 13007, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. “[T]he statute places no restrictions on the type of property damage that is compensable.” (McKay v. State of California (1992) 8 Cal.App.4th 937, 940.) Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include

such elements as the lost profits of a business damaged by fire. (See, e.g., Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal.App.2d 60, 62-63 [goods]; McKay v. State of California, *supra*, 8 Cal.App.4th at pp. 939-940 [lost profits].) If the fire also damages trees—that is, causes “injuries to . . . trees . . . upon the land of another” (§ 3346, subd. (a))—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff’s property) pursuant to section 3346.

Kelly, 179 Cal.App.4th at _____, 102 Cal.Rptr.3d at 46-47.

Conclusion

SDG&E and the tree trimming contractors do not address the standards for publication and instead seek backdoor review on the merits which they do not have standing to do. Their requests for decertification should be summarily denied on this ground. Nor are their request well taken on the merits, as Kelly was correctly decided.

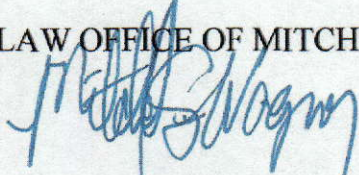
SDG&E demurred to the complaints in the 2007 SDG&E Fire Litigation on the ground that Barham v. Southern California Edison Company, *supra*, 74 Cal.App.4th 744 is contrary to decades of authority. The trial court overruled the demurrers and SDG&E unsuccessfully petitioned the Court of Appeal and this Court for review, contending not only that Barham is contrary to longstanding law but also that the magnitude of the 2007 fire losses necessitates restricting the application of inverse condemnation.

Continuing this theme, SDG&E argues that Kelly is contrary to 95 years of case law and that application of the 30-year old personal reason exception and the double damages statute for damage to trees caused by trespass should be limited because the danger of fires has increased and SDG&E’s insurance rates have “skyrocketed.” But the increasing risk of fires along with the 40-year history of “conflagrations” and resulting deaths and destruction of homes and property caused by SDG&E power lines is reason to leave Kelly intact to serve as a greater financial incentive for SDG&E to comply with design and maintenance standards to prevent power line fires in the first place. In any event, like Barham, the unanimous Opinion in Kelly written by Justice Richard Mosk follows decades-old law and is correctly decided.

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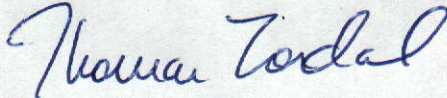
The private litigants in the 2007 SDG&E Fire Litigation, the County of San Diego and the City of San Diego all respectfully urge the Supreme Court to deny the request by SDG&E and the tree trimming contractors for depublication.

LAW OFFICE OF MITCHELL S. WAGNER



Mitchell S. Wagner, Esq.
Attorney for Malone and Maddock Plaintiffs

TOSDAL, SMITH, STEINER & WAX



Thomas L. Tosdal, Esq.
Attorneys for Malone and Maddock Plaintiffs

SINGLETON & ASSOCIATES



Terry Singleton, Esq.
Attorneys for Malone and Maddock Plaintiffs

THORSNES, BARTOLOTTA & MCGUIRE

John F. "Mickey" McGuire, Esq.
Attorneys for San Pasqual Academy and Bandy Canyon Ranch Plaintiffs

LAW OFFICES OF ALEXANDER M. SCHACK

Alexander M. Schack
Attorneys for Waldon Plaintiffs

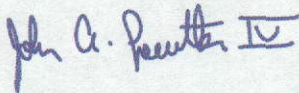
DREYER BABICH BUCCOLA CALLAHAM & WOOD, LLP

Roger A. Dreyer, Esq.
Attorneys for Plaintiff JOHN MICHAEL BAIN, individually
and as heir to John Christopher Bain and Victoria Fox, deceased.

GRECO, TRAFICANTE, SCHULZ & BRICK

Paul A. Traficante, Esq.
Attorneys for Evergreen Plaintiffs

DOYLE LOWTHER LLP



John A. Lowther, Esq.
Attorneys for Nemish Plaintiffs

OFFICE OF THE CITY ATTORNEY

Bruce Bailey, Deputy City Attorney,
Attorneys for the City of San Diego

JOHN J. SANSONE, County Counsel

William A. Johnson, Jr., Senior Deputy
Attorneys for County of San Diego

HURST & HURST

Debra Hurst, Esq.
Attorneys for Curtis and Watson Plaintiffs