

PUBLIC MATTER

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FILED
 NOV 30 2015
 STATE BAR COURT
 CLERK'S OFFICE
 LOS ANGELES

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STATE BAR COURT
 HEARING DEPARTMENT - LOS ANGELES

In the Matter of:) Case No. 13-O-13440-WKM
)
 SHELLY BARBARA ALBERT,) FIRST AMENDED NOTICE OF
 No. 174318,) DISCIPLINARY CHARGES; EXHIBITS 1-2
)
)
 A Member of the State Bar.)

NOTICE - FAILURE TO RESPOND!

**IF YOU FAIL TO FILE A WRITTEN ANSWER TO THIS NOTICE
 WITHIN 20 DAYS AFTER SERVICE, OR IF YOU FAIL TO APPEAR AT
 THE STATE BAR COURT TRIAL:**

- (1) YOUR DEFAULT WILL BE ENTERED;
- (2) YOUR STATUS WILL BE CHANGED TO INACTIVE AND YOU WILL NOT BE PERMITTED TO PRACTICE LAW;
- (3) YOU WILL NOT BE PERMITTED TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOU MAKE A TIMELY MOTION AND THE DEFAULT IS SET ASIDE, AND;
- (4) YOU SHALL BE SUBJECT TO ADDITIONAL DISCIPLINE. SPECIFICALLY, IF YOU FAIL TO TIMELY MOVE TO SET ASIDE OR VACATE YOUR DEFAULT, THIS COURT WILL ENTER AN ORDER RECOMMENDING YOUR DISBARMENT WITHOUT FURTHER HEARING OR PROCEEDING. SEE RULE 5.80 ET SEQ., RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA.

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1 The State Bar of California alleges:

2 JURISDICTION

3 1. SHELLY BARBARA ALBERT (“respondent”) was admitted to the practice of law
4 in the State of California on December 12, 1994, was a member at all times pertinent to these
5 charges, and is currently a member of the State Bar of California.

6 COUNT ONE

7 Case No. 13-O-13440
8 Business and Professions Code, section 6106
[Moral Turpitude]

9 2. In or about 2006, respondent erected fencing on her property located at 11203
10 Rhodesia Avenue, Sunland, California. An easement existed on respondent’s property and her
11 property was the servient tenement of the easement. At the time she purchased her property in
12 or about 2003, respondent was aware of the easement. The easement included a 13 foot strip of
13 land abutting respondent’s property line and continuing for approximately 150 feet. The
14 easement provided the only access for the dominant tenement. In or about 2005, the dominant
15 tenement was purchased by Mr. Henri Baccouche.

16 3. When respondent erected her fencing in 2006, it enclosed the easement running
17 through her property. After the fencing was erected, Mr. Baccouche objected to its interference
18 with the easement. Respondent was aware of the objection but refused to remove her fencing.
19 Instead, she represented that she would remove it after the completion of her home on the
20 property.

21 4. In or about 2009, respondent completed construction of her domicile, removed her
22 fencing, and then constructed new permanent fencing in the same location. The new fencing
23 included concrete footers which were not intended to be moved or removed. When respondent
24 erected the permanent fencing, she knew it would enclose the easement. Mr. Baccouche
25 continued to object on multiple occasions to the placement of the fencing which interfered with
26 the easement. Respondent refused to remove her fencing.

27 5. In addition to the fencing, respondent took other action to interfere with Mr.
28 Baccouche’s access to his property. Work crews that Mr. Baccouche hired to do brush

1 clearance in accordance with Los Angeles County requirements were harassed by respondent.
2 Subsequent to 2009, respondent attached her fencing to a fire gate that crossed the easement
3 which then prevented even foot traffic.

4 6. The issue of interference with the Mr. Baccouche's property rights was fully
5 litigated in Los Angeles Superior court in a case titled *Baccouche v. Albert*, case number EC
6 054848. Mr. Baccouche brought suit for, *inter alia*, Abatement of Private Nuisance,
7 Declaratory Relief, and Quiet Title related to respondent's interference with his easement. The
8 superior court found against respondent on all issues, described respondent's conduct as
9 "intentional and malicious" and awarded punitive damages against respondent. Respondent
10 then appealed that judgment to the Court of Appeals. That matter was captioned *Albert v.*
11 *Baccouche*, case number B249798. The Court of Appeals affirmed the judgment in all respects.
12 (The decision of the superior court and the opinion of the appellate court are included herein as
13 exhibits 1 and 2.)

14 7. From 2006 through in or about 2014, respondent wilfully, maliciously, and
15 continually interfered with the property rights of Mr. Baccouche by erecting fencing on her
16 property and by otherwise blocking access to the easement which she knew would interfere with
17 the property rights of Mr. Baccouche, including impairing Mr. Baccouche's ability to use or
18 improve the easement that ran along respondent's property, and thereby committed an act
19 involving moral turpitude, dishonesty, or corruption in willful violation of Business and
20 Professions Code, section 6106.

21 COUNT TWO

22 Case No. 13-O-13440
23 Business and Professions Code, section 6068(a)
24 [Failure to Uphold Laws]

25 8. The factual allegations of Count 1, consisting of paragraphs 2 through 6, are hereby
26 incorporated as though fully stated herein.

27 9. From 2006 through in or about 2014, respondent wilfully, maliciously, and
28 continually interfered with the property rights of Mr. Baccouche by erecting fencing on her
property and by otherwise blocking access to the easement which she knew would interfere with

1 the property rights of Mr. Baccouche. Specifically respondent knew that her fence would
2 impair Mr. Baccouche's ability to use or improve the easement that ran along respondent's
3 property. This interference constituted a private nuisance as defined by Cal. Civil Code section
4 3479 and violated the law of easements as described in California case law. Respondent
5 thereby failed to support the laws of California in willful violation of Business and Professions
6 Code, section 6068(a).

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8 **NOTICE - INACTIVE ENROLLMENT!**

9 **YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR
10 COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE
11 SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL
12 THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO
13 THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN
14 INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE
15 ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE
16 RECOMMENDED BY THE COURT.**

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14 **NOTICE - COST ASSESSMENT!**

15 **IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC
16 DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS
17 INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING
18 AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND
19 PROFESSIONS CODE SECTION 6086.10.**

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Respectfully submitted,

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THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL

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22 DATED: November 20, 2015

By:  _____

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Drew Massey
Deputy Trial Counsel

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, NORTH CENTRAL DISTRICT
BURBANK COURTHOUSE

FILED
LOS ANGELES SUPERIOR COURT

APR 11 2013

JOHN A. CLARKE, CLERK
BY: L. McDONALD, DEPUTY

HENRI BACCOUCHE

Plaintiff,

v.

SHELLY ALBERT

Defendant.

Case No. EC 051903

051848
FINAL STATEMENT OF DECISION

In this document, the Court announces its Final Statement of Decision. Pending further order or entry of Judgment, the Final Statement of Decision constitutes the orders of the Court.

Trial in this matter proceeded before the Court on August 27, 2012, August 28, 2012, August 30, 2012, August 31, 2012, September 4, 2012 and September 11, 2012. The Complaint by Plaintiff Henri Baccouche pleads claims against Defendant Shelly Albert for Trespass to Real Property and Trees, Abatement of Private Nuisance, Declaratory Relief and Quiet Title. After hearing the evidence, considering the exhibits, and arguments of counsel, the Court now makes the following findings of facts and law.

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I. Findings of Facts.

1. Plaintiff Henry Baccouche purchased property at 8041 Denivelle Road, in the Western Empire Tract in Sunland, California in 2005. He purchased a neighboring property at 8001 Denivelle Road in 2006. It is access to the 8041 property that is the subject of this lawsuit.

2. Defendant Shelly Albert purchased the property located at 11203 Rhodesia Avenue in Sunland California in 2003 with the intent to build her residence there. The land is also in the Western Empire Tract in the hills of Sunland and contiguous to 8041 Denivelle Road, owned by Plaintiff Baccouche.

3. When reaching the Western Empire Tract, Denivelle Road becomes a narrow paved road until the paving ends and a dirt roadway begins that ends at Plaintiff Baccouche's 8041 Denivelle Road property.

4. Defendant Albert has street access through Rhodesia. The northern part of her property line runs along the unpaved Denivelle road leading to Defendant Baccouche's property.

5. The only existing access to Plaintiff Baccouche's property is along the dirt roadway of Denivelle Road. The deed for Baccouche's 8041 property contains an easement over a portion of the Defendant's property 13 feet wide and approximately 150 feet long running parallel to the dirt roadway of Denivelle, for roadway purposes.

6. At the time Defendant Albert purchased her property, she was aware of the easement. The easement on Albert's land is to provide ingress and egress for a roadway for the property located at 8041 Denivelle Road, as well as another property along dirt Denivelle that has no other street access.

7. 8041 Denivelle Road contains 4 lots totaling 3.3 acres. The property at 8001 Denivelle Road has 3 lots on 7 acres of Property. Plaintiff Henri Baccouche purchased both properties as investments with the intent to develop them for sale as separate lots for the building of residences. He went to these properties two to three times a year for the purpose of brush clearance, and for various geological inspections in anticipation of developing the land. He had geological investigation of the properties conducted for building purposes and he had the dirt roadway cleared for access. At that time, Ms. Albert gave him access over the easement for the bulldozer and backhoe required to perform these tasks. The dirt roadway is insufficient for a bulldozer and other large machinery. She has refused access since then. (Testimony of Baccouche)

8. Ms. Susan Kohn owns property contiguous to both Plaintiff's and Defendant's property. The southern part of her property, which she testified has no address, also borders the dirt Denivelle and has no street access except through the dirt roadway. Her property has the same easement over Defendant Albert's property. Mr. Baccouche also has a 13 foot by 150 foot easement over the southern portion of Ms. Kohn's property. Together, Plaintiff's and Ms. Kohn's easements create a 26 foot wide, approximately 150 foot long easement for a roadway ingress and egress to her land and Mr. Baccouche's land. Ms. Kohn has owned her property for fifty years. .

9. These easements have existed since 1938 when the predecessor owner of these properties sold the parcels of land reserving as an easement for road purposes a strip of the northern boundary of what is now the Defendant's property creating a 26 foot wide area for a road.

10. These easements were intended to give access for a roadway to Mr. Baccouche's and Ms. Kohn's property. This easement for a roadway provides the only current access to Mr. Baccouche's and Ms. Kohn's property. Both Mr. Baccouche and Ms. Kohn currently have their various properties listed for sale. Currently, the only access to their properties is Denivelle Road, on which each have easements over Ms. Albert's property.

11. In 2006 when Ms Albert commenced construction of her residence, she acted as her own contractor. As a result, she resided in a trailer on the property. Shortly after Mr. Baccouche was given access to the easement for a bulldozer and backhoe to do soil testing on his property, Defendant Albert erected a temporary fence along the perimeter of the property for safety reasons. This fence enclosed the servient easement on her property that is for the benefit of Mr. Baccouche and Ms. Kohn. According to the testimony of both Mr. Baccouche and Ms Kohn, which the court credits, Ms. Albert said that the fence was temporary and would be removed once her house was built. Nevertheless, Mr. Baccouche objected to the fence, in writing, over a long period of time. He expressed his objection to having the easement cut off, and demanded that she remove the fence.

12. In approximately 2009, when her residence was build, Ms. Albert constructed a permanent fence with cements footers around the perimeter of her property, permanently enclosing the easement. Ms. Albert testified that she put up the fence around her property for protection, but readily admits that she did not walk the property line to determine where the fence should go but relied on the fence crew she hired to do that. She was aware, however, that the permanent fence she was installing would enclose the servient easement on her property. Ms. Albert testified she put up the fence for her protection and because she was told by her insurer

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that she would need one for public safety. Other than this hearsay testimony, no evidence from her insurer was offered.

13. When the permanent fence was put up, it not only closed in the easement on Albert's property, but it encroached on the south east portion of Mr. Baccouche's property. Ms. Albert put the fence up west of the olive trees that form a boundary between their properties. When Mr. Baccouche learned of the encroachment on his property he demanded in writing that it be removed. He made several such demands. (Exhibits 5 and 6) He also continued to demand that she remove the fencing that blocked his access to the easement. Ms. Albert did not remove the fence that encroached on his property and did not remove the fence that blocked access to the easement. After several email communications back and forth that did not result in a resolution (Exhibit 6 and the emails contained therein) Mr. Baccouche himself removed the fence that was encroaching on his property.

14. The dirt portion of Denivelle has been used by the Los Angeles Fire Department as a fire road for access to the hillsides in the area. Sometime in or about 2005 Ms. Albert asked the City Department of Public works to build a gate at the entrance to the dirt road. (Testimony of Susan Kohn, Shelly Albert). She testified that she did this because she was concerned for her safety. Ms. Albert thereafter put a lock on the gate to prevent access to the dirt portion of Denivelle Road leading to both Mr. Baccouche's and Ms. Kohn's property.

A. Access to the Easement

15. At some point in time after 2009, Ms. Albert extended the reach of her fence by adding pieces to attach to the gate, so that access to Denivelle Road, which blocked car access through the locked gate, and also blocked foot access. (Court's Exhibit 1). This prevented even foot access to Mr. Baccouche's property. (Testimony of Brian Fitzburgh)

16. Mr. Baccouche testified that although Ms. Kohn was provided a key to the "fire" gate to access the road, the key he was provided did not open the gate placed across Denivelle Road leading to his property. His own witness, Mr. Fitzburgh, however, testified that the key provided to Baccouche was hidden on dirt Denivelle Road for access by Mr. Fitzburgh. He did not testify to having used the key.

17. Evidence was presented that supports Mr. Baccouche's testimony that Ms. Albert intentionally interfered with his access to his properties. The crews he hired to clear the brush on his property required by Los Angeles County were harassed by Ms. Albert. The Court credits Mr. Baccouche's and Mr. Fitzburgh's testimony that, as a result of this harassment, several brush clearance crews would not work his property. The Court viewed a videotape of an encounter Ms. Albert had with Mr. Fitzburgh, Mr. Baccouche's realtor, and a brush clearance crew that was sent to give an estimates of the cost to clear the brush on Mr. Baccouche's property. The video shows Ms. Albert parking her car in the middle of Denivelle Road which prevented access back up Denivelle road. In the tape, she demanded to know who was at the gate attempting to enter the portion of Denivelle Road leading to Mr. Baccouche's property, a portion of Denivelle Road not on her property since her portion of the road was fenced and inaccessible. The video shows her harassing Mr. Baccouche's representative and crew, stating "we don't want you here - the community doesn't want you her, go away" and preventing access to the road. Mr. Fitzburgh testified that the access to Mr. Baccouche's property at 8041 Denivelle was completely blocked by Ms. Albert's extended fence on both sides of the gate and the locked gate such that no brush clearance could be accomplished. At trial Ms. Albert justified her conduct by stating "[b]ecause it is my property there and I was concerned about anyone being there and ignoring me." Mr. Fitzburgh testified that Ms. Albert's hostility commenced after being shown by him how Mr.

Baccouche planned to develop houses on his properties. Her statement to Mr. Fitzburgh appears to confirm this animus.

18. The evidence, including the testimony of Mr. Baccouche, Ms. Albert, Mr. Fitzburgh and Ms. Kohn, demonstrated that Ms. Albert has engaged in conduct over several years to prevent Mr. Baccouche's access to his property.

19. Mr. Baccouche testified that it was his intent to build houses on his property. He has his property listed for sale. The only current access to the property is through Denivelle Road. If the property is to be developed, any development will have to be through Denivelle Road, at least initially. Although, Mr. Baccouche has had plans drawn up to access his property through a cul de sac on Langmuir Road behind his property, he testified that to build new access through Langmuir is prohibitively expensive. These plans have received City/County approval. There is no evidence that Mr. Baccouche currently has any road access through Langmuir.

20. All engineers who testified, including an engineer who previously worked for Ms. Albert and the City, as well as Ms. Albert's engineer, agreed that building an access road over the 26 foot easement is feasible. The experts only disagree on the cost and how much County/City involvement will be necessary.

21. When Ms Albert applied for her building permits, she swore under penalty of perjury that:

"I further affirm under penalty of perjury, that the proposed work will not destroy or unreasonably interfere with any access or utility easement belonging to others and located on my property, but in the even such work does destroy or unreasonably interfere with such easement, a substitute easement(s) satisfactory to the holder(s) of the easement will be provided. (Sec 91.0106.4.3.4)" Exhibit 24

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22. Albert testified that she knew about the easement that ran 13 feet through her property. Indeed it was prominently on the deed of trust and Ms. Albert is a lawyer.

Notwithstanding this, Ms. Albert testified that she didn't know that she had built her house so close to the easement. The retaining wall surrounding Ms. Albert's property is very close to the easement, and in one area, is *within a few feet of the easement*. The Court heard testimony from the engineer that built her retaining wall. He said he knew about the easement for a roadway, but did not consider the weight of the roadway when calculating stress on the retaining wall. He opined that depending how the roadway is built, it might place too much stress on the retaining wall.

23. Ms. Albert testified that notwithstanding the easement, nor the affirmation given on her building permit, she will not remove her fence until all plans for a paved roadway are completed and permitted by the County/city, and will not provide a replacement easement across her property if the construction of her extensive retaining wall causes the construction of a roadway over the easement to be impossible or prohibitively expensive.

24. The Court finds that Ms. Albert has willfully and unreasonably interfered with Mr. Baccouche's easement to his detriment. This easement provides the only access to his land. Not only has Ms. Albert fenced off the easement on her property, but the evidence shows she has further fenced off all access to Mr. Baccouche's property by tying her fence to the existing fire road access fence with additional fencing to prevent any vehicle or even foot traffic to Mr. Baccouche's land. This prevented him from accomplishing necessary brush clearance and caused him to incur penalties from the City.

25. Mr. Baccouche has placed his property for sale through a real estate broker. The continued existence of the fence on the road access easement to his property is an impediment to

that sale, and any future efforts to develop his property and build a code compliant paved access road.

B. Cutting of the Olive Trees

26. The southwestern portion of Ms. Albert's property borders the southeastern portion of Mr. Baccouche's property. At the border sits approximately 9 olive trees.

27. Surveying trees apparently allows for different methods of determining the precise location of the trees.

28. In a survey done at the request of Mr. Baccouche, Mr. Barajas, a licensed surveyor, determined ownership of the trees by calculating location from the waist height of the trees through aerial observation. This placed the trees either on the property line or on Mr. Baccouche's property. In a survey done at the request of Ms. Albert, Mr. Hennon, also a licensed surveyor placed the trees on the survey map based on the locations of the main trunk as it meets the ground. By this measurement, most of the trees are on the property line, with one tree exclusively on Mr. Baccouche's property.

29. Home owners in the area of the property here at issue are required to do regular brush clearing as they are located in a fire district. Fruit trees are generally exempt from the brush clearance requirement. (Exhibit 28). Olive trees are fruit trees. (Testimony of Carl Mellinger.)

30. In connection with her 2009 brush clearing efforts, Ms. Albert had the olive trees located on the property line substantially "pruned". She did not contact Mr. Baccouche before the pruning and did not engage him in the process. Prior to the "pruning" pictures of the trees

showed a large upper canopy of greenery at the top of tall trunks. The trees look substantially different today with more bush like appearances.

31. The parties dispute whether the trees were damaged by the cutting in 2009. Both parties presented testimony from retained expert arborists. Plaintiff's certified arborist, Carl Mellinger, whose specialty is in damage appraisal and evaluation, used a complex computer program to determine the devaluation of the trees as a result of the 2009 cutting. He testified that instead of just cutting foliage to 6 feet off the ground, large trunks were cut off at the property line resulting in a reshaping of the trees to its current bush like state. Using factors such as condition before the pruning (the trees had 25 year old fire damage) property location, as well as other factors he evaluated the diminution in value of the trees. He testified that the trees were devalued as a result of damaging cuts by \$15,980. Exhibit 21 is a summary of his calculation of damage.

32. Defendants expert arborist, Regina Star, testified that the trees were not damaged at all. The Court, however, can review the before and after pictures of the olive trees and see that they currently look quite different and far less attractive. Ms. Star says the canopy was not affected, contrary to the testimony of Mr. Mellinger. The Court reviewed the parties' photographs of the trees (Exhibit 34, and Exhibit9) and as a result finds that Mr. Mellinger's opinion is more reliable and credible.

33. Ms. Albert testified that she was notified by the Fire Department that she had to conduct brush clearance and cut the olive trees. However, she produced no notification from the city, and none that specifically identified the olive trees. The City requires that for tall trees, the foliage on lower branches be cleared for six feet from the ground, but fruit trees are specifically exempted. (Exhibit 28).

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II Conclusions of Law

A. Trespass to Property and Trees

1. Trespass is the unlawful interference with possession of real property. It is the unauthorized entry onto the land of another. *Girard v. Ball* (1981) 125 Cal. App 3d 772. Trespass includes unauthorized use, entry or use of property such as trees or buildings that reside on the land. It can be the continued presence of a structure on another's property or injuring of another's property without permission. *NewHall Land & Farming Co.* (1993) 19 Cal App 4th 334.

2. Trespass is a tort. No specific intent to trespass is required. All that must be shown is the intent to be at the land where the trespassing occurred and lack of authorization by the owner. *Miller v. National Broadcasting Corp.* (1986) 187 Cal. App. 3d 1463. The landowner may be entitled to compensatory damage for the wrongful use or occupation of his property, nominal damages or punitive damages. The reasonable cost of repair or restoration of the property, and the cost of securing recovery are also authorized. See Civil Code Sections 3333, 3334, 3360 and 3294.

3. Further, California Code of Civil Procedure provides that damages for wrongful injuries to trees be double damages for actual detriment and discretionary treble damages if the conduct is intentional, willful and malicious. C.C.P. Section 3346; *Caldwell v. Walker*, (1963) 211 Cal. App. 2d 758.

4. Trees whose trunks stand on the land of one property owner belong to that property owner, while trees whose trunks stand "partly on the land of two or more coterminous owners, belong to them in common." Civil Code Sections 833 and 834. Where the tree grows on the land

of two or more property owners (a property line tree), neither owner may cut down the tree "without the consent of the other, nor cut down the part which extends into his land" if by doing so injures the common property in the tree. *Scarborough v. Woodhill* (1907) 7 Cal App 39. This proposition continues to be the law in California. See: *Kallis v. Sones* (2012)208 Cal App 4th 1274.

5. It is undisputed in this case that the olive trees at issue in this case, at the very least are property line trees, although Mr. Baccouche claims sole ownership of some of the trees depending on which licensed surveyor's method is used. As such, Ms. Albert was without authority to cut the olive trees in 2009 without the consent of Mr. Baccouche and is responsible for any damages that derive from such trespass.

6. It is further undisputed that the fence that Ms. Albert constructed to the west of the olive trees in 2009 without authorization, was a trespass to Mr. Baccouche's property. Ms. Albert refused to remove the fence on Mr. Baccouche's property after several emails, and it remained in place until October, 2009 when Mr. Baccouche exercised self help and removed it.

7. According to Plaintiff's expert Carl Mellinger, who the Court found more credible than Defendant's expert, the damages resulting from the cutting of the trees, are either the cost of the replacement at \$5000 to \$10,000 apiece, (\$45,000 to \$90,000) or the amount that the trees have been devalued at \$15,980. Plaintiff asks to be awarded the sum representing the damages to the trees value. Pursuant to Civil Code section 3346, this amount is to be doubled, or tripled where malice is found. The Court may also award damages for the "detriment proximately caused by defendant's trespass" because the trees now look like large bushes rather than tall large canopy trees. *Rony v. Costa*, (2012) 210 Cal. App. 4th 746. The Court does not find malice in

connection with the pruning of the trees. The Court does find that even after compensation for the damage, Plaintiff will still experience detriment from the loss of the aesthetic of the trees. Accordingly Defendant is liable for \$40,000 for the damage to the trees.

8. Plaintiff also asks for the cost of his land survey, as a cost of enforcing his claim for trespass. That cost is \$3000.

9. The Court awards judgment to Plaintiff on his first cause of action for trespass to Property and trees in the amount of \$43,000 representing the damage to the trees at \$15,980 doubled pursuant to C.C.P. 3346, \$8,040 for lost aesthetics and \$3000 for the cost of enforcing his property rights against trespass.

B. Abatement of Private Nuisance, Declaratory Judgment and Quiet Title

Plaintiff seeks to secure his rights to his easement through these three causes of action.

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1. **Private Nuisance**

10. Plaintiff seeks an injunction to enjoin Defendant from continuing to obstruct access to the easement and a court order requiring Defendant to remove the fence that she constructed that encloses the easement. Plaintiff also seeks punitive damages for willful and malicious interference with his interest in the easement.

11. The Civil Code defines a nuisance as “an obstruction to the free use of property, so as to interfere with comfortable enjoyment of life and property...” C.C. Section 3479. The remedy for a private nuisance is by civil action for abatement. C.C. Section 3501. Construction of a fence that obstructs the free use by another of property, to which he or she has a right, is a private nuisance. *Zimmer v. Dykstra* (1974) 39 Cal. App. 3d 422. In addition to an injunction, punitive damages are available for a private easement. Id.

12. Whether Plaintiff is entitled to relief is determined by the law of easements.

2. **Easements**

13. An easement is an interest in the land of another that entitles the owner of the easement to limited use and enjoyment in the property of another. An easement also requires that the owner of the property not interfere with the use authorized in the easement. *Darr v. Lone Star Industries* (1979) 94 Cal. App 3d 895,

14. There are many types of easements. Here, the deed of trust for the property located at 8041 Denivelle Road has contained an easement since approximately 1938 for “road purposes” over the properties located at 11203 Rhodesia Avenue and the Kohn property.

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15. Defendant purchased her property at 11203 Rhodesia Avenue, subject to and with knowledge of this easement. (Testimony of Shelly Albert, Ex 2). The Defendant does not dispute that Plaintiff possesses a dominant easement over a portion of Defendant's property that runs parallel to Denivelle Road, for purposes of a roadway.

16. As a general rule, the language of an easement is determinative of the scope of its use. *Pacific Gas & Elec Co. v. Hacienda Mobile Home Park*, (1975) 45 Cal App 3d 519 [the grant of an easement is to be liberally construed in favor of the grantee] Where there is a clear and specific grant for a specific use, as there is here, such a grant is decisive and the owner of the land may not use it in a manner that unreasonably interferes with the easement. *Wilson v. Abrams*, (1969) 1 Cal App 3d 1030. A corollary to this rule is that the owner of the property that has a servient easement may enjoy use of his property to whatever extent does not interfere with the easement and the holder of the easement must exercise the rights under the easement so as not to unduly "burden" the servient property. *Dierssen v. McCormack* (1938) 28 Cal App. 2d 164; *Atchison, Topeka & Santa Fe Ry Co. v. Abar* (1969) 275 Cal.App 2d 456. A servient owner may not use her land in a manner that obstructs normal use of the easement. *Herzon v. Grosso*, (1953) 41 Cal. 2d. 219.

17. The owner of property that has a servient easement (here 11203 Rhodesia Avenue) may not use the land in a manner that obstructs the normal use of an easement. In *Herzog v. Grosso, supra*. in a situation very similar to this one, defendants had granted an easement over their land providing ingress and egress from Plaintiffs' home. Defendant built a fence that blocked the easement, purportedly to prevent people from using the easement as a public road. The Court held that such purpose did not excuse the interference with Plaintiffs' easement. An injunction and damages for interference was affirmed. See also *Klompenburg v. Berghold*,

(2005)126 Cal App 4th 345 [upholding injunction where servient tenant constructed fence on easement even though Plaintiffs were provided keys as it contravened original grant.];

Blackmore v. Powell (2007) 150 Cal App. 4th 1593.

18. The grantee of an easement may also make repairs or improvements to the easement so long as it does not alter the intent. The courts have allowed grantees to bring an easement property to grade, improve a roadway through construction, and put up guardrails on a road easement for protection. Ballard v. Titus (1910) 157 Cal 673; Herzog v. Grasso, supra.

19. Defendant argues that the easement on her land is unusable because it is a steep hillside. The evidence, however, does not support her claim. Plaintiff's engineer expert, as well as engineer witnesses for the Defendant testified that a roadway over the easement is feasible. Further, Defendant's defense that the fence is necessary for her protection to keep out undesirables from her property is not persuasive. The fence around her property could have been built without enclosing the 13 foot easement.

20. Defendant also argues that a roadway could impact her retaining wall, which she built within 4 feet of the easement. Defendant's witness, Vic Bizai, who engineered the retaining wall, testified that despite knowing that there was an easement for roadway purposes at the north western part of Defendant's property where he located the retaining wall, he made no allowances for the weight and resulting stress of a paved road. He was unable to say whether the road would create a problem for the retaining wall. The Court can make no finding that enforcement of the easement would damage Defendant's property. Further, it is apparent that Defendant constructed the retaining walls of her property within, at one point, four feet of the easement without regard to Plaintiff's rights, and that she made a false statement to the Department of Building and Safety

in her application for a permit that her proposed construction would not interfere with an existing easement.

21. Defendant further claims, and the evidence supports, that the existing dirt roadway, which is currently predominantly over the Koln property, provides access by car or pick-up truck to Plaintiff's property. Indeed, currently the only flat road that exists is this easement on Ms. Koln's property. Defendant relies on the case of *Scruby v. Vintage Grapevine*, (1995) 37 Cal App 4th 697 for the proposition that because Mr. Baccouche does not currently need access to the easement on her property to access his property, she cannot be required to take down her fence. She argues that Defendant's use of the easement on her property is reasonable and does not deprive Plaintiff of any rights. The Court believes that Defendant's reliance on *Scruby* is misplaced. In *Scruby*, a non exclusive easement of 50 feet for roadway and utilities was at issue. The Plaintiff had access to the easement to use as a roadway, but the servient property owner also used part of the 50 foot easement for equipment for its business, to which Plaintiff objected claiming an exclusive right to the entire easement property without any use by the servient property owner.

22. The Court of Appeal, after affirming the lower court's rejection of *Scruby's* position, re-affirmed the general rule that the owner of the servient estate may use the easement "so long as the use does not 'interfere unreasonably' with the easement's purposes." *Id* at 702-203 and the cases cited therein. In *Scruby*, Plaintiff's access to the easement was not interfered with, and there was sufficient roadway for all purposes. Accordingly the denial of *Scruby's* claims was upheld on appeal. The situation here is far different. The remaining roadway accessible to Plaintiff is only wide enough for cars and pickup trucks (testimony of Baccouche) and is insufficient to support the development of the 8041 property. Plaintiff's access to the easement

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over Defendant's property is completely obliterated by the concrete fencing. Prior to the fence being constructed, Plaintiff required use of the easement for access by a bulldozer and backhoe to repair the level dirt road and dig trenches for soil exploration. That access has been cut off since sometime during 2006. Plaintiff will need access to the easement if construction is begun on his property. If sold, his property must be able to pass on an unobstructed easement to a successor owner. Plaintiff also testified to plans to subdivide and build on his property. Access to the easement for construction will be necessary. A road may need to be built using the full 26 feet of roadway. In *Scruby* the court found that Plaintiff had reasonable use of the easement for roadway purposes. Here, Plaintiff has no access to the easement on Defendant's property for any purpose at all. Accordingly, this is unlike the situation in *Scruby*.

23. Ms. Albert also claims that Mr. Baccouche is not permitted to drive on the dirt roadway of Denivelle because it is a fire road. The Los Angeles Municipal Code's Chapter V Public Safety and Protection, Article 7 Fire Protection and Prevention clearly provides an exception to the prohibition on entering upon any fire district as follows:

This subsection shall not prohibit residents or owners of private property or their invitees or guests from going to or from such private property, provided that such invitees or guests have the permission of the owner or resident to be in or upon such private property. Sec 57.25.21 (A) (1)

24. For the foregoing reasons, the Court grants Judgment to the Plaintiff on his causes of action for private nuisance, declaratory relief and quiet title. Plaintiff is entitled to reasonable use of the easement on Defendant's property. The fencing prohibiting Plaintiff's access must be removed to a site outside the easement. Defendant is enjoined from placing anything on the easement that will obstruct Plaintiff's use of the easement. The easement is to remain accessible for reasonable use by the Plaintiff for roadway purposes including the building of a roadway of

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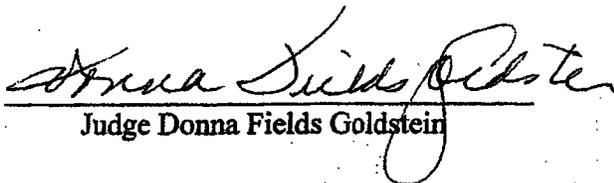
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sufficient width that meets all code requirements to his property. The Court quiets title on the reciprocal roadway easement in favor of Plaintiff.

24. The Court finds that Defendant's interference with Plaintiff's easement was intentional and malicious. She has refused to give Plaintiff access to the easement for seven years. She went so far as fencing off the access road to Plaintiff's property and telling plaintiff's representative "we don't want you here -- the community doesn't want you here, go away". This intentional blocking of Plaintiff's property and his easement is despicable conduct. The Court awards punitive damages in the sum of \$10,000.

Plaintiff is to prepare the judgment which shall be entered.

Dated: April 11, 2013



Judge Donna Fields Goldstein

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
CLERK OF SUPERIOR COURT
JUDICIAL BRANCH 1
3101 G ST
SAN DIEGO, CA 92161
TEL: 619-441-2000
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THE DOCUMENT TO WHICH THIS CERTIFICATE IS
ATTACHED IS A FULL TRUE, AND CORRECT COPY
OF THE ORIGINAL ON FILE AND OF RECORD IN
MY OFFICE **AUG 19 2015**
ATTEST.....

Sheiri R. Carter, Executive Officer of the
Superior Court of the California County of
Los Angeles.

8 - 020

by *[Signature]* DEPUTY

N. LE

Filed 9/2/14

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL – SECOND DIST.

FILED

Sep 02, 2014

JOSEPH A. LANE, Clerk

D. LEE Deputy Clerk

SHELLY ALBERT,

Defendant and Appellant,

v.

HENRI BACCOUCHE,

Plaintiff and Respondent.

B249798

(Los Angeles County Super. Ct.
No. EC054848)

APPEAL from a judgment of the Superior Court of Los Angeles, Donna Fields Goldstein, Judge. Affirmed.

Law Offices of Kerry S. Schaffer and Kerry S. Schaffer for Plaintiff and Respondent.

Gibson Law and Richard Gibson for Defendant and Appellant.

Defendant and appellant Shelly Albert appeals from a judgment in favor of plaintiff and respondent Henri Baccouche following a bench trial. Albert contends the trial court erred in ordering her fence removed from an easement on her property, and awarding compensatory and punitive damages to Baccouche. Albert further contends that the court erred in awarding costs against her under Code of Civil Procedure section 998. We affirm. Substantial evidence supports the court's finding Albert unreasonably interfered with the easement, and the court did not abuse its discretion in issuing an injunction ordering removal of the fence. The compensatory and punitive damages awarded to Baccouche are supported by substantial evidence. Lastly, Albert did not appeal from the order awarding costs under Code of Civil Procedure section 998, and we therefore have no jurisdiction to address the issue.

FACTS

Albert and Baccouche are neighboring property owners. Albert purchased property at 11203 N. Rhodesia Avenue in Sunland in 2003, with the intent to build a residence. The northern part of Albert's property line runs along a dirt roadway that leads to the contiguous property at 8041 Denivelle Road.

In 2004, Baccouche purchased property at 8001 Denivelle, which is comprised of three lots of approximately seven acres. In 2005, Baccouche purchased an adjacent property at 8041 Denivelle, which is comprised of four lots of approximately 3.3 acres. Both properties are accessed from Denivelle Road, which is paved until it reaches 8001 Denivelle, where it becomes a dirt road that leads to 8401 Denivelle. The dirt road provides the only existing access to 8041 Denivelle.

Baccouche purchased both properties as investments, intending to develop them for sale as separate residential lots. He went to both properties two to three times a year for the purpose of brush clearance, and conducted various geological inspections in anticipation of developing the land. Albert initially gave Baccouche access to the dirt road for a bulldozer and backhoe required to perform these tasks.

Roadway Easement

Baccouche's deed for 8041 Denivelle included a roadway easement for "road purposes" over Albert's property.¹ This easement allowed access along the dirt road to 8041 Denivelle, as well as another property along the dirt roadway without other access. The easement is 26 feet wide and approximately 150 feet long. It spans a 13-foot strip on the northern boundary of Albert's property and a 13-foot strip of the southern boundary of Baccouche's property. The dirt road currently is narrower than the overall easement but is within the plotted easement except where it terminates.²

At the time she purchased her property, Albert was aware of the easement, as it was predominately referenced on her deed. When Albert applied for her building permits, she signed a document under penalty of perjury "that the proposed work will not destroy or unreasonably interfere with any access or utility easement belonging to others and located on my property. But in the event such work does destroy or unreasonably interfere with such easement, a substitute easement satisfactory to the holder of the easement will be provided."

Albert erected a temporary chain-linked fence along the perimeter of her property for safety reasons when she began construction of her residence in 2006.

¹ In 1938, a grant deed was recorded reserving this roadway easement. The precise boundaries of the easement were set out in the grant deed by reference to a survey map.

² Susan Kohn owns the property contiguous to both Albert and Baccouche's property. The southern part of her property also borders the unpaved portion of Denivelle Road and has no street access except through the dirt roadway. Her property has the same easement over Albert's property, and Baccouche has a 13-foot by 150-foot easement over the southern portion of Kohn's property. Together, Baccouche and Kohn's easements create a 26 foot wide, approximately 150 foot long easement for a roadway ingress and egress to her and Baccouche's property. Kohn is not a party to these proceedings.

Albert's fence was placed "directly in the middle of the [dirt portion of Denivelle] road," enclosing the portion of the easement on her property. Albert said she would take the fence down "when the construction is finished. . . ." Nevertheless, Baccouche objected to the fence, in writing, over a long period of time. He expressed his objection to having the easement cut off and demanded that she remove the fence. Baccouche was concerned because the dirt road was his only access to the 8041 property, and he would like to use the entire 26-foot easement for roadway purposes.

The dirt roadway had been used by the Los Angeles Fire Department as a fire road for access to the hillside in the area. Sometime in or about 2005, Albert asked the Los Angeles Department of Public Works to build a fire gate at the entrance to the dirt roadway. Albert testified that she did this because she was concerned for her safety, and to prevent people from throwing trash onto her property. Albert thereafter put a lock on the gate to prevent access to the dirt road leading to 8041 Denivelle.

Around 2009, when Albert's residence was built, she replaced the temporary fence with a permanent fence with cement footers around the perimeter of her property. The fence not only permanently enclosed the portion of the easement on her property, but also encroached on the southeast portion of Baccouche's property. When Baccouche learned of the encroachment on his property, he demanded in writing that it be removed. He made several such demands. He also continued to demand that she remove the fencing that blocked his access to the easement. Albert refused Baccouche's demands. After several email communications back and forth that did not result in a resolution, Baccouche himself removed the fence that was encroaching on his property.

Albert did not walk the property line to determine where the permanent fence should go, but relied on the crew she hired to determine the property line. She was aware that the fence would enclose the easement on her property. Albert's testimony that she erected the fence for public safety because she cannot get homeowner's insurance without it was stricken by the court as inadmissible hearsay. Albert knew about the easement that ran 13 feet onto her property, although she was unaware that she had built her house so close to the easement. The retaining wall surrounding Albert's property is

very close to the easement, and in one area, is within a few feet of the easement. The engineer who built the retaining wall knew about the easement, but did not consider the weight of a potential roadway along the entire width of the 26-foot easement when calculating stress on the retaining wall. He opined that depending on how the roadway is built, it might place too much stress on the retaining wall.

All the civil engineers who testified agreed that constructing a roadway over the 26-foot easement is feasible. The experts only disagreed on the cost and how much involvement by the City will be necessary.

Albert testified that notwithstanding the easement, nor the affirmation given on her building permit, she will not remove her fence until all plans for a paved roadway are completed and permitted by the City, and will not provide a replacement easement across her property even if the construction of her extensive retaining wall causes the construction of the roadway over the easement to be impossible or prohibitively expensive.

At some point after 2009, Albert extended the reach of her fence by adding pieces to attach to the fire gate, so that access to the dirt roadway, which blocked car access through the locked gate, also blocked foot access to 8041 Denivelle.

Albert harassed the crews Baccouche hired to clear the brush on his property as required by the City. As a result of the harassment, several brush clearance crews would not work his property. In one instance, Albert parked her car in the middle of Denivelle Road to prevent access up the dirt road. Baccouche's realtor and a brush crew had come to give an estimate of the cost to clear brush on Baccouche's property. She demanded to know who was at the gate attempting to enter the dirt road leading to 8041 Denivelle, a portion of the easement which was not her property. She stated, "we don't want you here—the community doesn't want you here, go away," and prevented access to the road. Baccouche's realtor testified that Albert's hostility commenced after Baccouche planned to develop houses on his properties.

Baccouche currently has his properties listed for sale. The only access to 8041 Denivelle remains the dirt portion of Denivelle Road. If the property is to be developed,

any development will have to be through Denivelle Road, at least initially. Although Baccouche has had plans drawn up to access his property through another road behind his property, he has testified that to build new access through the alternative road is cost prohibitive. These plans have received City approval.

Olive Trees

Approximately nine olive trees sit at the border of Albert and Baccouche's property. Albert and Baccouche dispute whether there was any damage to the boundary trees and if so, the extent of the damage.

Baccouche's licensed surveyor determined ownership of the trees by calculating the location from the waist height of the trees through aerial observation. This placed the trees either on the property line or on Baccouche's property. Albert's licensed surveyor placed the trees on the survey map based on the locations of the main trunk as it meets the ground. By this measurement, most of the trees are on the property line, with one tree exclusively on Baccouche's property.

Property owners in the area are required to do regular brush clearing as they are located in a fire district. Albert testified that she was give notice by the Fire Department that she had to conduct brush clearance and cut the olive trees, although she produced no such notification at trial. The City requires that the foliage on lower branches of tall trees be cleared six feet from the ground, but fruit trees are specifically exempted.

In connection with her 2009 brush clearing efforts, Albert had the olive trees located on the property line substantially pruned. She did not contact Baccouche before the pruning and did not engage him in the process. Prior to the pruning, the trees had a large canopy of greenery at the top of the tall trunks. The trees looked substantially different after the pruning, with a more bush-like appearance.

Both parties presented testimony from retained expert arborists regarding whether the trees were damaged by the pruning in 2009. Baccouche's certified arborist, whose specialty is in damage appraisal and evaluation, used a complex computer program to

determine the devaluation of the trees as a result of the 2009 cutting. He testified that instead of just cutting foliage to six feet off the ground as required by the Fire Department, large trunks were cut off at the property line resulting in a reshaping of the trees to their current bush-like state. Using factors such as conditions before the pruning, he testified that the trees were devalued as a result of damaging cuts by \$15,980. Albert's expert arborist testified that the trees were not damaged at all.

PROCEDURAL HISTORY

Baccouche filed a complaint on January 3, 2011, a first amended complaint on March 9, 2011, and then a second amended complaint on August 29, 2011. In the operative second amended complaint, Baccouche alleged five causes of action: (1) trespass to real property and trees, (2) negligent damage to trees, (3) abatement of private nuisance, (4) declaratory relief, and (5) quiet title.

Albert filed a cross-complaint against Baccouche. At a mandatory settlement conference on July 13, 2012, the parties executed a stipulation for settlement in which Albert received \$1,500 from Baccouche and agreed to dismiss her cross-complaint with prejudice. The parties also agreed to a general release under Civil Code section 1542 and that each side would bear its own fees and costs. Albert agreed to file her request for dismissal with prejudice within five days of receipt of the settlement check. However, when Albert contacted Baccouche's counsel to advise that she was renegeing on the terms of the settlement of the cross-complaint, Baccouche sought a court order enforcing the judgment under Code of Civil Procedure section 664.6.

A bench trial began on August 27, 2012, and concluded on October 2, 2012. On April 11, 2013, the trial court issued a final statement of decision in favor of Baccouche. The court entered a judgment for damages, abatement of private nuisance, declaratory relief, and quiet title on May 7, 2013.

The court found that Albert willfully and unreasonably interfered with Baccouche's easement to his detriment. The easement is the only access to his property.

Albert fenced off the easement on her property and further fenced off all access to Baccouche's property by tying her fence to the existing fire gate. This additional fencing prevents all vehicles and foot traffic to 8041 Denivelle, and prevented Baccouche from performing the necessary brush clearance, resulting in penalties from the City. The court further found that Baccouche will need access to the easement if construction commences on his property or if his property is sold, as he must be able to pass on an unobstructed easement to a successor owner. "The remaining roadway accessible to [Baccouche] is only wide enough for cars and pickup trucks . . . and is insufficient to support the development of the 8041 property." The court awarded Baccouche \$10,000 in punitive damages, stating Albert's "intentional blocking of [Baccouche's] property and his easement is despicable conduct." As to the olive trees, the court found Baccouche's expert opinion more reliable and credible. The court awarded Baccouche on his first cause of action for trespass to property and trees in the amount of \$43,000, representing the damage to the trees at \$15,980 doubled pursuant to Civil Code section 3346, \$8,040 for lost aesthetics and \$3,000 for the cost of enforcing his property rights against trespass.

Albert filed a motion for new trial on May 16, 2013. On May 21, 2013, Baccouche filed a motion for attorney fees pursuant to Code of Civil Procedure section 1021.9, along with a memorandum of costs which included expert witness fees in the amount of \$6,329.74 pursuant to Code of Civil Procedure section 998. On June 10, 2013, Albert filed an opposition to Baccouche's memorandum of costs and moved to tax costs. On June 14, 2013, Baccouche filed an opposition to Albert's motion to tax costs. The trial court held a hearing on June 26, 2013. The court found that Albert had failed to establish grounds to tax any amount from Baccouche's memorandum of costs, and dismissed Albert's motion to tax costs in its entirety. The court also denied Albert's motion for new trial, along with Baccouche's motion for attorney fees. On July 18, 2013, the court issued an order regarding the motions for attorney's fees, to tax costs, and for a new trial. A notice of entry of the court's order was filed on July 24, 2013.

On July 1, 2013, Albert filed her notice of appeal from the judgment entered on May 7, 2013. No notice of appeal was filed from the July 24, 2013 order awarding costs.

DISCUSSION

Roadway Easement

Albert contends the trial court erred in ordering her fence removed from the easement because the fence did not unreasonably interfere with Baccouche's use of the easement. She also contends the court failed to properly balance all of the hardships between the parties when fashioning the injunction. Neither contention has merit.

"An easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be less than the right of ownership." (*Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1261, italics omitted.) The property that is benefitted by an easement is the "dominant" tenement or estate; the property that is burdened by an easement is the "servient" tenement or estate. (Civ. Code, § 803.) In this case, Baccouche's property is the dominant tenement, and Albert's property is the servient tenement.

"[T]raditional rules of property law forbid overburdening an easement or servitude and unreasonable conduct in exercising rights under either. '[T]he owner of a dominant tenement must use his easement and rights in such a way as to impose as slight a burden as possible on the servient tenement.' (*Barker v. Pierce* (1950) 100 Cal.App.2d 224, 226.)" (*Locklin v. City of LaFayette* (1994) 7 Cal.4th 327, 356, fn. 17.) At the same time, the owner of the servient estate retains "[e]very incident of ownership not inconsistent with the easement and the enjoyment of the same [¶] The owner of the servient estate may make continued use of the area the easement covers so long as the use does not 'interfere unreasonably' with the easement's purpose." (*Scrubby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702-703 (*Scrubby*)). Whether a particular use unreasonably interferes with an easement is a question of fact. We review the trial court's findings for substantial evidence. (*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 528.)

Here, the roadway easement created by the grant deed expressly provides Baccouche ingress and egress rights along the dirt portion of Denivelle Road leading to his property. When an easement is based on a grant, as it is here, the grant gives the easement holder both "those interests expressed in the grant and those necessarily incident thereto." (*Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 579.) An easement for roadway use "grants a right of ingress and egress and a right of unobstructed passage to the holder of the easement When the easement is 'nonexclusive' the common users 'have to accommodate each other.' (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 712.) An obstruction which unreasonably interferes with the use of a roadway easement can be ordered removed 'for the protection and preservation' of the easement. (*Id.* at pp. 712-713.)" (*Scruby, supra*, 37 Cal.App.4th at p. 703.)

The trial court's determination that Albert's fence unreasonably interfered with this right of access was supported by substantial evidence, and we therefore will not disturb the court's judgment. The court expressly found, "Albert has willfully and unreasonably interfered with . . . Baccouche's easement to his detriment. This easement provides the only access to his land. Not only has . . . Albert fenced off the easement on her property, but the evidence shows she has further fenced off all access to . . . Baccouche's property by tying her fence to the exiting fire road access fence with additional fencing to prevent any vehicle or even foot traffic to . . . Baccouche's land." Moreover, the court found that "[t]he continued existence of the fence on the road access easement to [Baccouche's] property is an impediment to" selling his property, "and any future efforts to develop his property and build a code complaint paved access road."

Albert argues that the existing dirt road, which is predominately over Baccouche's property, provides access by car or pickup truck to 8401 Denivelle. However, this dirt road accessible to Baccouche is *only* wide enough for cars and pickup trucks, and is insufficient to support the development of 8041 Denivelle. Prior to the fence being constructed, Baccouche required use of the easement for access by a bulldozer and backhoe to repair the level dirt road and dig trenches for soil exploration. That access was cut off by Albert's fencing shortly thereafter. Baccouche will need access to the

easement if construction is commenced on his property and will require use of the roadway easement to meet code requirements. If sold, his property must be able to pass on an unobstructed easement to a successor owner.

Albert relies on *Scruby, supra*, 37 Cal.App.4th 697 for the proposition that an owner of the dominant tenement does not have the right to use every portion of the easement. In *Scruby*, a nonexclusive easement of 50 feet for roadway and utilities was at issue. (*Id.* at 700.) The plaintiff had access to the easement to use as a roadway, but the servient property owner also used part of the 50-foot easement for equipment for its business, to which the plaintiff objected, claiming an exclusive right to the entire easement property without any use by the servient property owner. (*Id.* at 701-702.) The appellate court reaffirmed the general rule that the owner of the servient estate may use the easement “so long as the use does not ‘interfere unreasonably’ with the easement’s purposes.” (*Id.* at pp. 702-703.) The court reasoned that the plaintiff’s access to the easement was not interfered with, and there was sufficient roadway for all purposes. (*Id.* at 704.) The situation here is far different. Unlike in *Scruby*, where the plaintiff had reasonable use of the easement for roadway purposes, Baccouche has no access to the easement on Albert’s property for any purpose at all. Even if Albert removes the fencing around the fire gate and removes the lock, only a car or pickup truck can access the road leading to 8041 Denivelle, preventing proper access for developing the properties and constructing a code compliant roadway. Consequently, the trial court’s finding that Albert’s fence erected on the easement unreasonably interferes with Baccouche’s right of ingress and egress was fully supported by substantial evidence and is binding on appeal. (*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park, supra*, 45 Cal.App.3d at p. 528.)

Albert argues the trial court did not properly balance all of the hardships between the parties when fashioning the injunction because “she will suffer immediate and irreparable harm” if the fencing around her portion of the easement is removed. (See, e.g., *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 266-267 [“The trial court’s exercise of discretion to determine whether to grant or deny an injunction is based on

equitable principles. [Citation.] . . . In exercising that discretion, the court must consider the conduct and intent not only of the defendant, but also of the plaintiff. [Citation.] The trial court's consideration of the conduct of the parties must in turn be made in light of the relative harm that granting or withholding an injunction will do to the interests of the parties"].) Albert's claim that the fence is necessary for her protection and to keep undesirables from entering her property is unpersuasive. The fence around her property could have been built without enclosing the 13-foot easement. Additionally, the trial court did not admit Albert's hearsay statement that she cannot get homeowner's insurance without this fence. Substantial evidence supports the court's finding that the fence not only prevents Baccouche from developing his properties but also hinders their sale, as it is the only current means of ingress-egress. The court did not abuse its discretion in ordering Albert to remove her fence.

Punitive Damages

Albert contends the trial court erred in finding that Albert interfered with Baccouche's use of the easement, and therefore Baccouche was not entitled to punitive damage for trespass to real property. We disagree.

The trial court's finding that the interference was "intentional and malicious," provides a basis for awarding Baccouche punitive damages. Punitive damages are available for malicious interference with an easement. (See *Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 437-438.) An award of punitive damages requires a finding, by clear and convincing evidence, "that the defendant has been guilty of oppression, fraud, or malice . . ." (Civ. Code, § 3294, subd. (a).) Malice, for this purpose, is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id.*, subd. (c)(1).)

The record contains ample evidence supporting the award of \$10,000 in punitive damages. The trial court reasoned "[t]his intentional blocking of [Baccouche's] property

and his easement is despicable conduct. . . .” Albert has refused to give Baccouche access to the easement since erecting the permanent fence in 2009: She went so far as fencing off the fire gate, thereby blocking Baccouche access to his portion of the easement both by car and on foot. Albert went on to tell Baccouche’s realtor “we don’t want you here—the community doesn’t want you here, go away.” Moreover, Albert has blocked brush crews headed to Baccouche’s property, which has caused him to incur fines from the City. Under the circumstances, the award of punitive damages is supported by substantial evidence. (*Zimmer v. Dykstra, supra*, 39 Cal.App.3d at p. 439.)

Tree Damage: Civil Code Section 3346, Subdivision (a)

Albert contends that the court erred in relying on Civil Code section 3346, subdivision (a), and *Kallis v. Sones* (2012) 208 Cal.App.4th 1274 in assessing damages for Albert pruning the olive trees. Albert also argues that the court erred in failing to reduce the damages and then doubling it under Civil Code section 3346, subdivision (a).

Albert first contends for the first time on appeal that the court erroneously relied on Civil Code section 3346, subdivision (a), to assess any damage to the olive trees, and that the court should have relied on Civil Code section 834 as it applies to boundary trees by co-tenants. However, the court relies on both Civil Code sections 834 and 3346 as they are consistent with one another in assessing tree damage. (See, e.g., *Kallis v. Sones, supra*, 208 Cal.App. 4th at pp. 1278, 1280.) Regardless, Albert never denied the applicability of Civil Code section 3346 at trial, in her objections to the proposed statement of decision, or her motion for new trial. Accordingly, Albert forfeits this claim of error on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.) Any error was also invited, as Albert cited *Kallis v. Sones, supra*, 208 Cal.App.4th 1274 to support her position in closing argument without any reservation as to its application of Civil Code section 3346. (See, e.g., *Geffcken v. D’Andrea* (2006) 137 Cal.App.4th 1298, 1312 [the invited error doctrine is an application of the estoppel principle that where a party by his

or her conduct induces the commission of error, he or she is estopped from asserting it as a ground for reversal on appeal].)

Albert does not dispute that she was liable for having the olive trees pruned, including the one olive tree that was only on Baccouche's property. She argues, however, that the court failed to account for the common ownership of the eight trees in assessing damages. As trees growing on a property line, eight of the olive trees were "line trees." (*Scarborough v. Woodill* (1907) 7 Cal.App. 39, 40.) "Civil Code section 834 provides: 'Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.' As such, neither owner 'is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree.' (*Scarborough v. Woodill, supra*, at p. 40.)" (*Kallis v. Sones, supra*, 208 Cal.App.4th at p. 1278.)

"Where there is more than one legally permissible measure of damages, the trial court's choice of a particular measure under the specific circumstances of the case is a matter of discretion." (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 562; *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.) The general measure of damages for tortious injury to property is "the amount which will compensate for all the detriment proximately caused thereby." (Civ. Code, § 3333.) Putting aside the automatic doubling and potential tripling of damages, the measure for damages to trees is similar to that for property in general—the amount that "would compensate for the actual detriment." (Civ. Code, § 3346.)

The trial court relied on Baccouche's expert, who it found reliable and credible. The expert was a certified arborist, whose specialty is in damage appraisal and evaluation. He used a complex computer program to determine the devaluation of the trees as result of the pruning by Albert. There is no single fixed and inflexible rule for determining the measure of damages for injury to trees. (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862.) Diminution in value—i.e., the difference between the value of property before and after injury—is one measure that has been used. (*Ibid.*) The expert testified that instead of just cutting foliage to six feet off the ground as required by the

Fire Department, large trunks were cut off at the property line resulting in a reshaping of the trees to its current bush-like state. Prior to the pruning, the trees had a large canopy of greenery at the top of the tall trunks. He testified that the trees were devalued as a result of damaging cuts by \$15,980. Given the extensive pruning Albert inflicted on Baccouche's olive trees while trespassing on his property, we will not second-guess the amount the court selected after carefully considering the evidence before it.

We also reject Albert's contention that the trial court improperly doubled the amount of assessed damages pursuant to Civil Code section 3346, subdivision (a), which applies in cases of injury to trees. "Civil Code section 3346, subdivision (a), states in pertinent part: 'For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, *the measure of damages shall be twice the sum as would compensate for the actual detriment . . .*'" (Italics added.)" (*Kallis v. Sones, supra*, 208 Cal.App.4th at p. 1281.)

Because the court did "not find malice in connection with the pruning of the trees," it only doubled the damages as required by the statute. The court found Albert had probable cause to believe that the land which the trespass was committed was her own, and properly doubled the damages awarded to Baccouche. (Civ. Code, § 3346, subd. (a).)

Award of Costs

Albert contests the costs awarded against her pursuant to Code of Civil Procedure section 998. We have no jurisdiction to address this issue, as Albert did not file a notice of appeal from the postjudgment order.

“If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.’ [Citations.]” (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d, 35, 46.) A postjudgment order which awards costs is separately appealable, and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it. (*Ibid.*) Albert filed her notice of appeal from the judgment on July 1, 2013. The order denying Albert’s motion to tax costs was filed on July 18, 2013, and notice of entry of the order was filed on July 24, 2013. Any notice of appeal from the postjudgment costs order had to be filed within 60 days. (Cal. Rules of Court, rule 2(a)(1).) Albert’s failure to file a notice of appeal from that order precludes appellate review.

DISPOSITION

The judgment is affirmed. Plaintiff and respondent Henri Baccouche is awarded his costs on appeal.

KRIEGLER, J.

We concur:

MOSK, Acting P. J.

MINK, J. *

* Retired judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

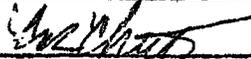
JOSEPH A. LANE, Clerk of the Court of Appeal,
Second Appellate District, State of California
do hereby Certify that the preceding is a true and
correct copy of the Original of the Opinion filed in the Cause,
as shown by the records of my office.

Witness my hand and the seal of this Court.

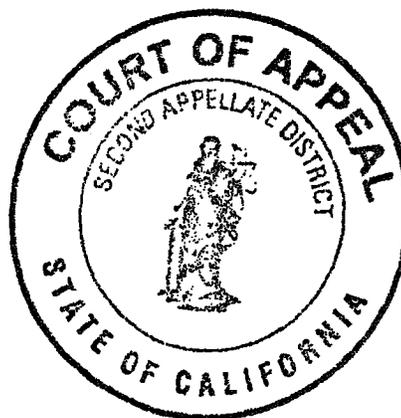
Dated

4.27.15

By



Deputy Clerk



9-017

DECLARATION OF SERVICE

by

U.S. FIRST-CLASS MAIL / U.S. CERTIFIED MAIL / OVERNIGHT DELIVERY / FACSIMILE-ELECTRONIC TRANSMISSION

CASE NUMBER(s): 13-O-13440-WKM

I, the undersigned, am over the age of eighteen (18) years and not a party to the within action, whose business address and place of employment is the State Bar of California, 845 South Figueroa Street, Los Angeles, California 90017, declare that:

- on the date shown below, I caused to be served a true copy of the within document described as follows:

FIRST AMENDED NOTICE OF DISCIPLINARY CHARGES; EXHIBITS 1-2

- By U.S. First-Class Mail: (CCP §§ 1013 and 1013(a))
By U.S. Certified Mail: (CCP §§ 1013 and 1013(a))
By Overnight Delivery: (CCP §§ 1013(c) and 1013(d))
By Fax Transmission: (CCP §§ 1013(e) and 1013(f))
By Electronic Service: (CCP § 1010.6)

- (for U.S. First-Class Mail) in a sealed envelope placed for collection and mailing at Los Angeles, addressed to: (see below)
(for Certified Mail) in a sealed envelope placed for collection and mailing as certified mail, return receipt requested, Article No.: 7196 9008 9111 1007 8509 at Los Angeles, addressed to: (see below)
(for Overnight Delivery) together with a copy of this declaration, in an envelope, or package designated by UPS, Tracking No.: addressed to: (see below)

Table with 4 columns: Person Served, Business-Residential Address, Fax Number, and Courtesy Copy to. Row 1: Shelly B. Albert, PO Box 4123 Sunland, CA 91041, Electronic Address, Arthur Lewis Margolis Margolis & Margolis LLP 2000 Riverside Dr Los Angeles, CA 90039

via inter-office mail regularly processed and maintained by the State Bar of California addressed to:

N/A

I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for mailing with the United States Postal Service, and overnight delivery by the United Parcel Service ('UPS').

I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after date of deposit for mailing contained in the affidavit.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Los Angeles, California, on the date shown below.

DATED: November 20, 2015

SIGNED:

Handwritten signature of Jason Peralta over a horizontal line, with the printed name 'Jason Peralta Declarant' below it.