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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

STARRH AND STARRH COTTON GROWERS, Plaintiff and Appellant, v. AERA ENERGY LLC, Defendant and Respondent.	Consolidated Case Nos. F058778 & F059660 (Super. Ct. No. S-1500-CV-245287) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Law Offices of Ralph B. Wegis, Ralph B. Wegis and Michael J. Stump; Hennigan, Bennett & Dorman, Bruce R. MacLeod; McKool Smith Hennigan, J. Michael Hennigan and Bruce R. MacLeod for Plaintiff and Appellant.

Munger, Tolles & Olson, Stephen M. Kristovich, Patrick J. Cafferty, Jr.; Clifford & Brown, Patrick J. Osborn, for Defendant and Respondent.

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This case involves a continuing subsurface trespass by defendant Aera Energy LLC (Aera) on the property of plaintiff Starrh and Starrh Cotton Growers (Starrh), resulting in contamination of Starrh's groundwater. After a reversal and remand by this

court, a jury awarded Starrh about $8.5 million in compensatory damages, which it determined according to the "benefits obtained" measure of damages provided by Civil Code section 3334. In the first of these two consolidated appeals, Starrh contends that a number of erroneous rulings by the trial court resulted in compensatory damages that were too low and in the preclusion of any punitive damages. We affirm the judgment with respect to compensatory damages, reverse with respect to punitive damages, and remand for a new trial on punitive damages.

In the second appeal, Starrh argues that the trial court abused its discretion when it denied Starrh's motions for attorneys' fees and costs. We conclude that the second appeal is moot because of the reversal in the first appeal. Consequently, we order that the second appeal be dismissed.

FACTUAL AND PROCEDURAL HISTORIES

The facts are described in detail in our previous opinion, *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583 (*Starrh I*). Starrh's 6,000 agricultural acres border the Belridge Oil Field, from which Aera extracts oil. Water comes out of the ground with the oil: six to nine barrels of water for every barrel of oil. This wastewater comes from far below the aquifers where ordinary groundwater is found and is high in boron, chlorides, and other dissolved solids. For many years, Aera disposed of the water by pumping it into a number of unlined ponds, including two, the Lost Hills and South ponds, which are close to Starrh's property. A great deal of wastewater has penetrated the ground beneath the ponds. It has collected in a deposit below the ponds called a "mound," and from there has migrated into the pore space under Starrh's land. The groundwater beneath Starrh's land is naturally salty, not potable, and not suitable for irrigation of most crops. Aera's wastewater has mixed with it and degraded it further. (*Id.* at pp. 589-590.)

Starrh sued Aera for trespass in 2001 and a jury trial was conducted in 2004. The jury awarded damages under two categories provided by Civil Code section 3334, "the

reasonable cost of repair or restoration of the property to its original condition" (Civ. Code, § 3334, subd. (a)), and "the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation" (*id.*, subd. (b)). (*Starrh I, supra,* 153 Cal.App.4th at pp. 589, 600, 602.) It awarded $3,248,611 in damages for benefits obtained, which the trial court had interpreted as costs avoided through the choice of the trespassing disposal method, and $3.8 million in damages for the cost of restoration of the property to its original condition. (*Id.* at pp. 589, 602.) Both sides appealed. (*Id.* at p. 589.)

In 2007, we reversed both parts of the verdict. Aera contended that the action was time-barred because the trespass was permanent, not continuing. We rejected this argument, holding the trespass was continuing. (*Starrh I, supra,* 153 Cal.App.4th at p. 597.) We agreed with Starrh that there was no evidence in the record supporting the finding that the cost of restoration was $3.8 million. (*Id.* at p. 600.) Starrh made this argument because it had sought a far larger amount of damages.

We also agreed with Starrh's argument that the trial court had interpreted the phrase "benefits obtained" in Civil Code section 3334 too narrowly. The trial court ruled that benefits obtained means "costs equal to those avoided by the trespasser—nothing more." (*Starrh I, supra,* 153 Cal.App.4th at p. 602.) It excluded evidence of Aera's profits and instructed the jury that it could award the "'reasonable value of the expenses that the defendants saved or avoided by reason of the wrongful occupation.'" (*Ibid.*) We held that the statute did not limit benefits obtained to costs avoided and that the Legislature's intent was "to eliminate *any* economic incentive to trespass as a means of waste disposal." (*Id.* at p. 604.) We concluded that "the term 'benefits obtained' may include profits enjoyed by Aera that are directly linked to the wrongful trespass." (*Ibid.*)

Immediately following these comments was a discussion in which we specified, in some detail, what we meant by "profits … directly linked to the wrongful trespass." We first rejected Starrh's contention that it should recover all the profits Aera earned by

extracting the oil associated with the wastewater that was deposited in the ponds. (*Starrh I, supra,* 153 Cal.App.4th at p. 604.) That argument "ignore[d] the alternative methods of disposal available to Aera." (*Id.* at p. 605.) Next, we described some alternative methods that had been revealed by the trial evidence. We stated that "[t]he evidence indisputably establishes that alternative, although more expensive, methods of disposal were available to Aera." Although "[t]he unquestionable intent in using the ponding method was to maximize profits," this did not "mean that no profits would be earned if other methods were selected." (*Id.* at p. 605.) Therefore, on remand, it would *not* be correct to treat as "benefits obtained" *all* the profits arising from oil production that used the disposal ponds from which the trespassing water emanated. Instead, "Starrh should be permitted to introduce evidence that some portion of Aera's profits is tied to the use of less expensive means of disposing of produced water." (*Id.* at p. 606.) In other words, the relevant profits would be the additional profits obtained by choosing the ponding method instead of the next least expensive disposal method that would have avoided the trespass.

On remand in 2009, the parties submitted motions in limine, and oral argument on the motions, in which they expressed their interpretations of our opinion's comments on benefits obtained. Aera's view was that, under the opinion, benefits obtained would be equal to the difference in cost between the ponding-disposal method and the next least expensive disposal method that would have avoided the trespass. Starrh, by contrast, continued to hope it could recover all the profits Aera earned from oil production that used the ponds for wastewater disposal. Starrh's approach would potentially lead to a billion dollars-plus more in damages than Aera's approach.

On its own motion, the court concluded that Aera's interpretation was correct: "[T]he direct link between the financial benefit and the trespass [citation] is the *difference in* (or portion of) profits between the disposal methods (the one actually used and the next least expensive available alternative) AERA enjoyed on each barrel that has

trespassed onto Starrh property, not *all* of the profits AERA enjoyed on such barrels." The court observed that it was theoretically possible for other profits to be directly linked to the trespass. For example, the trespass could have increased the revenue received for the oil, in addition to reducing the expense of extracting it. The court pointed out, however, that the parties had mentioned no evidence supporting this theory. It also observed that it was theoretically possible that the entire net profit was attributable to the cost savings arising from the trespassing disposal method, but again stated that there was no reason to think this was the case. To the contrary, our opinion had stated that it was indisputable that more expensive disposal alternatives were available that still would have allowed Aera to earn substantial profits. For these reasons, the court ruled that "Starrh will not be permitted to ask for the entire profit linked to each barrel of produced water that has trespassed …. It will only be permitted to ask for the difference in profits between the actual disposal costs AERA incurred for each barrel of produced water that has trespassed and whatever the jury finds to be the next least expensive available disposal alternative for each barrel …."

In accordance with this ruling, the court also denied in part Starrh's motion in limine to exclude evidence of alternative disposal methods Aera could have chosen instead of using the ponds. Starrh's motion in limine No. 17 sought exclusion of evidence of three alternatives to the ponds that Aera could have chosen to use but did not. These were "'Purchase and Resale of Land'" (i.e., buying the land before 1991, when Starrh did not yet own it, and later selling it to Starrh while retaining the groundwater rights), which allegedly would have cost only $228,295 more than using the ponds; "'Different Location for the Ponds,'" with an additional cost of $499,970; and "'Filtration/Disposal by Injection'" (involving filtering the wastewater and disposing of it in disposal wells sited to avoid trespass), with an additional cost of $4,034,483. Starrh argued that none of these alternatives were appropriate as a measure of damages because

"benefits obtained" meant all the profits from extracting the oil associated with the wastewater, while the alternatives were only ways of measuring avoided costs.

In its ruling, the trial court reiterated its view that the benefits obtained were the "excess profits Aera earned based partly on its decreased cost of disposal," so evidence of alternative disposal methods was admissible. The court did, however, exclude evidence of the methods of buying the land or locating the ponds elsewhere. The pond locations were chosen in 1958 by Aera's predecessor, and the purchase alternative would have required the participation of the previous owner of the land. The court ruled that these options were too speculative. The third alternative, filtration and disposal in disposal wells, "seem[ed] to be … reasonably available" and evidence of it was to be admitted.

Starrh also sought to limit the alternative disposal methods the jury could consider by requesting a jury instruction that damages could be based on alternative methods only if they were *immediately* available, that is, able to be implemented by Aera at any time, with no lag time between the decision to implement and actual implementation. The court refused to give this instruction, explaining that our opinion in *Starrh I* discussed disposal methods that might take time to implement. The court's understanding was that we were implying that these methods were potentially available.

In addition to the benefits-obtained damages, Starrh sought damages for the cost of restoring the groundwater to its original condition. Aera moved to exclude the testimony of two experts Starrh proffered to support a scenario in which all the contaminated water would be pumped out of the ground and treated, over a period of up to 50 years and at a cost of hundreds of millions of dollars. The court granted the motion to exclude the testimony of Dr. Joseph Culkin on the grounds that his proposed scheme would result in water that was in a better condition than the original condition, and that his proposals for disposing of the treated water were speculative. The court also granted in part a motion to exclude the testimony of Dr. Jeffrey Dagdigian. Because of these rulings, Starrh informed the trial court that it was unable to go forward on its claim for

damages based on the cost of restoration and would proceed to trial only on the benefits-obtained theory. The court then granted Aera's motion for nonsuit on the restoration claim. Other rulings of significance to these appeals will be described later in this opinion.

In his opening statement, Starrh's counsel told the jury he would prove that no alternative methods of wastewater disposal were available to Aera, so Starrh was entitled to all the profits Aera earned by extracting and selling the oil that resulted in the production of the water that went into the ponds. He said this figure would be in the hundreds of millions of dollars. Aera's counsel countered that alternative disposal methods were available and that the additional cost of using them would have been less than $10 million. Among others, the filtration-reinjection method[1] was available and would have cost only a few cents more per barrel than the ponding method.

Marvin St. Pierre, an Aera employee, testified that Aera actually implemented the filtration-reinjection method beginning in 2005, after the verdict in the first trial. Using the new method, Aera stopped depositing water in the South and Lost Hills ponds in 2006. St. Pierre also testified that this method was reasonably available as early as the 1950's.

The period for which Starrh sought damages was October 2, 1998 (near the time of Aera's formation) through the time of the verdict.[2] Aera expert Thomas Johnson testified that 69,430,327 barrels of wastewater from the Lost Hills and South ponds crossed the property line and migrated beneath Starrh's property during the claim period. St. Pierre testified that the difference in cost between the ponding method and the

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[1]This method is sometimes referred to in the record and briefs as the "recycle-reinjection" method.

[2]Aera was formed in 1997. The parties' briefs do not make clear why Starrh's claim period begins specifically on October 2, 1998, but it is undisputed this is the correct date.

filtration-reinjection method would be 5.81 cents per barrel. This would have amounted to a total of about $4 million over the course of the claim period.

In addition, during the implementation of the filtration-reinjection method, there would have been a cost arising from stopping oil production until the new method was in operation. When Aera actually implemented the filtration-reinjection method in 2005 and 2006, the time from the beginning of the implementation to the cessation of deposits into the South and Lost Hills ponds was about 18 months. This meant that if Aera had chosen to avoid the trespass by beginning to implement the filtration-reinjection method at the start of the claim period, it would have had to shut down production in a portion of the oil field for the first 18 months. Aera employee William Hanson testified that if the necessary portion had been shut down for the 18 months from October 1998 to March 2000, Aera's net income from oil production for that period would have been reduced by $2,976,394.

Starrh's expert Jeffrey Dagdigian testified that about 140 million barrels of wastewater crossed onto Starrh's property from the Lost Hills and South ponds during the claim period. Starrh did not, however, present any evidence of alternative methods of disposing of the wastewater or of the cost of any alternative methods. Instead, it relied on the contention that no alternative other than stopping production permanently was reasonably available, and therefore the benefits obtained were simply all of Aera's profits from the production of the oil that was accompanied by the trespassing water.

A special verdict form was submitted to the jury. First, the form asked the jury how many barrels of wastewater from the Lost Hills and South ponds crossed the boundary between the parties' land in each year of the claim period. The jury found that 2,252,262 barrels crossed in the partial year 1998, 9,009,048 barrels in each year from 1999 to 2008, and 3,753,770 barrels in the partial year 2009, for a total of 96,096,512 barrels. Next, the form asked how many dollars of benefits Aera obtained in each year from use of the Lost Hills and South ponds that resulted in wastewater crossing onto

Starrh's property. The jury found that Aera obtained $626,922 in the partial year 1998, $2,507,688 in 1999, $1,019,493 in 2000, $523,428 in each year from 2001 to 2008, and $218,095 in the partial year 2009, for a total of $8,559,622. The form asked for similar findings about wastewater deposited in two other ponds called the Reagan and Highway 33 ponds. The jury found that no water trespassed from those ponds. The court subsequently entered judgment for Starrh for $8,559,622.

The parties agree that the jury must have accepted St. Pierre's figure of 5.81 cents per barrel as the additional cost of using the filtration-reinjection method, since that figure explains the dollar figures the jury calculated for each year, given the water volumes it found for each year. The parties also agree that the jury must have accepted Hanson's figure of $2,976,394 for the profits Aera would not have earned during the 18-month implementation period if it partially shut down production in order to implement the filtration-reinjection method at the beginning of the claim period, since that figure explains the dollar amounts the jury assigned for 1998, 1999, and 2000.

The total figure for barrels of trespassing wastewater—96,096,512—is harder to explain. It falls between the parties' experts' figures of 69 million and 140 million, but not half-way between. It is 17 million barrels closer to Aera's figure than to Starrh's, and falls roughly three-eighths of the way between the two. One explanation, proposed by Aera, is that the jury believed testimony by Starrh's expert Dagdigian about errors he found in the calculations and measurements supporting Aera's figure of 69 million barrels. Adjusting Aera's figures with Dagdigian's corrections would have resulted in a total of 96.3 million barrels, according to Aera, only slightly higher than the jury's figure.

While the jury was deliberating, the court and parties discussed Starrh's punitive-damages claim. In its complaint, Starrh alleged that Aera was liable for punitive damages specifically for its conduct in continuing to use the ponds "despite and since" the judgment for Starrh on December 20, 2004, following the first trial. The reason for this specific reference to Aera's conduct after the first trial was, as the trial court explained,

that "we had our initial verdict of December 17 of '04 that no punitive damages were available for [the period before that]. It was only after that time period that punitive damages are in issue."

During the first trial, the court granted Aera's motion for nonsuit on Starrh's punitive-damages claim. Aera had argued that Starrh could not show oppression or malice by clear and convincing evidence because the interest that was invaded was Starrh's interest in its groundwater, and the evidence showed that Starrh and Aera both believed the groundwater was not usable for irrigation. As a result, Aera could not have had the intent to harm Starrh. On the other hand, Starrh contended that there was evidence that the groundwater could have been used to irrigate certain crops, including cotton, and that Aera knew this was true. The court agreed with Aera: "[T]he evidence does not rise to clear and convincing that the defendants intentionally or maliciously were trying to damage something the Plaintiffs owned[,] in this case, water rights, because even if they knew it was—could be used for cotton irrigation, certainly, in this particular case, it was never being used for such, and I don't think it rises to that particular level, so I am not going to allow the case to go forward on punitive damages." Starrh did not assert in its previous appeal that the nonsuit on this issue was erroneous.

Earlier in the current trial, the court had ruled that the trial would be divided into separate phases for compensatory and punitive damages. During the jury's deliberations on compensatory damages, however, the court decided that the second phase would be unnecessary if the jury believed Aera's evidence on a single point: whether the water Aera placed in the ponds after the first verdict in 2004 resulted in any of the trespassing that took place before the verdict in the second trial. In other words, the court believed there would be no basis for punitive damages if the jury found that all the water that had trespassed as of the time of the second verdict resulted from acts Aera committed before the first verdict. It suggested to the parties that water Aera placed in the ponds after the first verdict could result in trespasses after the second verdict, in which case Starrh might

bring a new lawsuit: "There may be another trial when those barrels eventually crossed. I don't know."

The court apparently decided on its own motion to follow this procedure. The parties' briefs do not say they requested it and we have found nothing in the record indicating that anyone suggested or requested this approach.

The jury returned its damages verdict and the court proceeded to ask the supplemental question. After saying "[y]ou are not to be concerned about why I want to know this," without allowing the parties to present evidence or argument on punitive damages, and without instructing the jury on punitive damages, the court submitted this question to the jury in writing:

> "In reference to your verdict that 96,096,512 barrels of produced water placed in the Lost Hills and South Ponds crossed the boundary between AERA ENERGY and STARRH AND STARRH COTTON GROWERS between October 2, 1998 and June 5, 2009, please answer the following question.
>
> "Did any of the 96,096,512 barrels of produced water that you found crossed the boundary between AERA ENERGY and STARRH AND STARRH COTTON GROWERS, cross because of any conduct by AERA ENERGY that occurred after December 17, 2004?"

After being sent to deliberate on this question, the jury sent the trial judge a question: "Can you please clarify on, quote, any conduct by Aera Energy that occurred after December 17 of '04?" The court gave the following answer: "What I mean by that is we know water crossed after that date. You found it. The question is, did any of Aera's conduct cause that water that crossed after December 17 of '04, did their conduct—did they do something after that date that caused that water to cross?" The jury deliberated more and returned with a "no" verdict. Based on this verdict, the court entered a judgment denying punitive damages.

There was no discussion on the record of the decision to proceed in this manner before the court went ahead with it. Apparently, the court had mentioned to the parties

off the record the previous day that it was considering this procedure. The parties were permitted to make arguments to the court on the record only after the jury had returned with its answer. Starrh objected at that time—the first time it was given a chance to object on the record—arguing that the procedure was irregular and denied Starrh the right to present evidence and argument on the claim.

Having prevailed on liability and received a compensatory-damages verdict, Starrh filed motions for attorneys' fees and costs. The motion for fees was based on Code of Civil Procedure section 1021.9, which provides:

> "In any action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, the prevailing plaintiff shall be entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law."

After the first trial, Starrh made a fee motion based on the same section. The trial court denied the motion after concluding that, even though Starrh's land was undisputedly "under cultivation," the statute did not apply because the trespass was to the subsurface, not the surface. We reversed, concluding there was no basis in the statute for that distinction. (*Starrh I, supra*, 153 Cal.App.4th at pp. 606-608.) The fee motion following the second trial covered all of Starrh's counsels' fees, those earned both before and after the first verdict.

Because Starrh's attorneys represented Starrh on a contingent-fee basis, they did not keep contemporaneous time records. To support the fee motion following the first trial, Starrh's counsel submitted attorney time information that had been reconstructed from various records. The motion applied hourly rates to each attorney's time to yield a lodestar (i.e., hours times hourly rate) figure of $4,618,997. The motion then applied a multiplier of 1.5 and requested total fees of $6,928,495. In the motion following the second trial, however, Starrh used a different approach. Instead of creating time records, counsel merely cited the 40 percent contingent fee agreed to by Starrh. Applied to the

verdict of $8,559,622, the contingent fee would be $3,423,848.80. Starrh then requested a multiplier of 2, so the total fee request was $6,847,697.60. Starrh pointed out that the contingent fee (without the multiplier) was *less* than the lodestar amount Starrh had substantiated with reconstructed time records for just the period up to the first verdict. A declaration by Starrh's lead counsel, Ralph Wegis, stated that his side spent about as much time on the case after the first verdict as before.

The trial court denied the fee motion without prejudice. It stated that, "in order to award a reasonable amount of attorney fees, the court must use the 'lodestar method,'" that is, the method by which fees are determined by first multiplying the number of attorney hours worked by the attorney's hourly rate and then applying various kinds of adjustments. Because Starrh had instead proposed a figure based on the 40-percent contingent-fee agreement, and "did not submit to this court documentation of the number of attorney hours spent on this cased nor any evidence on what might be considered reasonable attorney rates in our community for this type of legal work," the court awarded nothing.

In response to this ruling, Starrh filed a new fee motion, this time supported by reconstructed evidence of hours and hourly rates for both the period before the 2004 verdict and the period after. This time Starrh requested a lodestar figure (hours times rates) of $8,881,335.50 and a multiplier of .5, for a total request of $13,322,003.25. Starrh did not file this motion, however, until after it had filed its notice of appeal. The trial court denied the motion on the ground that it lost jurisdiction when the notice of appeal was filed. On appeal, Starrh concedes that this ruling was correct, and argues only that the court's initial denial of the motion for not including lodestar evidence was erroneous.[3]

[3]Starrh withdrew a separate appeal (case No. F060394) from the court's ruling that it lacked jurisdiction over the revised fee motion.

Starrh's motion for costs was based on Civil Code section 3334, subdivision (a), which provides:

> "The detriment caused by the wrongful occupation of real property … is deemed to include the value of the use of the real property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, *and the costs, if any, of recovering the possession*." (Italics added.)

Starrh relied on the italicized provision. It argued that the purpose of the litigation was to "recover possession of its subsurface from the continuing wrongful occupation by Aera …." It sought to recover expert witness fees and expenses, fees for reporters' transcripts of daily proceedings, and online legal research fees. The total request was $687,129.67.

Along with the costs motion, Starr also submitted a memorandum of costs pursuant to Code of Civil Procedure section 1033.5. This memorandum included deposition costs, filing fees, process server fees, court reporter fees, and other amounts established by previous orders of the court. The total amount requested was $181,563.11.

The trial court awarded $164,424.28 of the amount requested in the memorandum of costs. It denied the motion for costs based on Civil Code section 3334, stating in a written order that Starrh failed to provide sufficient evidence to support the requested amounts. It cited a similar order it issued after the first trial: "The plaintiff has been on notice since 4-08-05, over four years ago, that this court would not accept as evidence of reasonable or necessary costs the mere totals of what was billed.… This time the plaintiff did the same as it did following the last trial. Therefore, it is impossible for this court to determine if the costs submitted by the plaintiff were reasonable or necessary. Therefore, zero dollars is awarded under Civil Code 3334."

Starrh filed two appeals, one from the judgment entered on the damages verdict (case No. F058778) and one from the denials of the fee and cost motions (case No. F059660). We have consolidated these two appeals. A third appeal, No. F060394, as we have said, was withdrawn by Starrh.

DISCUSSION

I. Compensatory damages

A. Application of the benefits-obtained measure of damages

Several of Starrh's arguments on appeal challenge the trial court's application of this court's rulings on the application of the benefits-obtained measure of damages under Civil Code section 3334, subdivision (b). These arguments are raised in parts VI.A, B, D.1, D.2, and D.4 of Starrh's opening brief in case No. F058778.

Most fundamentally, Starrh says the trial court was wrong about the relationships among profits, avoided costs, and benefits obtained. This notion is discussed in part VI.A of Starrh's brief. Starrh argues that when we held that the purpose of benefits-obtained damages is "to prevent any economic advantage for polluters resulting from the wrongful dumping on another's land" (*Starrh I, supra,* 153 Cal.App.4th at p. 604), we meant that all the profits Aera earned by means of the oil extraction related to the wastewater disposal must be disgorged, not merely that Aera must pay the difference between the cost of the trespassing disposal method and the cost of a nontrespassing disposal method.

Starrh is mistaken. We did hold that profits are relevant. (*Starrh I, supra,* 153 Cal.App.4th at p. 604.) We went on, however, to say that if a nontrespassing disposal method was available, then the difference in cost between that method and the ponding method would be the proper measure of the benefits obtained. (*Id.* at p. 605.) We also expressly rejected Starrh's contention that, "because the ability to dispose of produced water is critical to Aera's ability to generate oil, Aera's overall profits were linked directly to the wrongful occupation of Starrh's property." (*Ibid.*) Our holding was that

"Starrh should be permitted to introduce evidence that some portion of Aera's profits is tied to the use of less expensive means of disposing of produced water." (*Id.* at p. 606.) The trial court correctly perceived that this meant that if revenues remain equal, then the cost savings is equal to the extra profits obtained by means of the trespass. In other words, although profits are relevant, under the particular circumstances of this case (that is, where an alternative method would increase costs but not reduce revenues), the increase in profits from the trespass is the same as the savings in costs from the trespass.

Remarks in Starrh's reply brief in case No. F058778 seem to indicate that Starrh misunderstands the point about revenues. Starrh says it is "preposterous" to argue that "revenues were not higher because the Lost Hills and South ponds were used," since Aera earned revenues by selling oil associated with the water deposited in those ponds. The question, however, is not whether there were any revenues associated with the trespassing activity. It is only whether any portion of the revenues earned would have had to be sacrificed to avoid the trespass. In this case, there was no evidence that revenues would be affected, except during the implementation period (for which the jury in fact awarded $2.9 million for revenues that would have been lost).

Starrh also argues that the benefits obtained were equal to all of Aera's profits from extracting the oil associated with the trespassing water because there really were no alternative disposal methods available to Aera. This idea is expressed in parts VI.D.1, D.2, and D.4 of Starrh's brief. Starrh says "Aera had a failure of proof" of its alternative methods, so it was "erroneous for the trial court to submit them to the jury." Starrh describes the alternative methods of which Aera presented evidence, including the filtration-reinjection method the jury relied on, as "hypothetical" and "back dated" and therefore not really available to Aera. Similarly, Starrh characterizes the alternatives Aera's witnesses described (including the one the jury relied on) as "Speculative Inventions" with "No Basis In Fact" that were used to support a "straw man" claim for avoided costs. Further, the filtration-reinjection method was not an available method

because it took time to implement it. Starrh's meaning appears to be that the jury should have been allowed to consider only alternative disposal methods that Aera actually considered before or during the time when it was depositing the water that trespassed on Starrh's land and that it could have implemented immediately. According to Starrh, only then would the alternatives have been truly available and not "hypothetical" or "back dated."

Starrh misunderstands what we meant when in *Starrh I* we stated that the cost of available alternative disposal methods must be used in calculating benefits-obtained damages. We were referring simply to methods Aera could have used, but did not. Methods that Aera could have used, but did not, naturally were "back dated" because it was necessary to consider what the consequences of using them in the past would have been, and naturally were "hypothetical" because Aera did not actually use them. We did not intend to imply anything in *Starrh I* that would support the view that, in addition to being possible, the alternatives the jury could consider must have been actually contemplated by Aera at the time of the trespass.

Starrh is also mistaken when it says, in part VI.B of its brief, that the court erred by refusing to instruct the jury that if it calculated benefits-obtained damages on the basis of an available alternative disposal method, it must find that the alternative method was *immediately* available. Starrh does not point to any place in the record where it actually requested this instruction, but it does quote the trial court's oral comments refusing to give it. The court said, "I just disagree with you if it has to be immediately available. So you are not going to get an instruction that says it has to be immediately available regardless of what Black's Dictionary says or any other dictionary, because I think the Court [of Appeal] was clearly aware that [various alternatives] were not up and running at the time and yet they still reference them." Later, the court also ruled that Starrh could not argue to the jury that an alternative needed to be immediately available: "As far as the immediately available, I've said before and I cautioned you after your opening

statement that it's not a requirement. The actual implementation or the ability to implement it immediately is not necessary to find an alternative is reasonably available. [¶] So … you cannot argue that it has to have been immediately available to implement …. That's not a requirement."

The court was correct. In *Starrh I*, we referred simply to "the alternative methods of disposal available to Aera" (*Starrh I, supra,* 153 Cal.App.4th at p. 605), not the methods immediately available. We see no reason why that limitation should have been imposed. To the contrary, if an alternative disposal method was available only with a delay for implementation, it would be logical for the jury to consider awarding damages based on the cost of using that method plus the cost of lost oil production during the implementation period. In fact, that is exactly what the jury did.

Starrh contends that by refusing to require alternatives to be immediately available, the court "made a mockery" of the legislative purpose of Civil Code section 3334, subdivision (b). It did this because the effect of the refusal was to "limit[] Starrh's recovery to Aera's 'costs avoided'" instead of all of Aera's profits from extracting the oil linked with the trespassing water.

We have already explained that in this case, benefits-obtained damages under Civil Code section 3334, subdivision (b), did not mean all of the profits Aera earned by extracting the oil at issue. This conclusion does not undermine the statute. Starrh rightly points out that in *Starrh I*, we stated that "the intent of the Legislature was to eliminate *any* economic incentive to trespass as a means of waste disposal." (*Starrh I*, *supra*, 153 Cal.App.4th at p. 604.) We also said, however, that "[i]t is not enough to simply measure the profits earned in any given time period or proportion them to a particular part of the trespasser's business." (*Id.* at pp. 604-605.) We held that the benefits obtained must be "directly linked" to the trespass (*id.* at p. 604) and that evidence that Aera received more profit because the ponding method was cheaper than another available method would show a direct link (*id* at p. 606). We did not mean, and Civil Code section 3334 does not

mean, that benefits-obtained damages are equal to the largest amount of gains by a trespasser that can be calculated in connection with a trespass. As we held, a purpose of benefits-obtained damages is to create a disincentive for illegal dumping. (*Id.* at p. 603.) Although Starrh's approach undoubtedly would be a deterrent, it would be a deterrent out of proportion to the part of the trespasser's gains that necessarily arose from the trespass. The Legislature did not intend to transfer *all* the economic benefits of an activity associated with a trespass to the injured landowner even when the trespasser could have earned most of those benefits without trespassing.

B. Wastewater remaining in the ground on Aera's side and expected to trespass later

Starrh makes two arguments about wastewater that would remain in the ground, despite Aera's adoption of an alternative disposal method, and eventually migrate to Starrh's side of the boundary. First, in part VI.D.3 of its opening brief in case No. F058778, Starrh contends that Aera admitted that its alternative methods would not stop the eventual migration of wastewater deposited before implementation, but the trial court still refused to instruct the jury it must find that any alternative it relies on will stop the trespass. In fact, both sides submitted proposed jury instructions calling for a finding that an alternative method would have kept wastewater from crossing the property line, but the instructions the court gave had no similar reference. Starrh does *not* claim, however, that this was error because it meant the jury could have relied on a method that would not work at all, i.e., would allow even the wastewater subjected to it to remain contaminated and to trespass. There is no dispute that the filtration-reinjection method would prevent trespassing by the contaminated water to which it would be applied, and there is no evidence from which the jury could have found the contrary. Instead, Starrh's point is that, unless the method was implemented many decades ago when oil production at Belridge first began, long before Aera was formed, then there would be some wastewater left in the ground after implementation and this water would eventually

migrate across the property line. Without an instruction on this point, the jury could calculate damages without taking account of that portion of the trespassing water.

The defect in this reasoning is that the verdict compensated Starrh for all the water that crossed during the claim period. The verdict form included the jury's determination of the quantity of water that trespassed, with a figure for the number of gallons for each year. It is possible, of course, that some of the water that would have been placed in the ponds before the beginning of the claim period might not have migrated onto Starrh's property until after the end of the period. It is also possible that water placed in the ponds during the claim period did not trespass until after the end of the period. The verdict form correctly asked, however, how much water trespassed *during* the claim period. Water that trespassed after would have to be the subject of a future claim. In *Starrh I*, we agreed with Starrh's argument that the trespass at issue here is a continuing trespass, not a permanent trespass; and a continuing trespass is "essentially a series of successive injuries" for which, "[i]n order to recover for all harm inflicted," a plaintiff "is required to bring periodic successive actions." (*Starrh I, supra*, 153 Cal.App.4th at p. 592.) In sum, trespassing water that would not have been prevented by the alternative method the jury relied on either was included in the jury's verdict or had not yet trespassed as of the end of the claim period and therefore would be the subject of a future lawsuit.[4]

The same reasoning applies to the second argument Starrh makes about water remaining in the ground on Aera's side. In parts VI.H and VI.I of its opening brief in case No. F058778, Starrh challenges the trial court's exclusion of Starrh's evidence regarding steps that could have been taken to pump out of the ground, or block from migrating to Starrh's property, wastewater that remained in the ground under Aera's property after Aera actually implemented the filtration-reinjection method starting in

[4]This reasoning was not addressed in the parties' original briefing. We invited the parties to submit supplemental briefing discussing it. Both parties submitted supplemental briefs.

2005. Starrh's theory was that this water would inevitably trespass and that creating an underground freshwater barrier to prevent this, or pumping the water out of the ground before it could happen, would be alternatives to trespassing; the costs Aera saved by not doing these things should be awarded to Starrh as benefits-obtained damages. The court ruled that these actions were not alternative disposal methods, and the cost savings from not taking them was not a benefit directly linked to the trespass. Aera argues that blocking or pumping the water would be a form of restoration, even though the water has not yet trespassed, so Starrh should not have been permitted to make any claim based on those techniques because its claim for restoration cost damages had been nonsuited.

Even if the trial court and Aera are both incorrect, however, the court's ruling on this point could not have had an impact on the verdict because the verdict compensated Starrh for all the water that trespassed during the claim period. That is, if any water trespassed during that period that would have been prevented from trespassing by the methods Starrh was prohibited from presenting to the jury, the verdict counted that water and awarded damages for it. If water trespasses after the end of the claim period because of Aera's failure to implement those methods (or for some other reason), that would be a subject for a future lawsuit.

The above discussion establishes that any possible error was harmless because there is no reasonable probability that the verdict would have been different absent the rulings Starrh challenges. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) The jury was asked how many barrels actually crossed during the claim period, and there is no reason to suppose it would have found a different number if it had heard evidence or instructions about wastewater remaining in the ground after implementation of the alternative disposal method.

In its supplemental brief, Starrh argues that it has been prejudiced because, for four different reasons, it may be barred from recovering additional benefits-received damages in future lawsuits. The projected outcome of future continuing-trespass

lawsuits, however, is not part of the harmless-error analysis. To determine whether an alleged error is harmless, we consider whether there is a reasonable probability of a better verdict in *this* lawsuit absent the error. As we have said, there is no likelihood of a different verdict because the verdict included all the water that actually crossed the property line during the claim period.

Some of the excluded evidence that related to pumping out or blocking water is what Starrh refers to as "Logan's documents and testimony," Logan being an expert witness. Starrh says this evidence was "relevant to other issues as well," and that the court erred in excluding it as to those issues. Starrh does not, however, say what those issues were, whether it ever obtained any rulings on the admissibility of the evidence as to those issues, and why the rulings, if there were any, were wrong. It merely states that the evidence was "admissible under a variety of Evidence Code provisions (as argued in Plaintiff's Motion to Move Exhibits into Evidence)," with a footnote citing a place in the appellate record. When an appellant's brief fails to identify issues and articulate arguments, those issues and arguments are forfeited. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

C. Pre-1993 dumping instruction

The trial court gave the jury the following instruction:

> "Various theories will be argued by the parties about how many barrels of produced water crossed the boundary between Aera and Starrh and how to calculate the benefits obtained based on those barrels. You are free to accept or reject all or any part of any theory. However, if you find that produced water placed in the ponds prior to January 1st of 1993 crossed the boundary only because of Aera's conduct prior to January 1 of 1993, you may not find any benefits obtained for those barrels."

Starrh describes the final sentence as the "Pre-1993 Dumping Instruction" and argues that the verdict must be reversed because this sentence was erroneous. This argument is made in part VI.C of Starrh's opening brief in case No. F058778.

The instruction was given because the benefits-obtained provision of Civil Code section 3334 was enacted in 1992 and took effect on January 1, 1993.[5] In the court's view, the jury could not award benefits-obtained damages based solely on conduct that took place before the provision became effective. We do not understand Starrh to be challenging that proposition.

Still, Starrh proposes numerous reasons why it was error to give the instruction: (1) Aera was not formed until 1997, so it had no conduct before 1993; (2) the court "unduly emphasized" the instruction by saying the jury was free to accept or reject the parties' theories, but not free to award benefits-obtained damages for conduct before 1993; (3) "[r]etroactive application of Civil Code §3334 to pre-1993 conduct was simply impossible under the pleadings in this case" because Starrh was not attempting to prove that Aera had successor liability for events preceding its formation; (4) the instruction "invited the Starrh II jury" to reconsider whether Aera's conduct caused a trespass, and in fact the jury *did* "redecide the issue and reach an opposite conclusion"; (5) the instruction "confused 'benefits obtained' *from dumping into storage* … with 'benefits obtained' *from the wrongful occupation*"; and (6) the instruction conflicted with our statements in *Starrh I* that Aera's "ponding practices establish a continuing trespass" and that "natural hydrological and gravitational forces" caused the wastewater to migrate to Starrh's property (*Starrh I, supra,* 153 Cal.App.4th at pp. 590, 595), and our alleged implicit holding that "evidence of the date that produced water was deposited in the ponds is unnecessary …."

Starrh's arguments on this issue are hard to follow. For instance, if Starrh never argued for retroactive application of benefits-obtained damages, it could not have been prejudiced by a jury instruction ruling out that retroactive application. Likewise, it makes

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[5]The statute was enacted on August 9, 1992. (Stats. 1992, ch. 469, § 1, pp. 1847-1848.) It became effective on "January 1 next following a 90-day period from the date of enactment of the statute …." (Cal. Const., art. IV, § 8, cl. (c)(1).)

no sense to say that the jury decided that Aera's conduct did not cause a trespass, since the award of damages presupposes Aera's trespass.

To the extent we understand Starrh's point, it is that the instruction wrongly implied that the time of dumping was the crucial time for determining Aera's liability, not the time when the water crossed the boundary, and invited the jury to deduct barrels that were deposited before 1993 but crossed during the claim period. Starrh claims it has "demonstrate[d]" that the jury chose the figure of 96,096,512 barrels of trespassing water instead of a higher figure because of the instruction. As we will explain, Starrh has not demonstrated this occurred.

Starrh's contention is that, in closing argument, Aera's counsel asserted that evidence on water-travel times showed that, of about 140 million barrels said to have crossed during the claim period, only 99 million were deposited after 1993. This is close to 96,096,512, Starrh says, so it must have been the basis of the verdict. Further, because Aera's counsel argued to the jury that all of the water in the Reagan and Highway 33 ponds was deposited there before 1993, Starrh says the jury's finding of zero barrels from those ponds must have been determined by the instruction.

This argument attributes two effects to the instruction. First, the argument claims the instruction caused the jury to view all the water deposited before 1993 as irrelevant to the damages calculation. Second, it claims the instruction caused the jury to deduct all the water deposited before 1993 from the barrel count it entered on the verdict form.

The instruction, however, directed the jury to do neither of these things. It told the jury not to award damages for water placed in the ponds before 1993 if that water crossed the boundary *only because of Aera's conduct before 1993*. This left the jury free to award damages for water deposited before 1993 if it found that Aera's actions during the claim period (such as depositing more water) were a cause of that water crossing during

the claim period.[6] Further, the instruction did not tell the jury to deduct anything from its count of barrels; it only said not to find benefits obtained for pre-1993 barrels that crossed only because of pre-1993 conduct. In this respect, the instruction was consistent with the verdict form, which first asked for a raw count of the number of barrels that crossed during the claim period. The form asked the jury, "How many barrels of produced water placed into the Lost Hills and South Ponds *crossed the boundary* between" Aera and Starrh for each year of the claim period? (Italics added.) The form did not ask for a determination of the number of barrels that crossed during the claim period but were deposited earlier, and it did not provide any means for deducting any quantity from the number of barrels that crossed.

The jury's 96-million-barrel finding for the Lost Hills and South ponds, therefore, does not reflect any kind of deduction from the barrels that crossed during the claim period. The finding of zero barrels for the Reagan and Highway 33 ponds likewise cannot be accounted for by assuming the jury thought barrels crossed but then deducted all of them because of the instruction. The jury must have accepted testimony by Aera's expert that no water ever crossed the boundary from those ponds.[7]

Because the instruction did not direct the jury to make a deduction from the barrels that crossed during the claim period, and the verdict form told the jury to enter the entire number of barrels that crossed during the claim period, any reduction in damages the jury imposed because of the pre-1993 dumping instruction could only have been

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[6]The contrary assertion in Starrh's reply brief in case No. F058778—"[t]his instruction told the jury it could not hold Aera accountable for water that was in fact pushed across the [Starrh] boundary in 1998-2008 to the extent such water had been deposited by Aera's predecessors prior to 1993"—is simply incorrect.

[7]Might water have crossed from those ponds after the end of the claim period? Starrh's expert Dagdigian testified that water from those ponds could travel to Starrh's land in 16.7 years. We express no opinion on whether this could this be a basis for a future claim by Starrh.

reflected in its calculation of the number of dollars awarded. The parties agree, however, that the award reflects a calculation of 5.81 cents for each of the 96 million barrels. Therefore, the jury did not reduce the damages award based on the challenged instruction.

For these reasons, we conclude that the instruction could not have had the effect Starrh claims. It did not tell the jury to deduct pre-1993 water even if it was pushed across the property line by Aera's deposits during the claim period. In fact, the jury did not reduce its award because of any such water. Consequently, Starrh has not shown that the instruction was either erroneous or prejudicial.

D. Interest on benefits obtained

Starrh challenges two rulings related to its claim that it should have received, as part of the benefits-obtained damages, a sum representing interest or return on capital on the money Aera saved by using the trespassing disposal method. These challenges are set out in part VI.G of Starrh's opening brief in case No. F058778.

The first ruling Starrh challenges involves proffered testimony of Starrh's expert Neill Freeman. Freeman stated in deposition testimony that the benefits received by Aera from use of the Lost Hills and South ponds were $1.8 billion if equal to gross revenue, and $1 billion if equal to after-tax net income. Spreadsheets Freeman prepared showed these figures plus prejudgment interest at an annual rate of 10 percent.

Aera filed a motion in limine to exclude all of Freeman's testimony. The court granted the motion. It ruled that Freeman's calculations had a "fundamental flaw" because they were not based on the amount of wastewater that actually crossed the property line. About prejudgment interest, it stated:

> "[A]bsen[t] evidence that Aera put the extra profits (the amount equal to avoided costs) it made into some type of interest bearing fund (this would be a direct link to the trespass), Starrh is generally not entitled to interest for purposes of benefits obtained. There must be a direct link. Other uses of extra profits become too attenuated. Starrh is permitted to present

evidence of any direct link but the interest calculation by Mr. Freeman falls short of that goal."

The second ruling Starrh challenges involves evidence that Aera made a deliberate decision not to implement an alternative disposal method because it preferred to use the money for profitable purposes. While examining an Aera employee, Starrh's counsel asked, "Do you recall one of the goals being that management wanted to delay the capital cost related to alternative disposal options to save present value dollars?" The court sustained Aera's objection on relevance grounds.

The question of prejudgment interest arose again after the verdict when, by stipulation of the parties, Starrh filed a motion pursuant to Civil Code section 3288 for prejudgment interest on the $8.5 million in benefits-obtained damages awarded by the jury. The court denied the motion without explanation.

The issue of whether the court should have granted Starrh's posttrial motion for prejudgment interest on the $8.5 million in damages involves an apparent question of first impression: Does prejudgment interest apply to benefits-obtained damages? We need not answer that question, however, because Starrh has not challenged the court's denial of the posttrial motion. Starrh's opening brief does not claim that the motion for prejudgment interest was erroneously denied. In fact, part VI.G of the brief does not mention that motion at all. Aera's brief does discuss the motion, saying it is "unclear" whether Starrh is arguing that the motion should have been granted. In any event, Starrh included no argument about the motion in its reply brief.

The only arguments Starrh does make are that it was entitled to interest or a return on capital based on $40 million to $104 million in capital costs Aera avoided by not implementing an alternative disposal method. Starrh contends the court erred when it granted the motion in limine to exclude Freeman's testimony and when it sustained Aera's relevance objection to the question about saving present-value dollars. As Aera points out, however, Starrh does not explain where these numbers come from and

provides no record citation for them. Even after Aera points this out, Starrh offers no explanation in its reply brief of why it is entitled to the time value of *that amount* of money. More specifically, Starrh does not explain why it would be entitled to the time value—whether described as interest or return on capital—of any amount other than that of the verdict (and, we repeat, it has declined to challenge the court's denial of its motion for interest on *that* amount). By not providing a basis in the record for its claim that it is entitled to interest or the value of an investment return on $40 million to $104 million, and by not providing adequate argument for that claim, Starrh has forfeited it. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com., supra,* 21 Cal.4th at p. 366, fn. 2.)

Starrh argues that we should reverse the judgment simply because the court stated that interest was available only if Aera placed the benefits it obtained in an interest-bearing fund, a proposition for which there is no authority. We do not agree. Assuming the law contains no such requirement, we would still hold that Starrh has failed to provide adequate briefing on how the court's mistaken view harmed Starrh. Starrh has not challenged the denial of its posttrial motion for prejudgment interest on $8.5 million and has not presented a comprehensible basis for its claim that it is entitled to the time value of $40 million to $104 million.

Starrh's view may be it is entitled to the return Aera could have received on money it did not spend on capital expenses involved in setting up an alternative disposal method, and that this would be distinct from Starrh's recovery for capital costs that were included in the verdict, just as operating costs included in the verdict would be distinct from any interest that could be recovered upon those costs. If so, however, there is still no reason why the principal basis for this return would not be equal to the capital costs included in the verdict. In other words, we do not see why this return would not simply be part of any prejudgment interest that could have been awarded pursuant to Starrh's posttrial motion, the denial of which Starrh does not challenge.

In sum, Starrh has failed to raise a challenge to the rejection of its motion for interest on the $8.5 million in damages because it does not refer to that motion in either of its briefs; and it has forfeited by inadequate briefing its claim for a return on $40 million to $104 million in avoided capital costs.

E. Aera's prior statements about availability of alternatives

In a brief filed in *Starrh I*, Aera argued that if it had to stop using the Lost Hills and South ponds immediately, it would need to stop oil production in part of the Belridge field for some period of time. The brief stated:

> "[T]he undisputed evidence and the jury's avoided cost finding based on the west side ponds alternative also show that if Aera had to discontinue its use of the Lost Hills and South ponds immediately, without having an alternative available on the same day it ceased operation of these ponds, Aera would have to cease operating a large portion of the oil field because of Aera's inability to dispose of the approximately 170,000 barrels of produced water coming out of the ground every day with the oil from the oil field. Of course, the resulting loss of oil production while Aera developed and implemented an alternative would be to the detriment of not only Aera but also the public at large, particularly during these times of uncertainty in the Middle East and the impact on consumers of supply and demand."

Starrh filed a motion in the current case requesting an order for judicial estoppel, preventing Aera from denying that it would have to stop oil production if it were required to stop using the Lost Hills and South ponds without an immediately available alternative. The court apparently never ruled on that motion directly, but Starrh raised the issue again by requesting jury instructions stating that Aera was bound by an admission that it would have to stop oil production under those conditions. The court denied that request.

Starrh also made a motion to introduce the above passage from Aera's *Starrh I* brief into evidence. The court denied the motion, holding that it was already clear that Aera would have to stop production while implementing an alternative method, so the evidence was cumulative.

Starrh now argues that these rulings were error.[8] It contends that if the jury had been instructed, or at least allowed to hear evidence, that Aera would have needed to shut down oil production while implementing an alternative, it would have returned a larger damages verdict. This contention appears to be based on the notion that if the jury had known of Aera's prior statements, it would have believed that Aera never had any alternatives to using the ponds and would have awarded Starrh damages based on all of Aera's oil-production profits for the entire claim period.

We need not decide whether the court's ruling was error because Starrh has not demonstrated prejudice. The jury clearly understood that oil production would have to be shut down while Aera implemented an alternative. As the parties agree, the verdict reflects a finding that if Aera had implemented the filtration-reinjection method in October 1998, it would have lost $2,976,394 because of an 18-month cessation of production in part of the oil field. This shows that the jury already understood the point that could have been demonstrated by the excluded evidence or by any reasonably framed estoppel instruction. The jury did not make the further inference Starrh wanted it to make, i.e., that Aera had *no* reasonably available alternatives. There is no reason to believe the jury would have drawn that inference if Starrh's requests had been granted because it already knew all the information Starrh sought to impart. Therefore, there is no reasonable probability that rulings favorable to Starrh on these motions would have resulted in a verdict more favorable to Starrh. As a result, any error was harmless.

To meet this harmless-error argument, Starrh claims that its goal was not "to establish Aera's need to shut-in [i.e., stop production from] oil wells if it ceased dumping in the ponds," but to impeach an Aera witness's testimony about "the measure of Aera's incremental oil profits from not having to shut in oil wells on account of lack of disposal

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[8]This argument appears in part VI.E of Starrh's opening brief in case No. F058778.

capacity …." Starrh accuses the trial court of failing to understand this distinction. The statements in Aera's *Starrh I* brief indicated that Aera would have had to stop production in some portion of the field for some period of time. The jury understood this, and there is no other material fact those statements could have shown. Even if the statements, with their references to the public interest and the situation in the Middle East, were hyperbolical, they did not refer to the *amount* of production that would have been lost. The court's decision to withhold the statements from the jury made no difference.

F. Refusal of instruction on damages for periods without available alternatives

Starrh unsuccessfully requested the following jury instruction:

> "If there was no reasonably available alternative to the ponds for disposing of produced water from any portions of the oil field during any segments of the Crossing Time Periods, then Aera's 'benefits obtained' are the profits that Aera earned from such portions of the oil field for such segments of the Crossing Time Periods."

The instructions the court approved did not include this language. Starrh argues that the court erred in refusing to give the instruction.[9]

Any error in omitting this instruction was, again, harmless. The verdict included $2,976,394 for oil-production profits Aera would have lost if it had shut down part of the field for 18 months while implementing an alternative disposal method. There is no likelihood that Starrh would have obtained a better result if the instruction had been given because the jury already understood that the benefits-obtained damages for any shutdown period were the oil profits lost because of the shutdown.

Starrh argues that the $2,976,394 finding was erroneous because it was based on a hypothetical 18-month implementation period at the beginning of the claim period (October 1998 to March 2000) instead of the 38-month period when Aera actually

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[9]This argument appears in part VI.F of Starrh's opening brief in case No. F058778.

implemented the filtration-reinjection method from 2005 to 2008. Starrh says it would have received more damages if the jury had based its findings on the latter period because that period was longer and oil prices were higher then.

This argument is hard to follow. It was appropriate to use a hypothetical shut-down period, and for that period to be at the beginning of the claim period, because the question was how much extra Aera *would have* spent or lost *if* it had used an alternative method starting at the *beginning* of the claim period. Further, the *length* of the period was merely a question of whose evidence the jury believed. Aera presented evidence that 18 months was the length of time it took to divert wastewater from the South and Lost Hills ponds. Implementing the new method for the Reagan and Highway 33 ponds took longer, but Aera presented evidence that no water from those ponds ever reached Starrh's land. This evidence was sufficient to support the jury's finding.

G. Exclusion of evidence of expert testimony on restoration costs

Starrh's complaint, as we have said, included a claim pursuant to Civil Code section 3334 for damages based on the reasonable cost of restoring the groundwater to its original condition. As part of its support for this claim, Starrh designated Joseph B. Culkin, Ph.D., to provide expert opinions.

Aera filed a motion in limine to exclude Culkin's testimony. It argued, first, that the restoration method Culkin proposed in his deposition, which involved pumping the water from the ground and treating it, would not restore the water to its original condition, but would instead result in water of better quality than the original. Starrh would receive a windfall if it were awarded damages based on the cost of making the water purer than it had been before the contamination.

Aera's motion next argued that Culkin had only speculated about how to dispose of the treated water. He proposed transferring the water to the State Water Project to be deposited in the California Aqueduct, but admitted he did not know the water-quality requirements for the State Water Project. He also proposed providing the water to oil

companies for use in boilers, but admitted he did not know the water-quality requirements for that use and did not know whether any oil companies were in need of water for that purpose.

In support of its opposition to the motion in limine, Starrh submitted a new declaration by Culkin to answer Aera's criticisms. In this declaration, Culkin stated that if the filtration method he proposed would make the groundwater better than it was originally, that would only be a "byproduct" and an "unavoidable consequence" of the process of removing boron, which was one of the primary contaminants added by Aera's trespassing water. The declaration also proposed using the treated water for irrigation. The water could "be applied as irrigation water in real time." For periods when irrigation water is not needed on Starrh's land, the water could "be held in an on site equalization tank or pond for later use in irrigation." Culkin did not know the cost or feasibility of the latter scheme. He declared, "It may be viable. I don't know."

The declaration further stated that, although Culkin still did not know what requirements the State Water Project might impose before accepting water, he believed Starrh's groundwater could be treated to achieve any degree of purity that might be required. As for boiler water, Culkin declared that differences between the treated water that could be produced from Starrh's groundwater and water actually being used in boilers by oil companies "are not economically important." He also stated that "[i]t is not conjecture on my part that large amounts of steam are being used in the oil fields of California, including those adjacent to Starr[h] Farms." He added nothing to his previous testimony, however, about whether there would be any actual demand for treated water from Starrh.

The trial court granted Aera's motion. In a written order, it stated:

> "Granted. Aera is only responsible for a restoration project that would return the native water under Starrh's property to its original state or condition. [Citation.] Aera is not responsible for cleaning the native water to a better quality. If it is not physically possible to return the native water

> to its original state, but the water can be treated to a better quality, Aera does not benefit from its trespass. However, no such evidence (that the water cannot be returned to its original state or condition) has been presented by this witness or any other witness. Evidence of water restoration projects that treat the water to a state better than its original condition is irrelevant absen[t] some showing that [this] is the best that can be done. It appears that Dr. Culkin did not testify during his deposition about a plan that would return the native water to its original state. If he did, Starrh can certainly direct the court to the specifics in the deposition or to any report he authored that was timely turned over to Aera.
>
> "Regardless of the above, Dr. Culkin's plan to dispose of the treated water is based on pure speculation. Any disposal option considered has no basis in fact. Thinking, or hoping, that the State Water Project will accept the water, or that an oil company will use it for boiler feed does not equate to having a viable disposal plan.
>
> "Aera has a right to know the specifics of the restoration plan, including viable disposal options, proposed by any witness in order to adequately defend itself. Dr. Culkin's plan does not accomplish this.
>
> "Dr. Culkin's declaration that was attached to Starrh's opposition is stricken as untimely. It is based on new opinions and evidence."

Aera filed a motion in limine to exclude testimony by another Starrh expert, Jeffrey Dagdigian. The motion argued, among other things, that Dagdigian was not qualified to opine about the matters at issue and that his opinions were based on speculation. The court agreed that some of Dagdigian's opinions were based on speculation, but ordered an Evidence Code section 402 hearing to determine whether he was qualified to give other opinions. The section 402 hearing was held and Dagdigian was allowed to testify on some issues.

The parties have not directed us to portions of the record from which we could determine whether the court intended to allow Dagdigian to give any testimony on the topic of restoring Starrh's groundwater. In any case, Starrh stated that the court's rulings left it unable to proceed on the claim for restoration costs, leading to the nonsuit on the restoration claim. Consequently, neither Dagdigian nor anyone else testified on that

issue. On appeal, Starrh does not argue that Dagdigian should not have been prevented from testifying on the subject of restoration.

Starrh contends that the court's decision to exclude Culkin's testimony about restoration was erroneous for several reasons.[10] As Aera points out, however, it is undisputed that Culkin's testimony was insufficient to establish the restoration claim without the support of Dagdigian's testimony on the same subject. In the supplemental declaration he submitted in opposition to Aera's motion in limine, Culkin stated:

> "I was designated as an expert witness in this matter by plaintiff on the general subject of 'reasonable restoration.' Actually, however, my testimony is only one component of an overall study on that topic that is the subject of the expert testimony of Jeffrey V. Dagdigian of Waterstone Environmental, Inc. The piece that I was asked to testify concerning is the method and cost of treating groundwater by reverse osmosis using the VSEP technology that I invented and patented."

Given Starrh's failure to argue that Dagdigian was erroneously prevented from testifying on restoration costs, the exclusion of Culkin's testimony on that subject was harmless because Culkin's testimony could not have established the claim for restoration costs except as support for Dagdigian's "overall study on that topic." Starrh says nothing in its reply brief to rebut Aera's argument on this point. We conclude that Starrh has failed to show that any error in the exclusion of Culkin's testimony was prejudicial. Due to this holding, it is unnecessary to address the parties' remaining contentions about the exclusion of Culkin's testimony.

H. The "hydraulic theory of trespass"

Responding to a remark in Aera's brief, Starrh argues in its reply brief in case No. F058778 that if the jury had accepted what Starrh calls the "hydraulic theory of trespass," it would necessarily have awarded more in benefits-obtained damages, and that the jury was required to accept that theory as a matter of law. We do not agree.

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[10] This argument appears in part VI.K of Starrh's opening brief in case No. F058778.

The explanation of the "hydraulic theory of trespass" in Starrh's brief goes as follows: The Lost Hills and South ponds were hydraulically linked with the groundwater at the property line in such a way that every time a barrel of water was added to the ponds, some corresponding quantity of water was pushed across the property line. As a result, for every day Aera deposited water in the ponds, there was a corresponding trespass the same day.

Starrh contends that the jury must have rejected this theory because it answered the court's special-verdict question on punitive damages in the negative. Starrh takes the view that the jury could not have found that Aera did not cause water to trespass during the time between the 2004 and 2009 verdicts (even though Aera continued depositing water in the ponds during that time) unless it had rejected the notion that each barrel deposited corresponds to a quantity of water simultaneously being pushed across the property line. Starrh also contends that if the jury had accepted the theory, it could not have found that a uniform quantity of water, 9,009,048 barrels, crossed the boundary each year. Presumably Starrh means the quantity should have varied with the amount deposited each year.

Starrh claims that the rejection of the theory must have reduced the amount of trespassing water the jury found. To find that nothing Starrh did between the two verdicts caused any of the water that trespassed during that time to trespass, the jury "had to ignore … [the] 'pushing' barrels dumped in the ponds by Aera after 2004." If the jury had accepted the hydraulic theory, it would have found that those barrels pushed some amount of water across the property line during the period between the two verdicts, and this would have increased the total.

Finally, Starrh says the jury could not properly have rejected the theory, for three reasons: (1) Substantial evidence did not support any alternative to the theory; (2) Aera was collaterally estopped from relying on any alternative theory because the *Starrh I* verdict depended on the hydraulic theory to support causation, and the causation finding

supporting the *Starrh I* verdict was not appealed from; and (3) the correctness of the hydraulic theory was the law of the case because we endorsed the theory in our opinion in *Starrh I*.

Starrh is incorrect on each of these three points. First, there was evidence upon which the jury could have relied in rejecting the hydraulic theory. Aera expert Thomas Johnson testified that the water from the Lost Hills and South ponds accumulated in an underground mound, and the amount of water flowing out of the mound and onto Starrh's property depended on "the permeability, the area and the gradient," not the amount deposited into the ponds. Those factors did not change, so the amount of contaminated water flowing out of the mound and onto Starrh's property would have been "essentially the same" even if Aera had stopped making deposits before the beginning of the claim period in 1998. Johnson also testified that water moved away from the mound at a very slow rate, inches per day at most, and could take decades to proceed through the system.

On the basis of this testimony, the jury could reasonably have found that, although adding water to the ponds caused water to trespass, and at least some portion of each quantity of water added to the ponds would eventually trespass, an increase or decrease in the amount deposited would have no short-term effect on the amount that trespassed. This was due to the buffering effect of the mound and the slow, constant rate of flow. Starrh attempts to explain away Johnson's testimony, but its argument is unpersuasive. In any event, the jury did not have to agree with it.

Second, the verdict in *Starrh I* has no collateral-estoppel effect on this issue because that verdict did not logically depend on the hydraulic theory. The jury must have accepted *some* theory of causation according to which depositing water in the ponds led to water trespassing, but it need not have endorsed the hydraulic theory in particular. The *Starrh I* jury simply answered in the affirmative the questions whether Aera intentionally, recklessly, or negligently caused its wastewater to enter Starrh's groundwater and

whether Aera's conduct was a substantial factor in causing harm to Starrh. These findings were compatible with a variety of theories of causation. They were compatible with the hydraulic theory, but they also were compatible with Aera's theory that the water would have flowed from the mound to the property line at a constant rate throughout the claim period even if Aera had stopped dumping.

Third, nothing we said in *Starrh I* implies any specific theory of causation. True, we stated that, "[a]s more water is put into the mound, more water will move toward Starrh's property," and "the water table below Starrh's property will continue to be degraded as more and more produced water mixes with the native groundwater." (*Starrh I, supra*, 153 Cal.App.4th at pp. 590, 596.) These statements imply nothing, however, about *when* or at what *rate* the water will reach Starrh's property, and it is compatible with both the hydraulic theory and Aera's constant-rate theory. We do not endorse one view or the other.

In sum, Starrh's view that the hydraulic theory of trespass was ironclad because it was fixed by *Starrh I* and could not have been rejected by any rational finder of fact is unsupported.

I. Sufficient evidence

Starrh's briefs at some points imply that the jury's 96-million-barrel finding was not supported by sufficient evidence. "When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

The jury's figure fell between the parties' experts' figures. Aera's contention that the jury's number can be accounted for by applying Starrh's expert's corrections to Aera's expert's total is reasonable. There is a small difference between the jury's figure,

96,096,512 barrels, and the figure resulting from Starrh's expert's corrections, 96.3 million, but "a reviewing court does not have to be able to arrive at the same figures after its review of the evidence …." (*People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 636.) We conclude that the substantial-evidence standard is satisfied.

II. Punitive damages

Starrh argues that the trial court erred prejudicially when it terminated Starrh's case on punitive damages after submitting a factual question to the jury without allowing the parties to present argument or to add evidence relating to punitive damages.[11] Under the circumstances, we agree.

A. Authorities relating to denial of closing argument

There is not a great deal of California authority addressing this issue, but the authority that does exist is unequivocal on the subject of a party's right to present closing argument. In *Shippy v. Peninsula Rapid Transit Co.* (1925) 197 Cal. 290 (*Shippy*), a personal injury case, defense counsel stated his willingness after the close of evidence to submit the case to the jury without closing argument. The plaintiff's counsel wanted to make an argument to the jury. The court asked the jurors to stand up if they felt they could decide the case without argument or even instructions. Ten jurors stood. The defense was willing to waive both argument and instructions. The plaintiff argued that instructions should be given, but waived argument after "noting an exception" to the proceedings. The court instructed the jury, which returned a defense verdict. The plaintiff's motion for a new trial was granted by a different judge. The defendant appealed. (*Id.* at pp. 291-294.)

The Supreme Court held that "the action and conduct of the trial judge … constituted a serious or prejudicial irregularity occurring during the trial of the cause and

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[11]This argument appears in part VI.J of Starrh's opening brief in case No. F058778.

for which a new trial should have been and was properly granted." (*Shippy, supra,* 197 Cal. at p. 294.) The court continued:

> "It is the long-established right of both of the parties thereto to have an opportunity to argue the cause and to have the jury after such argument instructed by the judge of the court as to the law of the case; and it was equally the duty of the jury under the admonition of the court not to form or express an opinion with respect to the merits of either the facts or the law of the case until the case should be finally submitted to them. The action of the trial court in the instant case in inquiring of the jurors whether they were then prepared to pass upon the issues of both fact and law involved in the case without either argument of counsel upon the facts or instructions from the court upon the law of the case amounted in substance to a requirement of the jurors that they evince a fixed state of mind with respect to both the facts and law of the case which they were not entitled to hold or to express at that stage in the proceedings." (*Shippy, supra,* 197 Cal. at pp. 294-295.)

The court went on to explain that there was no waiver because plaintiff's counsel stated that he wanted to argue and only capitulated after the court forced the jurors to demonstrate that they had prejudged the case. (*Shippy, supra,* 197 Cal. at p. 295.)

Shippy is different from the present case in one way: Here the court did not demand that the jurors stand to exhibit their improper prejudgment of the case. The underlying principle, however, is the same. The jury was improperly required to make an outcome-determinative decision without hearing argument, evidence, or instructions bearing upon that decision.

California cases dealing with this issue in other contexts have applied similar reasoning. In *In re William F.* (1974) 11 Cal.3d 249, a juvenile delinquency case, the court denied defense counsel's request to present argument after the conclusion of testimony. (*Id.* at p. 253.) Saying that "nothing that you might say is essential to or even will benefit the record," the court proceeded to find the delinquency petition true. (*Id.* at p. 253, fn. 3.) The Supreme Court reversed, holding that counsel's request to present argument must be granted "if fundamental fairness in the factfinding process is to be accorded" to the minor. The denial of argument is a denial of due process. (*Id.* at

p. 255.) In *In re William G.* (1980) 107 Cal.App.3d 210, we followed *William F.* and held that the trial court's rejection of defense counsel's attempt to make a closing argument in a juvenile delinquency case denied the minor a fair hearing. (*Id.* at pp. 216-217.)

In *People v. Bonin* (1988) 46 Cal.3d 659, 695, footnote 4, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, footnote 1, the Supreme Court disapproved *William F.* to the extent that it "implies that error adversely affecting defense counsel's closing argument necessarily infringes on the defendant's constitutional right to the assistance of counsel." It did not, however, alter *William F.*'s holding that it is error to deny a party the opportunity to present any closing argument. (*People v. Bonin*, *supra*, at pp. 694-695.)

B. Irregularity of the proceedings

There are several procedural devices, including summary adjudication and nonsuit, that allow a cause of action to be taken away from the jury because the evidence fails to raise a factual question for the jury to decide. Here, however, the court terminated Starrh's case on punitive damages without using any of these conventional methods. In fact, the court had the opportunity to use one of them and found it was not appropriate. Aera had earlier made a motion for summary adjudication on punitive damages. The court granted the motion "as to anything pre-December 17 of '04," but denied it "after that," saying, "I think there are disputed issues of fact. The jury might go either way." The court went on:

> "They might say, you know, when Aera was told that Starrh is trying to use the native groundwater yet they continued to and Starrh presented evidence that a mixture would allow them to grow cotton, Aera continued to dump knowing they were going to contaminate more of the native water, the jurors might buy that and say they should have stopped that. On the other hand, they might say that's nothing, no, it's okay. I don't know what they are going to say. I think it's disputed. I think there are disputed issues of fact. I think there are other theories. So as to the summary judgment

motion, I think there are disputed issues of fact that can go to the jury. The jury should decide whether or not punitive damages are appropriate."

We have located no authority that authorizes a trial court to ask a jury on its own motion an outcome-determinative factual question without first allowing the jury to hear evidence and argument or be instructed on the applicable law. This situation is especially problematic in a case like this one that is factually and legally complex.

C. Authorities relied on by Aera

Aera cites Code of Civil Procedure section 625, which authorizes the court to direct the jury to find a special verdict "upon all, or any of the issues." The court here undoubtedly had authority to use a special verdict form for punitive damages. It does not follow, however, that it had authority to submit an outcome-determinative question to the jury without evidence, instructions, or argument on the issue of which the outcome was to be determined.

Aera cites various cases in which a trial court's use of a special verdict, or its entry of judgment on an issue without presenting the issue to the jury, was approved by appellate courts. None of these cases, however, involve situations that are at all factually or procedurally similar to the situation we face in this case.[12] Here, there was no issue involving an inconsistent, ambiguous, or insufficient verdict in phase one of the trial. To

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[12] *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1091 (under Code Civ. Proc., § 619, court has power to send jury back out to correct inconsistent, ambiguous, or insufficient verdict); *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 301-302 (trial court has wide latitude to determine whether additional questions should be put to jury to correct inconsistent verdict); *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 284-285 (trial court has inherent power to control litigation, conserve judicial resources, and formulate rules of procedure; pretrial decision to enter defense judgment based on res judicata effect of federal court decision was within this power); *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593-1595 (under trial court's inherent power to control litigation, court acted irregularly but not improperly when, on basis of plaintiff's in-court statements, it found that cause of action was barred by statute of limitations and dismissed it via order in limine).

the contrary, the verdict in phase one of the trial completely resolved the issues in phase one. The purpose of the question the court subsequently put to the jury was to determine whether punitive damages were ruled out, an issue *not* before the jury in phase one. Further, the general scope of a trial court's power to control the litigation before it is not at issue here, only the specific question of whether a court can terminate a plaintiff's case on an issue by asking a jury a factual question in isolation, without instructions, evidence, or argument on the issue. Consequently, Aera's citations are not helpful.

Although we have focused on Starrh's right to present a closing argument because that is the primary focus of the parties' briefs, the same principles apply to jury instructions and an opportunity to present additional evidence. If the court was required to allow Starrh to present an argument to the jury, nothing could support the irregularity of not also allowing presentation of otherwise-admissible evidence or not instructing the jury on the law of punitive damages. For all these reasons, we conclude that the trial court erred.

D. Prejudice

We next turn to the question of prejudice. Starrh argues that the error is reversible per se. Under the circumstances of this case, however, it is unnecessary to address this contention. As we will explain, the error is prejudicial under the ordinary standard for reversible error: An error is reversible when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 445, p. 499 [doctrine applies to civil as well as criminal cases].) If Starrh had been allowed to present argument and evidence and if the court had instructed the jury on punitive damages, it is "reasonably probable" that the jury would have made a finding favorable to Starrh.

The first consideration supporting this conclusion is that if Starrh had been allowed to argue, then even without the introduction of additional evidence, the jury

could reasonably have made a different finding on whether water trespassed because of Aera's actions between December 2004 and the time of the second trial. The record is thin because the court acted without a motion by the parties and because it explained its thinking mostly off the record. The court appears, however, to have decided to shortcut the punitive-damages phase of the trial on the basis of the following reasoning: There was evidence of a lag time between the depositing of wastewater in the ponds and the migration of wastewater onto Starrh's property. There also was evidence that groundwater flowed from Aera's property to Starrh's at a constant rate, regardless of whether wastewater was being deposited in the ponds. Finally, there was evidence that much wastewater was stored in a mound under Aera's property and that the water that trespassed was first included in this mound and then gradually released. Due to the lag time, water deposited in the ponds after the first verdict might not have reached Starrh's property before the time of the verdict in the current case. In addition, because of the constant flow rate and the water stored in the mound, the same quantity of wastewater might have flowed across the boundary between the two verdicts even if no additional water had been deposited by Aera during that time. The court must have reasoned that if, because of this evidence, the jury found that Aera's decision to continue using the ponds after the first verdict did not cause any of the trespassing that took place between the two verdicts, then Starrh did not suffer additional harm during that period because of Aera's conduct during that period. The court must have further reasoned that if this was so, then punitive damages would have been inapplicable as a matter of law even if Aera acted with malice by continuing to use the ponds.

The court's reasoning, however, failed to take account of contrary evidence on which the jury might well have relied if Starrh's counsel had been allowed to make an argument directing the jury's attention to that evidence. In the first phase of the trial, there was evidence that water deposited in the South pond took 3.2 years to reach the nearest point on Starrh's property. The time from the first verdict to the second was

between four and five years. If Starrh had had an opportunity to point this out to the jury, the jury could reasonably have found that Aera's conduct between the two verdicts did cause water to trespass during that period.

The second consideration supporting the conclusion that the court's error was prejudicial is that the relevant evidence and the court's question were both complex. The jury was required to understand and interpret expert testimony on hydrogeology, but was placed in the position of trying to do so without the benefit of argument by either side and without instructions from the court. The court's question, similarly, was not easy to follow. It asked, "Did any of the 96,096,512 barrels of produced water that you found crossed the boundary … cross because of any conduct by AERA ENERGY that occurred after December 17, 2004?" The jury did not know what the court meant by "any conduct" by Aera "that occurred after" the first verdict, and asked a written question about it. The court's answer, unfortunately, could just as easily have been misunderstood. It said, "What I mean by that is we know water crossed after that date. You found it. The question is, did any of Aera's conduct cause that water that crossed after December 17 of '04, did their conduct—did they do something after that date that caused that water to cross?" This phrasing was no clearer than the original, and without the benefit of argument by counsel, the jury could reasonably have understood it to be asking whether Aera did anything *other than continuing to deposit water* that caused the trespassing water to trespass. The jury's "no" verdict might, after all, have been compatible with a view that the water trespassed because Aera was continuing to deposit water in the ponds.

Contrary to Starrh's view, the jury's finding was supported by evidence, and nothing in our opinion in *Starrh I* conflicts with it. This is not the end of our inquiry, however, with respect to prejudice. The evidence Starrh presented in phase one and additional evidence it could have presented in phase two, if allowed, *also* could have

supported the opposite answer if phase two had proceeded as expected, with evidence, instructions, and argument.

The third consideration supporting our prejudice determination is that with argument, instructions, and additional evidence, it is reasonably probable the jury would have found the mental state necessary to award punitive damages. Punitive damages are available "for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice …." (Civ. Code, § 3294, subd. (a).) In a trespass case, the necessary mental state exists if the defendant acted with a "conscious disregard for the property rights" of the plaintiff. (*Goshgarian v. George* (1984) 161 Cal.App.3d 1214, 1225.)

In phase one, Starrh attempted to question Barry Biggs, an Aera vice president, about when Aera learned that its wastewater had reached Starrh's land. The court upheld a relevance objection and instructed Starrh's counsel not to go into this subject. Aera's CEO, Gene Voiland, had testified in a deposition taken in 2008 that an Aera geologist told him at some point that the water had reached Starrh's land. There is no apparent reason why this evidence would not be relevant *in phase two*. On the basis of this evidence, the jury might have found that Aera knew its wastewater was trespassing but continued to deposit it in the ponds anyway. Further, the trial court itself acknowledged that it would be open to the jury to find that, after the first verdict, Aera knew Starrh was using the groundwater for irrigation, so it could no longer claim it was not conscious of harm to groundwater that had value.

E. Collateral estoppel

The collateral-estoppel effect of the nonsuit on punitive damages in the first trial does not stand in the way of a retrial on the issue. It is undisputed that there is no collateral-estoppel effect for the period *after* December 2004. It is also untrue, contrary to Aera's view, that all the evidence used in the first trial is now made inadmissible by the collateral-estoppel effect of the nonsuit.

Collateral estoppel bars relitigation of an issue already litigated and decided in an earlier proceeding. (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 413, p. 1053.) Aera has cited no authority, and we know of none, holding that it also bars re-presentation of evidence in a subsequent proceeding on a different issue. Since it is undisputed that there is no collateral-estoppel effect for the period after December 2004, any otherwise admissible evidence relevant to punitive damages for that period would not be barred by the mere fact that it was presented in the earlier trial. For example, evidence that Aera deposited water in the ponds before December 2004 with conscious indifference about whether it would violate Starrh's property rights might be admissible if it could support an inference that Aera also was consciously indifferent when it deposited water after December 2004.

F. Due process limitations on punitive damages

Aera argues that because benefits-obtained damages are based on the gain by the defendant, not the loss to the plaintiff, the due process clause of the Fourteenth Amendment mandates a ratio of zero between benefits-obtained damages and punitive damages. We decline Aera's invitation to establish a new rule that punitive damages cannot be based on an underlying award of benefits-obtained damages.

No case has ever reached this conclusion, and the rule Aera urges us to adopt would clearly be an extension of the doctrine Aera relies on. Aera relies, for instance, on *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 580, in which the Supreme Court stated that the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff," and that "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." (*Id.* at p. 580.) The court went on to hold that the Alabama court had violated the federal Constitution by awarding Gore punitive damages equal to "500 times the amount of his actual harm as determined by the jury." (*BMW of North America, Inc. v. Gore, supra,* at p. 582.) Aera interprets these references

to "actual harm" and "compensatory damages" as meaning that punitive damages cannot be awarded in any amount unless the plaintiff is awarded an underlying form of damages based on harm to the plaintiff. It contends that "Starrh received *no* damages for actual harm" because the verdict was based on benefits obtained by Aera, not harm suffered by Starrh, so no punitive damages can be awarded. Neither *Gore* nor the other United States Supreme Court or California state court cases Aera cites, however, hold that punitive damages can never be awarded in a case in which the only other damages awarded are measured by a defendant's gain.

In *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, one of the cases Aera cites, the trial court found that the plaintiff failed to state a cause of action for intentional infliction of emotional distress (among other things) and sustained the defendant's demurrer. The Court of Appeal rejected the plaintiff's argument that she could establish intentional infliction of emotional distress based on a claim for punitive damages alone. (*Id.* at p. 530.) It held that "an award of compensatory damages in some amount is a prerequisite to a punitive damage award, whether in the form of nominal damages [citation], restitution [citation], an offset [citation], or damages presumed by law [citation]." (*Id.* at p. 532.) Starrh, of course, is not attempting to recover punitive damages alone. Further, the *Berkley* court's embrace of nominal damages and restitution as underlying bases for punitive-damages awards tends to support rather than undermine Starrh's position. Nominal damages are not based on harm to a plaintiff, and restitution is designed to deprive a defendant of an unjust gain as well as to compensate a plaintiff. *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408 (*Campbell*) and *Bardis v. Oates* (2004) 119 Cal.App.4th 1, which Aera also cites, are no more helpful.

The case cited by Aera that comes closest to being factually analogous is *Bridgeport Music, Inc. v. Justin Combs Publishing* (6th Cir. 2007) 507 F.3d 470. There, a jury awarded compensatory damages of $366,939 and punitive damages of $3.5 million for copyright infringement. (*Id*. at p. 488.) In holding that the punitive-damages award

was excessive, the Court of Appeals noted that a portion of the compensatory damages was based on the profits of the infringer. It concluded that this was one reason for finding the ratio of punitive-to-compensatory damages to be too high. (*Id.* at p. 489.) The court did not, however, hold that no punitive damages could have been awarded if all the compensatory damages were based on the profits of the infringer. That question was not presented. In any event, an opinion of the Sixth Circuit is not binding authority, and to adopt it would be to extend the law, which we decline to do.

California law authorizes punitive damages for "the breach of an obligation not arising from contract" where "the defendant has been guilty of oppression, fraud, or malice …." (Civ. Code, § 3294, subd. (a).) There is no statutory limitation to cases in which the underlying damages verdict is measured by reference to the plaintiff's loss rather than the defendant's gain. Further, there is some indication in the case law that, where it is difficult to measure a plaintiff's actual harm, the constitutional considerations may be different. (*Campbell, supra*, 538 U.S. at p. 425 ["a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine'"].)

G. Double recovery

We also decline to adopt Aera's theory that to award punitive damages in this case would be to allow a double recovery because punitive damages and benefits-obtained damages have the same purpose. Aera cites *Watson Land Co. v. Shell Oil Co.* (2005) 130 Cal.App.4th 69, 79, in which it was stated that in authorizing benefits-obtained damages, "the Legislature intended to eliminate financial incentives for trespass by eradicating the benefit associated with the wrongful use of another's land." Then Aera cites *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 747, which held that punitive damages are "'for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example.' [Citation.]"

These authorities, however, refute Aera's argument instead of supporting it. *Watson Land Co. v. Shell Oil Co.* says benefits-obtained damages take away a defendant's wrongful gain. *Romo v. Ford Motor Co.* says punitives punish a defendant. These are *different* purposes. To take away a gain wrongfully obtained by a thief, for example, the law restores the stolen property to its owner. When this happens, the thief has not yet been punished. For punishment, he is sent to prison. Benefits-obtained damages and punitive damages are analogous. Benefits-obtained damages remove the gain the trespasser made by trespassing, putting the trespasser in the financial position he would have been in without trespassing. Punitive damages punish the trespasser and teach him not to do it again by putting him in a worse financial position than he would have been without trespassing.

III. Attorneys' fees and costs

A. Attorneys' fees

Conceding that the trial court lacked jurisdiction to consider its amended motion for attorneys' fees, Starrh argues that the court abused its discretion when it denied the original motion without prejudice because Starrh relied on its contingent-fee agreement instead of lodestar data. Starrh also argues, without contradiction by Aera, that if we reverse and remand for retrial, the appeal from the denial of the fee motion will be moot, since Starrh will be able to file a new fee motion at the end of the proceedings on remand. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 869, p. 929 [after general reversal, "incidental matters, proceedings, or claims based on the judgment are … nullified"].)

We agree that the appeal from the denial of the fee motion is moot. Since we are reversing the judgment in part and remanding for retrial on punitive damages, Starrh will be able to file a new fee motion on remand covering the proceedings to date. Further, lodestar data is now in the record (or available to be placed in the record) for all the

services provided by Starrh's counsel through the verdict in the second trial, and the trial court will be able to rely on it.

In its opening brief, Starrh argues that, in spite of the mootness, for the court's guidance on remand, we should decide whether the court had discretion to insist on lodestar data and refuse to consider a request based on a contingent-fee agreement alone. In its reply brief, however, Starrh backs off from the claim that the court was required to consider the fee request based on the contingent-fee agreement alone. Instead, it argues that "[w]hen a fee-shifting statute is silent as to how the trial court must determine a reasonable attorney fee, the lodestar adjustment method is presumptively applicable. [Citations.] Under that method, the existence of a contingency fee agreement between the prevailing party and his or her attorney is one of several factors that may be considered in determining whether the lodestar base should be adjusted upward." It concedes "the principle that '[t]he starting point of every fee award … must be a calculation of the attorney's services in terms of the time he has expended on the case,'" maintaining only that "it is *permissible* for the court to award a percentage of the verdict (based on the contingent fee agreement), so long as the award is not excessive when compared with a traditional lodestar calculation."

On November 7, 2011, in response to our invitation to submit supplemental authorities, Starrh filed a letter in which it appears to reverse its position again. It argues that in *People v. Taylor* (2011) 197 Cal.App.4th 757, the Third District Court of Appeal recently contradicted other authority by holding that a motion for attorneys' fees can be based on a contingent-fee agreement alone. *Taylor* involves an award of attorneys' fees as restitution under Penal Code section 1202.4, subdivision (f)(3)(H). The Court of Appeal compared this statute with fee-shifting statutes designed for application in civil cases and stated that "[v]ictim restitution presents different interests." (*Taylor, supra*, at p. 763.) It is not clear what approach the court would have taken in a civil case. Further, the *Taylor* court never stated that a court must award fees based on a contingent-fee

agreement to a litigant who declines to provide lodestar data. It merely held that the trial court did not abuse its discretion by relying on the contingent-fee agreement without lodestar data. (*Id.* at p. 764.)

In any event, it is unnecessary for us to resolve the parties' dispute over the role that Starrh's contingent-fee agreement can have in the trial court's determination of a reasonable attorneys' fees figure. Lodestar data has already been placed before the court for the period from the beginning of the litigation until the verdict after the second trial. There is no doubt that the court will have discretion to consider this data as well as the contingent-fee agreement. If Starrh refuses to submit lodestar data for the period after the second verdict, the trial court should decide in the first instance on remand, in light of *Taylor* and other authority, whether it should award fees for that period based on the contingent-fee agreement alone.

Next we turn to Aera's argument that the amended motion should not be considered on remand because it was untimely filed as a matter of law. Conceding that the trial court did not reject the amended motion for this reason, Aera argues that we should hold it was untimely filed because Starrh filed it within 90 days after the ruling denying the original motion, but not within 60 days.

It is unnecessary for us to decide whether the amended motion was timely filed because of our holding that the appeal is moot. Consequently, even if the motion were untimely filed, Starrh would be entitled to file a new motion at the conclusion of the proceedings on remand.

For the benefit of the trial court, we observe that if we were to rule on the issue, we would not conclude the motion was untimely filed as a matter of law. Because the trial court did not specify a time for filing of the amended motion, the only requirement was that the motion be filed within a reasonable time. (*Coviello v. Moco Fruit Co.* (1941) 42 Cal.App.2d 637, 639.) We see no basis for a determination that a reasonable time in this case was 60 days—not 90 days. To file the amended motion, Starrh's

attorneys had to reconstruct time records for several years of litigation. For us to say *as a matter of law* that this was a 60-day task, not a 90-day task, we would have to conclude that reasonable minds cannot differ on the point. We do not believe that to be the case.

Citing cases involving statutes of limitations (e.g., *Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1522), Aera argues that we should reason by analogy and hold that a reasonable time for the amended motion was 60 days because 60 days was the time limit for filing the original motion under California Rules of Court, rules 3.1702(b) and 8.104(a)(1). We are not persuaded. The circumstances surrounding the refiling of a fee motion after a denial without prejudice can differ from those surrounding the filing of the original motion. To hold that the 60-day period applies to refiling as well *as a matter of law* would imply that trial courts have no discretion to find a longer period for refiling to be reasonable. That simply is not correct.

The fact that Starrh is entitled to an award of reasonable attorneys' fees as the prevailing party under Code of Civil Procedure section 1021.9 and our holding in *Starrh I, supra,* 153 Cal.App.4th at pages 606-608, is established. The only reason Starrh did not obtain a fee award is that the trial court was not satisfied with Starrh's evidentiary showing. Starrh will have an opportunity to satisfy the court on remand.

B. Costs

Starrh argues that the trial court erred and abused its discretion when it denied Starrh's motion for costs under Civil Code section 3334. Finding that Starrh did not provide sufficient evidentiary support for the motion, the court denied the motion with prejudice, denying Starrh an opportunity to supplement the evidentiary support and saying Starrh should have known what evidence was required because the court denied a similar motion for similar reasons after the first trial more than four years earlier. Starrh's appeal from the denial of this motion also is moot because the judgment is reversed.

Again, for the guidance of the trial court and the parties on remand, we make several observations. First, the court's denial of the motion on grounds of inadequate evidence *with prejudice* is questionable. Under Civil Code section 3334, a trespass victim is *entitled* to costs incurred in recovering possession of property. When the court's dissatisfaction is based on the moving party's failure to adhere to remarks the court made almost five years earlier, a reasonable course of action might be to allow the moving party to supplement its showing in an amended motion. Given the procedural posture here, we are not called upon to decide whether the court's failure to provide this opportunity was an abuse of discretion.

On the other hand, Starrh is mistaken in its argument that the court abused its discretion by finding the evidence supplied to be inadequate. Starrh says the court should have relied on its own knowledge of the proceedings to determine which of the requested costs were recoverable and what amounts were reasonable. The court clearly had discretion to rely on its own knowledge of the proceedings, but it also had discretion to insist on a more detailed accounting of the costs submitted by Starrh and a more detailed explanation of the need for the costs incurred. (See, e.g., *Wagner Farms, Inc. v. Modesto Irr. Dist.* (2006) 145 Cal.App.4th 765, 774 [reasonableness of cost item is question of fact for trial court, reviewable for abuse of discretion].)

Aera argues that even if Starrh's costs had been sufficiently supported by evidence, at least some of them are not recoverable costs under Civil Code section 3334. Aera contends that costs are recoverable under that section only if they are "'reasonably necessary to the conduct of the litigation'" and "'reasonable in amount'" within the meaning of Code of Civil Procedure section 1033.5, subdivisions (c)(2) and (c)(3). It contends that Starrh's evidence failed to establish that any of the claimed costs were reasonably necessary or reasonable in amount, as discussed above, but it also contends that some of Starrh's claimed costs were not reasonably necessary *by definition* because, for instance, they pertained to expert testimony that was excluded. Starrh argues that the

reasonableness requirements of Code of Civil Procedure section 1033.5 do not apply to costs recoverable under Civil Code section 3334. It says Civil Code section 3334, subdivision (a), makes "the costs, if any, of recovering the possession" a category of damages which need only be shown to be proximately caused by the trespasser.

The trial court did not expressly rule on the relationship between costs under Code of Civil Procedure section 1033.5 and costs under Civil Code section 3334, but it did implicitly require a showing of reasonableness and necessity when it stated that "it is impossible for this court to determine if the costs submitted by the plaintiff were reasonable or necessary."

The appeal being moot, we also need not rule on the relationship between the two statutes. Even if Code of Civil Procedure section 1033.5 does not apply to costs under Civil Code section 3334, however, the court did not abuse its discretion in requiring the submitted costs to be reasonable and necessary. We do not interpret section 3334 to mandate an award of unreasonable or unnecessary litigation[13] costs, even if those costs should be viewed as a category of damages. In this case the parties stipulated to have the trial court decide on the costs request under Civil Code section 3334. We are not prepared to hold that a court deciding on that type of request is precluded from considering whether the requested costs are reasonable and necessary. We express no opinion on which costs claimed by Starrh were reasonable and necessary, a matter to be determined in the first instance by the trial court.

Finally, Aera argues that no costs are recoverable under Civil Code section 3334 because that section authorized recovery only of costs "of recovering the possession" of the property. (Civ. Code, § 3334, subd. (a).) Aera says the statute is inapplicable because the property in question is Starrh's groundwater and Starrh neither lost nor

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[13]The statute refers to "cost … of recovering the possession" without limitation to litigation costs. (Civ. Code, § 3334, subd. (a).) About nonlitigation costs of recovering possession, we say nothing.

recovered possession of its groundwater. The trial court did not address this argument and we need not decide it now; the trial court can consider it in the first instance on remand.

DISPOSITION

The judgment is reversed with respect to punitive damages, and the case is remanded for a new trial limited to the issue of punitive damages, consistent with part II of the Discussion above. The appeal from the denial of Starrh's motions for attorneys' fees and costs (case No. F059660) is dismissed as moot. At the conclusion of the proceedings on remand, Starrh may submit new motions for fees and costs for determination consistent with part III of the Discussion above. The judgment is affirmed in all other respects.

The parties shall bear their own costs on appeal.

Aera's motion in case No. F059660, filed on April 14, 2011, to strike portions of Starrh's reply brief, or in the alternative for leave to file a surreply brief, is denied as moot.

Starrh's request in case No. F058778, filed on July 2, 2010, for judicial notice of a brief filed by Starrh in *Starrh I* and a portion of the reporter's transcript of the 2004 trial, is granted.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Kane, J.

_____
Detjen, J.