A159332

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT, DIVISION ONE

ATLAS PALLET CORP.,

Plaintiff & Appellant,

v.

USS-POSCO INDUSTRIES,

Defendant & Respondent.

Appeal from the Superior Court of Contra Costa County
Hon. Charles S. Treat
No. C19-00370

Appellant's Opening Brief

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CERTIFICATE OF INTERESTED PARTIES

This is the initial certificate of interested entities or persons submitted on behalf of Appellant Atlas Pallet Corp.

The undersigned certifies that interested entities or persons required to be listed under rule 8.208 of the California Rules of Court is **Le Shang Lin**, a real person, and the sole owner of Appellant Atlas Pallet Corp. (AA 107–108.)

Other than Mr. Lin, there are no interested entities or persons that must be listed in this Certificate under rule 8.208.

Dated: 7/30/20

By: */s/Benjamin I. Siminou*
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QUESTION PRESENTED

Under California law, landowners have a duty to maintain their land in a reasonably safe condition. Plaintiff, Defendant's neighbor, alleges that Defendant knew vagrants were camping—and setting *campfires*—in a neglected area of Defendant's property characterized by overgrown, dry grass. Can Plaintiff sue Defendant if, after Defendant failed to take appropriate action, Plaintiff's business was destroyed *twice in five years* by grassfires started by vagrants camping in Defendant's field?

INTRODUCTION

This appeal concerns an order sustaining a demurrer to a complaint by Atlas Pallet Corporation ("Atlas") against USS-POSCO Industries ("UPI").

In that complaint, Atlas sought damages after a fire on UPI's property spread to Atlas's neighboring property, destroying it. Atlas's complaint alleged that UPI knew vagrants frequently camped—and set *campfires*—in an unmaintained field on UPI's property characterized by tall, dry grass. Atlas further alleged that, in August 2013, a vagrant camping in UPI's field ignited a grassfire that quickly spread to Atlas's adjacent property. Atlas—which was in the business of manufacturing and storing wooden pallets—quickly burned to the ground.

But this lawsuit is *not* about that fire. This lawsuit is about the *second* fire that destroyed Atlas. That fire occurred in August 2018, when yet another vagrant camping in UPI's field ignited yet another grassfire that quickly spread to Atlas, destroying it yet again.

Having now lost its business twice in five years, Atlas sued UPI seeking damages for the August 2018 fire, alleging negligence, premises liability, trespass, and nuisance theories. In its operative complaint, Atlas alleged that UPI had two specific duties:

First, Atlas alleged UPI had a duty to take reasonable measures "to prevent homeless people from entering the property, camping there, and creating a fire hazard for neighboring landowners," in order to decrease "the risk of fires occurring on its property" in the first place.

Second, Atlas alleged UPI had a duty to "mow dry grass," "perform weed abatement," "clear debris," and otherwise maintain its field to decrease the risk that "fires occurring on its property" would "spread[] to the Atlas property."

The trial court sustained UPI's demurrer without leave to amend on two grounds:

First, it concluded that, as a matter of law, UPI did not have a duty to prevent any trespassers from rendering UPI's property a fire hazard to its neighbors.

Second, it concluded that UPI was not liable for failing to clear its overgrown, dry grass since such a duty would expose owners of "huge swaths of grassland realty ... throughout much of the county and the state[] to liability for spreading fires ... that the landowners had nothing to do with starting."

The trial court was wrong on both counts.

First, under California law, landowners have a duty—subject to ordinary negligence principles—to mitigate a hazardous condition on its property, even where the condition was created by a trespasser.

Second, under California law, landowners have a duty—subject to ordinary negligence principles—to prevent the accumulation of flammable materials on their premises, and are liable for fire damage resulting from a breach of that duty, even if the fire was started by a third person.

Accordingly, the judgment in favor of UPI must be reversed, and this case remanded with directions to overrule UPI's demurrer, or at worst, to sustain with leave to amend.

STATEMENT OF FACTS

UPI is a national steel manufacturer with 700 employees and sales exceeding $1 billion.[1] UPI built its empire out of a sprawling property in an industrial area of Pittsburg, California. (AA 020.) Most of that property is developed, except for a large, unmaintained field in the northwest corner. (AA 022.)[2]

Presumably because it was far from UPI's operations, UPI essentially treated its field as a dumping ground and a place to store hazardous waste and industrial chemicals. (E.g., AA 023, 032.) Otherwise, UPI's employees largely ignored the field, and as a result, the field was consistently full of tall grass, overgrown weeds, and dead tree limbs. (AA 022; see also AA 008 [describing "dense 3 to 4-foot-high vegetation"].)

Indeed, UPI's field was so consistently and thoroughly overgrown that neighbors—particularly "Pacific Coast General," an adjacent business—regularly complained to UPI about the overgrowth and urged UPI to clear its field. (AA 023.)

But tall grass, overgrown weeds, and dead tree limbs were not the only things in UPI's field on a regular basis. Ostensibly drawn to the field's remote location and the coverage its overgrown vegetation provided (AA 009), vagrants have long used UPI's field as an indefinite campsite, replete with tents, mattresses, and furniture. (AA 022–023, 025.)

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[1] <https://www.ussposco.com/about_us.php> [as of July 30, 2020].

[2] Citations to the "Appellant's Appendix" appear as **(AA ###)**. Citations to the "Reporter's Transcript" appear as **(RT ##)**.

As one might expect, UPI's neighbors were greatly concerned about the transients camping in UPI's field.

For example, in addition to complaints about the overgrown field, the employees at Pacific Coast General regularly complained to UPI about the transients camping in it, citing them as an additional reason for UPI to clear its field. (AA 023.)

Other neighbors— "Auto Marine Services" and "US Glass & Aluminum"—also reported seeing homeless encampments on UPI's field on a near-constant basis. (AA 023.)

Indeed, the problem with transients at UPI's property was so pervasive that the Pittsburg Police Department received over **200** calls about it during a six-month span in 2010. (AA 026.)

Five years later, in 2015, the problem with vagrants camping in UPI's field was still so pervasive that UPI *itself* called the police about the issue. (AA 026.) Like UPI's neighbors, the police bluntly advised UPI to "clean up" its field. (*Ibid.*)

On rare occasion over the years, UPI would actually heed calls to mow its grass and dismantle the transients' encampments. (AA 094.) But each time, the overgrown grass and transients would quickly return. (AA 094; AA 023.)

The vagrants in UPI's field were a particular concern to the employees at nearby US Glass & Aluminum: They actually reported seeing vagrants gathering tree branches and starting campfires in UPI's field on numerous occasions. (AA 023–024.)

Perhaps not surprisingly, multiple wildfires broke out in UPI's field over the years.

The first fire occurred in **August 2013**. According to an insurance report, that fire erupted when a homeless person camping in UPI's field on a "long-term" basis discarded "smoking material" among the "dry grass in the field, which quickly caught fire." (AA 024.) Fed by the tall, dry grass, the fire spread from UPI's field to neighboring property, including Pacific Coast General and Atlas. While Pacific Coast General suffered only relatively minor damage, Atlas—which manufactured and stored wooden freight pallets—quickly burned to the ground. (AA 024.)

The second fire occurred in **August 2018**. According to the fire department's report, that fire started when yet another homeless person who had been camping in UPI's field ignited some grass with a lighter, which then spread to "adjacent dry grass." (AA 027.) Like the fire five years before, the August 2018 grassfire quickly spread to Atlas's property, where Atlas—again full of wooden pallets—burned to the ground once more. (AA 027.)[3]

Tragically, the August 2018 fire was the end of Atlas. After Atlas's insurer paid its claim for the August 2013 fire, Atlas could no longer afford fire insurance from the insurers who would actually it write a policy. As a result, Atlas was uninsured when it burned a second time in August 2018, and could not afford to rebuild.[4]

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[3] A week before the August 2018 fire, Pacific Coast General had again urged UPI to clear its overgrown field. (AA 024.)

[4] The August 2018 fire was the last one to burn Atlas, but it was not the last fire in UPI's field. In August 2019, *another* grassfire broke out near Atlas's now vacant land. (AA 105, 107.)

STATEMENT OF THE CASE

I. Atlas's original complaint; UPI's first demurrer

Atlas sued UPI for the August 2018 fire, alleging premises liability, negligence, trespass, and nuisance. (AA 006.)

In its original complaint, Atlas emphasized that UPI had a duty to reasonably maintain its property to prevent foreseeable harm to its neighbors, but failed to do so. (AA 009.) Specifically, Atlas alleged that UPI failed to reasonably maintain its property by, among other things, allowing "vegetation to grow in such a manner as to provide cover to ongoing transient activity and thereby increasing the likelihood of transient activity on the property," and by failing "to protect against or stop the presence of transients burning fires on the property, which presented an unreasonable risk of harm to Atlas." (AA 009.)

UPI demurred, arguing it did not have a duty to protect Atlas from third parties trespassing on UPI's property. (AA 014.) The trial court agreed and sustained the demurrer.

In its order, the trial court emphasized that "[t]here is no allegation that UPI, or any of its employees, had anything whatsoever to do with starting this fire." (AA 014.) The trial court further emphasized that "the complaint alleges no *affirmative acts* by [UPI] creating or enhancing ... the risk of transients." (AA 016, italics added.)

Instead, Atlas had merely accused UPI "of *failing* to take various steps to *prevent* transients from occupying [UPI's] property and starting fires there—inadequate security in general, poorly maintained fences, trash and vegetation, and just generally failing

to keep transients out." (AA 016.) Thus, the trial court concluded that "the case is one seeking to impose a duty on a landowner to control or prevent the activities of a third party." (AA 015.)

In the trial court's view, such a duty only "exist[ed] if the defendant had a 'special relationship' either to the immediate wrongdoer (as a parent responsible for a child), or to the victim (as a university responsible for the safety of its students)." (AA 015.) Since "[n]o such special relationship is alleged or hinted at here," the trial court concluded that Atlas's "complaint fails to allege any factual basis for a duty." (AA 016.)

Although the trial court was "skeptical that plaintiff can amend in a way that will survive a renewed demurrer," it nonetheless gave "plaintiff one chance to try," and therefore sustained UPI's demurrer with "leave to amend." (AA 017.)

II. Atlas's amended complaint; UPI's second demurrer

Atlas filed an amended complaint. There, Atlas once again alleged that UPI had a "duty as a landowner to exercise reasonable care to maintain its premises in a reasonably safe condition" so as "to prevent a fire from starting on its property and spreading to neighboring landowners." (AA 028.) This time, Atlas emphasized that UPI breached that duty in two ways:

First, as before, Atlas alleged that "[a]s owner of the field UPI had control over who was permitted to enter the land and had the right and ability to prevent homeless people from entering the property, camping there, and creating a fire hazard for neighboring landowners." (AA 028.) Specifically, Atlas alleged that UPI had a duty to "erect barricades" to prevent the "steady flow of

trespassers into the area" who then "enter and occupy the land." (AA 031.) But UPI failed to do so, increasing "the risk of fires occurring on its property." (*Ibid.*)

Second, Atlas alleged that "[a]s owner of the field … UPI also had control over the accumulation of debris, weeds, grass, and other combustible materials" there. (AA 028.) Specifically, Atlas alleged that UPI had a duty to "clear debris," "mow dry grass," and "perform weed abatement" in the area. (AA 031.) But UPI failed to do so, increasing the odds that any "fires occurring on its property" would quickly "spread[] to the Atlas property." (AA 031.)

UPI demurred again. As before, it argued that there is no "special relationship" between neighboring landowners under California law, and therefore that it did not have an affirmative duty to maintain its field for Atlas's protection. (AA 110.)

Atlas opposed. (AA 088.) Citing Civil Code section 1714, Health and Safety Code sections 13007 and 13008, and other authorities, Atlas emphasized that UPI had an affirmative duty to maintain its property so as to prevent foreseeable risks to its neighbors. (E.g., AA 098.)

The trial court sustained UPI's demurrer once again.

In its order, the trial court held that "[t]he fatal problems in the original complaint are still present in the First Amended Complaint." (AA 118.) Specifically, the trial court once again emphasized the absence of any affirmative misconduct by UPI that started the fire, and the absence of a special relationship between UPI and Atlas. (*Ibid.*) On that basis, the trial court—referencing its "previous analysis" (*ibid.*)—rejected Atlas's theory that UPI

was liable by virtue of having failed "to prevent homeless people from entering the property, camping there, and creating a fire hazard for neighboring landowners." (AA 028.)

Next, the trial court addressed Atlas's "detailed allegations that [UPI] created or allowed multiple sources of great fire danger on its property, including overgrown grass." (*Ibid.*) The trial court correctly read those allegations as suggesting a "theory that even if [a] defendant is entirely blameless as to the origin of the fire, it may be liable for negligently creating a condition that made the fire much worse and harder to extinguish." (AA 118.)

The trial court acknowledged that "[t]he theory finds legal support in *Reid & Sibell, Inc. v. Gilmore & Edwards Co.* (1955) 135 Cal.App.2d 60," in which a court permitted a claim for fire damage to proceed to trial against a man who stored paint thinner in a building that caught fire, even though he did not actually start the fire. (AA 118.) But the trial court bluntly distinguished *Reid*: "The Court cannot accept … that mere overgrown dry grass without more could amount to a sufficiently negligent … hazard to bring the case within the … theory of *Reid*." (AA 119.)

Atlas sought leave to amend (RT 16), and the trial court indicated it might grant leave to amend "if [Atlas] could allege" something "other than grass which were fire hazards that were actually involved in this fire." (RT 17.) But on the assumption Atlas would "have alleged it by now" if it could (*ibid.*), the trial court sustained UPI's demurrer without leave to amend, and entered judgment in favor of UPI. (AA 121.) This appeal followed.

STATEMENT OF APPEALABILITY

On October 15, 2019, the trial court sustained a demurrer to Atlas's operative complaint without leave to amend. (AA 105.) Although that order was captioned as an "order sustaining a demurrer," it stated that all of Atlas's claims against UPI—and UPI itself—were "dismissed with prejudice." (AA 109, capitalization omitted.)

On October 28, 2019, UPI served Atlas with a "Notice of Entry of Judgment or Order" to which UPI attached the trial court's October 15 order. (AA 110–116.)

Cognizant that "[a]n order sustaining a demurrer without leave to amend is not appealable," (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1396), Atlas submitted a proposed judgment of dismissal on November 21, 2019, to moot any possibility this Court might not construe the October 15 order as an entry of dismissal. (AA 120–123.)

On December 10, 2019, the trial court advised Atlas that it "cannot file/issue your proposed judgment of dismissal" because the "matter is dismissed as to this party." (AA 130.)

Having thus confirmed with the trial court that its October 15 order contained a judgment of dismissal—and was therefore appealable (*Sisemore*, *supra*, 151 Cal.App.4th at p. 1396)—Atlas filed a notice of appeal on December 24, 2019. (AA 131.)

The December 24 notice of appeal (AA 110) was filed less than 60 days after the October 28 notice of entry (AA 131), and was therefore timely. (See Cal. Rules of Court, rule 8.104(a)(1).)

STANDARD OF REVIEW

This appeal concerns an order sustaining a demurrer without leave to amend. (AA 105.)

In reviewing that order, this Court's first task is to "determin[e] whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In doing so, the reviewing court must "accept as true the properly pled factual allegations of the complaint." (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1557, citing *Blank*, *supra*, 39 Cal.3d at p. 318.) "Furthermore, the allegations of the complaint must be read in the light most favorable to the plaintiff and liberally construed with a view to attaining substantial justice among the parties." (*Venice Town*, *supra*, 47 Cal.App.4th at p. 1557.)

If this Court determines that the operative complaint is *not* sufficient to state a claim, it must next determine "whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion," and reversal is required. (*Blank*, *supra*, 39 Cal.3d at p. 318.)

"Because the function of a demurrer is to test the sufficiency of a pleading as a matter of law, [reviewing courts] apply the de novo standard of review in an appeal following the sustaining of a demurrer without leave to amend." (*California Logistics, Inc. v. State of California* (2008) 161 Cal. App. 4th 242, 247.)

ARGUMENT

The balance of this brief proceeds in three parts:

Part I demonstrates that UPI owed a duty, subject to ordinary negligence principles, to prevent its property from posing a fire hazard to its neighbors under Civil Code section 1714.

That general duty included two underlying ones:

- a duty to prevent trespassers from exposing UPI's neighbors to unreasonable fire danger (e.g., by installing fencing, clearing vegetation, and demolishing encampments); *and*

- a duty to prevent natural conditions of its property from exposing UPI's neighbors to unreasonable fire danger (e.g., by trimming vegetation and cutting fire-breaks between the field and UPI's neighbors).

Part II demonstrates that if the foregoing duties were not imposed on UPI by virtue of Civil Code section 1714, they were certainly imposed under the plain language of Health & Safety Code sections 13007 and/or 13008.

Part III demonstrates that, in addition to negligence-based claims, UPI's general duty to prevent its property from posing a fire hazard to its neighbors also supports claims against UPI for premises liability, nuisance, and trespass.

I. UPI owed a duty under Civil Code section 1714 to mitigate fire hazards on its property.

"The general rule in California, as codified in Civil Code section 1714, is that all landowners are responsible for an injury caused to another by the want of ordinary care or skill in the management of their property." (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 488.) To that end, "California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 514.)

As discussed in the sections that follow, UPI's general duty to maintain its land in a reasonably safe condition gave rise to two specific duties of care in this case:

First, UPI had a duty to take reasonable measures (such as installing fencing, clearing vegetation, and demolishing encampments) "to prevent homeless people from entering the property, camping there, and creating a fire hazard for neighboring landowners." (AA 028.)

Second, UPI had a duty to "clear debris," "mow dry grass," and "perform weed abatement" in its field in order to decrease the risk that "fires occurring on its property" would "spread[] to the Atlas property." (AA 031.)

A. UPI had a duty to prevent trespassers from rendering UPI's property a fire hazard to its neighbors.

At bottom, the trial court entered judgment for UPI simply because the fire here, although originating in UPI's field, was started by a *trespasser*. (AA 016.) In so holding, the trial court's order stands for the sweeping proposition that landowners will *never* have a duty to prevent trespassers from exposing their neighbors to unreasonable fire danger, no matter how foreseeable that fire danger is, or how easily it could have been prevented.

As discussed below, the trial court was wrong in two fundamental respects:

First, California long ago abandoned a system in which "immunities from liability" were "predicated upon" rigid "classifications of trespasser, licensee, and invitee." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 117.) Under modern California law, landowners have a general duty maintain their land in a reasonably safe condition, which includes an affirmative duty to mitigate hazardous conditions "even though the condition was created solely … by the unauthorized conduct of some third person." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 369, italics added, citing Rest.2d Torts, § 364, subd. (c).)

Second, any categorical exceptions to that duty must be subjected to "critical scrutiny" (*Sprecher*, *supra*, 30 Cal.3d at p. 363), and should only be indulged if "clearly supported by public policy." (*Rowland*, *supra*, 69 Cal.2d at p. 112.) Here, public policy *strongly* favors imposing a duty of reasonable care on landowners to protect their neighbors from foreseeable fire danger posed by trespassers on the landowner's property.

1. UPI had the exclusive ability—and thus the duty—to prevent trespassers from rendering its field a fire hazard to its neighbors.

The trial court's decision to absolve UPI of liability for the fire that destroyed Atlas simply because it was started by a trespasser is fundamentally at odds with California tort law.

Indeed, "[i]n this state, duties are no longer imposed on an occupier of land solely on the basis of rigid classifications of trespasser, licensee, and invitee." (*Ann M.*, *supra*, 6 Cal.4th at p. 675.) Instead, "ordinary negligence principles … determine a possessor's liability for harm caused by a condition of the land," regardless of how the condition arose or who it affects. (*Sprecher*, *supra*, 30 Cal.3d at pp. 364–365.)

Thus, the mere fact that the fire that destroyed Atlas was started by a trespasser on UPI's property does not absolve UPI of liability if UPI was negligent in failing "to prevent homeless people from entering the property, camping there, and creating a fire hazard for neighboring landowners." (AA 028.)

This conclusion is rooted in the California Supreme Court's landmark decision in *Rowland*, *supra*, 69 Cal.2d 108.

In that case, the plaintiff—a "social guest" (or "licensee") of the defendant—was injured by a broken a knob on a faucet in the defendant's bathroom. At the time, the "general rule" was that a landowner only owed an "invitee a duty to exercise ordinary care to avoid injuring him," and "that a trespasser and licensee or social guest [were] obliged to take the premises as they find them insofar as any defective condition thereon may exist." (*Rowland*, *supra*, 69 Cal.2d at p. 114.)

Rowland held that "the wholesale immunities resulting from the common law classifications" were at odds with "the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code … that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property." (*Rowland*, *supra*, 69 Cal.2d at p. 119.)

Thus, rather than "rigid classifications" and resulting categorical immunities, *Rowland* held that "[t]he proper test to be applied to the liability of a possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." (*Ibid.*) While *Rowland* acknowledged that "the plaintiff's status as a trespasser, licensee, or invitee may … have some bearing on the question of liability, the status is not determinative." (*Ibid.*)

Although *Rowland* dealt specifically with "the duty to take affirmative action for the protection of individuals coming upon the [defendant's] land" (*Sprecher*, *supra*, 30 Cal.3d at p. 368), a subsequent case—*Sprecher*, *supra*, 30 Cal.3d 358—confirmed that, under *Rowland*, "ordinary negligence principles … determine a possessor's liability for harm caused by a condition of the land" to neighboring properties, regardless of how the condition arose. (*Sprecher*, *supra*, 30 Cal.3d at pp. 364–365.)

In *Sprecher*, "heavy spring rains" provoked "an active landslide" from a 90-acre parcel onto a neighboring home. (*Id.* at p. 361.) Citing evidence the parcel owner "had reason to know of

the landslide, but did nothing to abate the condition" (*id.* at p. 373), the homeowner sued for the resulting damage to his home.

Notably, both sides agreed the landslide was "a natural condition of the land" and had *not* "been affected by any of [the owner's] activities on the 90-acre parcel." (*Ibid.*) That fact was significant because, historically, landowners were only liable for harm to neighbors caused by "artificial conditions" on their land; landowners "ha[d] no duty to remedy a natural condition of the land in order to prevent harm to a property outside his premises." (*Ibid.*)

The California Supreme Court granted review in *Sprecher* to decide whether a landowner's liability for "harm to a property outside his premises" should be "determined by reference to the origin of the condition causing harm or in accord with ordinary principles of negligence." (*Id.* at p. 362.) Ultimately, *Sprecher*—relying heavily on *Rowland*—chose the latter and rejected "[t]he distinction between artificial and natural conditions." (*Id.* at 371.)

As *Sprecher* explained, "modern cases recognize that after *Rowland*, the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the property." (*Sprecher*, *supra*, 30 Cal.3d at p. 368.)

In *Sprecher*'s view, a landowner's "supervisory control over the activities conducted upon, and the condition of, [its] land" (*id.* at p. 368, quoting *Husovsky v. United States* (D.C. Cir. 1978) 590 F.2d 944, internal quotes omitted), rendered it moot whether a hazardous condition was "artificial" or "natural" in origin. Either

way the landowner had the ability—and, thus, the *duty*—to take reasonable steps to mitigate it. (*Id.* at pp. 364–365; see also *Leslie Salt Co. v. San Francisco Bay Conservation & Development Commission* (1984) 153 Cal.App.3d 605, 622 ["[L]iability and the duty to take affirmative action flow not from the landowner's active responsibility for a condition of his land that causes widespread harm to others … but rather, and quite simply, from his very possession and control of the land in question."].)

Of course, if a landowner's control over its property supports an affirmative duty to mitigate a naturally occurring condition, it follows that landowners also have the ability—and, thus, the *duty*—to prevent *trespassers* from creating hazardous conditions on their property.

And, indeed, in rejecting the distinction between artificial and natural conditions, *Sprecher* relied on the fact that "most courts recognize that the possessor is under an affirmative duty to act with regard to an artificial condition even though the condition *was created solely … by the unauthorized conduct of some third person*." (*Id.* at p. 369, italics added, citing Rest.2d Torts, § 364, subd. (c).)

Sprecher did not cite any California decisions as support for that rule, but it could have.

For example, in *People v. Southern Pac. Co.* (1957) 150 Cal.App.2d Supp. 831, the appellate department of the Los Angeles Superior Court recognized that "[t]he owner … of real property who has notice or knowledge that a continuing condition exists on such property … and who thereafter fails to use reasonable care to

abate such condition, is liable therefor in the same manner *as the one who first created it*." (*Id.* at p. 833, italics added.)

And in *Rogers v. Jones* (1976) 56 Cal.App.3d 346, the Court of Appeal recognized that "[w]here . . . it is the conduct of a third party on the premises which directly causes the injury, liability may attach … where the possessor of the premises has reasonable cause to anticipate such conduct and the probability of resulting injury, and fails to take affirmative steps to control the wrongful conduct." (*Id.* at p. 351, disapproved on other grounds in *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112; see also *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799 ["Liability will normally be imposed in circumstances where the possessor has reasonable cause to anticipate the misconduct of third persons."].)

Instead of California cases, *Sprecher* cited section 364 of the Restatement Second of Torts, which states that "a possessor of land is subject to liability to others outside of the land" for a harmful condition "created by a third person without the possessors consent" if "reasonable care is not taken to make the condition safe after the possessor knows or should know of it." (Rest.2d Torts, § 364, subd. (c).) The comment to section 364 confirms that "[t]he rule stated in this Subsection applies to an artificial condition created on the land ... by any third person, *including a trespasser on the land*." (*Id.*, com. j, p. 262, italics added.)

Similarly, Prosser & Keeton's treatise states that a landowner "is under a duty to exercise proper care to prevent harm

to others" from "the conduct of trespassers" if the owner "knows or should know of the danger." (Prosser & Keeton, Torts (5th ed. 1984) § 57, p. 392.)

Prosser drew that conclusion from cases such as *De Ryss v. New York Central Railroad Co.* (1937) 275 N.Y. 85, and *Brogan v. City of Philadelphia* (Pa. 1943) 29 A.2d 671.

In *De Ryss*, a trespasser on railroad property accidentally shot a man on neighboring land while the trespasser was attempting to hunt ducks on a nearby river. In reviewing the claim, New York's highest court stated:

> Care commensurate with the known danger is the duty of every owner of real property. Thus if the railroad authorities knew that persons were in the habit of shooting guns from its bridges or signal towers, ordinary caution would have required the company to take measures to stop it; such practice continued after knowledge of its existence and an opportunity to end it would make the company liable.

(*De Ryss*, *supra*, 275 N.Y. at p. 91.)

Similarly, in *Brogan*, a motorist was injured when boys trespassing on a construction site seized mortar material left open at the site, and threw it at passing cars. In light of "evidence that for some time, with the landowner's knowledge, boys entered on his land and buildings, then in his possession, and threw missiles into the street," the Pennsylvania Supreme Court held that the landowner could be liable if he failed to "exercise[] the proper measure of care to prevent the use of his property by the boys in such way as might reasonably be thought to result in injury to users of the public highway." (*Brogan*, *supra*, 29 A.2d at p. 673.)

These authorities all confirm that, subject to ordinary negligence principles, landowners have an affirmative duty to prevent hazardous conditions on its property, even where such conditions were "created solely … by the unauthorized conduct of some third person." (*Sprecher*, *supra*, 30 Cal.3d at p. 369.)

But of all the decisions that might be cited on this point, two are particularly instructive.

The first is this own Court's decision in *Levy-Zenter Co. v. Southern Pacific Transportation Co.* (1977) 74 Cal.App.3d 762.

In that case, a fire broke out beneath a wooden warehouse in a railyard owned by Southern Pacific, then spread to several neighboring businesses. (*Id.* at pp. 768–769, fn. 1.)

As in this case, "[i]tinerant activity" at the railyard was "the single most likely source" of the fire. (*Id.* at p. 775.) Also like this case, the plaintiffs in *Levy-Zenter* presented evidence of "repeated instances of itinerant activity in the vicinity of the warehouse" prior to the fire. (*Id.* at p. 776.) And, like this case, a prior fire had occurred at an identical warehouse at the railyard which had also been "attributed ... to itinerant activity, as evidenced by the cardboard beds ... observed underneath [that warehouse] just before its destruction in the [prior] fire." (*Ibid.*)

Ultimately, this Court affirmed the verdict against Southern Pacific, finding "that there was ample substantial evidence" of "Southern Pacific's negligence," including the fact that Southern Pacific ~~"failed to take precautions against continuing itinerant activity."~~ (*Ibid.*)

The second decision directly on point is the Illinois Court of Appeal's decision in *Dealers Service & Supply Co. v. St. Louis National Stockyards Co.* (Ill.Ct.App. 1987) 508 N.E.2d 1241.

In *Dealers*, a fire broke out on a vacant lot owned by one landowner, which then spread to—and burned down—a building on a neighboring property. Similar to UPI's field here, the defendant's lot in *Dealers* was "full of high weeds." (*Id.* at p. 1243.) Also like this case, "[u]nknown parties also dumped trash and refuse in this general area," and "[t]here was also references to … hoboes in this general area." (*Ibid.*) Lastly, as with this case, "there were previous trash fires and weed fires on the vacant land in this general area." (*Ibid.*)

Like Atlas here, the plaintiff in *Dealers* sued the owner of the vacant lot, alleging that the "defendant negligently and carelessly maintained [its] property so as to create a condition hazardous to plaintiff's property because of the threat of fire." (*Id.* at p. 1242.)

The trial court granted summary judgment in favor of the defendant, but the Illinois Court of Appeal reversed. Citing *Sprecher*, the court emphasized that "a landowner is under a duty of reasonable care to prevent harm to others where he knows or should know of a danger created by the conduct of or condition resulting from the conduct of trespassers." (*Ibid.*) Accordingly, *Dealers* held that the owner of the vacant lot had a duty "to exercise reasonable care if it allows the dumping of inflammable materials on vacant land already overgrown with weeds, on or near which railroad tracks pass and hoboes loiter." (*Id.* at p. 1245.)

* * *

To summarize, by absolving UPI of liability merely because a trespasser started the fire that destroyed Atlas, the trial court regarded landowners as categorically immune for *any* harm a trespasser on their property might do to a neighboring property, no matter how foreseeable the harm, how severe the harm, or how easily the harm could have been prevented.

But under modern tort law, "duties are no longer imposed on an occupier of land solely on the basis of rigid classifications of trespasser, licensee, and invitee." (*Ann M.*, *supra*, 6 Cal.4th at p. 674.) Instead, a landowner's "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty" to mitigate a hazardous condition, regardless of who or what gave rise to it, or who is affected by it. (*Sprecher*, *supra*, 30 Cal.3d at p. 370.) Thus, even where a plaintiff alleges "harm by a dangerous artificial condition created solely by [a third party]," the "proper test … is whether in the management of his property [the defendant] has acted as a reasonable [person] in view of the probability of injury to others." (*Id.* at p. 370, 363, internal quotes omitted, quoting *Rowland*, *supra*, 69 Cal.2d at p. 119.)

2. The *Rowland* factors do not justify categorical immunity for a landowner's negligent failure to prevent trespassers unreasonable fire danger.

Rather than a rigid system in which "immunities from liability predicated upon ... classifications of trespasser, licensee, and invitee," courts in California use a seven-factor test to

"determine whether immunity should be conferred upon the possessor of land." (*Rowland*, *supra*, 69 Cal.2d at p. 117.) These so-called "*Rowland* factors" are as follows:

> [1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care … , and [7] the availability, cost, and prevalence of insurance for the risk involved.

(*Id.* at p. 113.)

Because California law views "distinctions resulting in wholesale immunities" with "critical scrutiny" (*Sprecher*, *supra*, 30 Cal.3d at p. 363), courts should create no-duty exceptions for otherwise negligent conduct only where such an exception is "clearly supported by public policy" under the *Rowland* factors. (*Rowland*, *supra*, 69 Cal.2d at p. 112.)

Here, the *Rowland* factors do *not* even remotely support—let alone "clearly" support—a categorical rule that would immunize a landowner's negligent failure "to prevent homeless people from entering the property, camping there, and creating a fire hazard for neighboring landowners." (AA 028.) To the contrary, all seven *Rowland* factors weigh strongly in favor of such a duty.

The **first** factor ("the foreseeability of harm to the plaintiff") is "[t]he most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145.)

Here, there is no question that, by 2018, UPI should have foreseen the possibility that vagrants camping on its property over the years might start a fire that ultimately posed a hazard to Atlas. Indeed, UPI knew:

- that its field was overgrown with tall, dry grass (AA 022);
- transients consistently used that field as a camp site (AA 023–024, 26);
- transients camping in its field often started campfires (AA 023–024); and
- a vagrant camping in UPI's field started a grassfire in August 2013 that spread to neighboring properties and burned Atlas to the ground (AA 024).

In short, by August 2018, UPI did not merely foresee the *possibility* that a vagrant camping in its field might start a fire that would go on to destroy Atlas; *it had already witnessed that exact scenario play out*.

The **second** factor ("the degree of certainty that the plaintiff suffered injury") is also obvious: There is no dispute that the fire ignited by a transient in UPI's field in August 2018 spread to Atlas's property and ultimately destroyed Atlas.

The **third** factor ("the closeness of the connection between the defendant's conduct and the injury suffered") also weighs in favor of a duty here.

"An intervening third party's actions that are 'themselves derivative of defendants' allegedly negligent conduct ... do not

diminish the closeness of the connection between defendant's conduct and plaintiff's injury for purposes of determining the existence of a duty of care.'" (*Kesner*, *supra*, 1 Cal.5th at p. 1148, quoting *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 583; see also *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 58–59 ["If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the [landowner] negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the [landowner] from being liable for harm caused thereby."].)

Thus, because the vagrant's presence in UPI's field was itself a foreseeable consequence of UPI's negligent failure to maintain its field—by, for example, erecting and maintaining fences, clearing brush, and undertaking occasional patrols—the vagrant's role in starting the fire does not diminish the "closeness of the connection" between UPI's negligence and Atlas's destruction.

The **fourth** factor ("the moral blame attached to the defendant's conduct") also weighs in favor of a duty here.

Courts "may assign moral blame 'where the defendants exercised greater control over the risks at issue.'" (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1091, quoting *Kesner*, *supra*, 1 Cal.5th at p. 1151.) Here, UPI, as the owner of the field, was best positioned to mitigate the fire hazard that vagrants camping in its field presented to surrounding properties. (*Dealers*, *supra*, 508 N.E.2d at p. 1245 ["The landowner is also normally best able to prevent harm to others."].) Moreover, UPI's conscious

decision to avoid spending relatively modest money to maintain its field saddled Atlas with a considerable cost—the loss of its entire business.

The **fifth** factor ("the policy of preventing future harm") also weighs in favor of a duty here.

Even when relatively small, fires pose an obvious threat "to people and property." (*Association of California Ins. Co. v. Jones* (2017) 2 Cal.5th 376, 382.) And history has shown that small fires can easily become massive wildfires "result[ing] in billions of dollars in damages and numerous lives lost." (California Regulatory Law Reporter (Fall 2019), 25 Cal. Reg. L. Rep. 219, 231, internal quotes omitted.)

Given the devastation that fires can cause, it is certainly in the community's interest to require property owners to take reasonable measures to mitigate fire hazards on their property. Thus, the policy of preventing future harm weighs in favor of a duty on landowners to take reasonable steps to mitigate fire hazards posed by trespassers on their property.

The **sixth** factor ("the burden to the defendant and consequences to the community of imposing a duty to exercise care") also weighs in favor of a duty here.

To be sure, the duty Atlas seeks to impose on UPI would require landowners to incur costs to maintain their property. Depending on the circumstances, they may be required to clear brush, erect fences, cut fire-breaks, and inspect their property. But landowners already have these duties under existing law.

For example, in *Salinas v. Martin* (2008) 166 Cal.App.4th 404, this Court recognized that "[a] landowner has an *affirmative duty* to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must *inspect* them or take other proper means to ascertain their condition." (*Id.* at p. 412, italics in original, internal quotes omitted, quoting *Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134.)

Similarly, on the belief that "property values and the general welfare of the community are founded in large part on appearance and maintenance of properties," and that "problems" with "fire and accident[s]" are "becoming increasingly substantial in significance and effect," (Pittsburg Mun. Code, § 1.20.010, subd. A), Pittsburg already imposes various duties on landowners to maintain their property. One such ordinance expressly requires "the removal of weeds ... from private property" (*id.*, § 8.16.010), with "weeds" defined to include vegetation "which attain large growth as to become a fire menace when dry." (*Id.*, § 8.16.020, subd. A.) Other ordinances require landowners to maintain their fencing in "good repair." (*Id.*, § 18.84.235.)

In any event, the categorical immunity UPI seeks would have consequences to the community far greater than any burden on landowners from the duty at issue here.

Indeed, all things being equal, categorical immunity for failing to mitigate fire hazards posed by trespassers on private property would tend to increase the number of fires relative to a duty of reasonable care to mitigate such hazards.

In many cases, the considerable costs to rebuild or repair fire damage falls to the property owners themselves, either because they could not obtain fire insurance (as with Atlas following the August 2013 grassfire), or more commonly, because they are underinsured. (See *Jones*, *supra*, 2 Cal.5th at p. 382 ["After the 1991 Oakland Hills fire and 2003 Southern California wildfires, legislators discovered through public hearings an additional aspect of the danger wildfires pose to homeowners: underinsurance. … [W]hen large wildfires struck Southern California in 2007 and 2008, state officials realized the underinsurance problem persisted."].)

Of course, even when insurers pay the costs from fire damage, they must either absorb those losses, or more likely, spread the loss to their insureds by raising rates for landowners in the community.

Ultimately, then, granting landowners categorical immunity for failing to mitigate fire hazards posed by trespassers on their property would not actually reduce the burdens on the community. Instead, it would amplify those burdens and redistribute them from the most to least culpable landowners in the community.

The **seventh** factor ("the availability, cost, and prevalence of insurance for the risk involved") also weighs in favor of a duty here.

In *Rowland*, the Court observed that, as a general matter, "there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even

substantially increase the cost." (*Rowland*, *supra*, 69 Cal.2d at p. 118.) As the party seeking a categorical immunity, the burden was on UPI to provide contrary evidence. (Cf. *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 166.) And yet there is no such allegation, much less *evidence*, in this record.

Indeed, the only information regarding insurance here suggests the immunity UPI seeks would actually frustrate efforts to secure insurance. As noted at the outset of this brief, the August 2013 grass fire hampered Atlas's efforts to secure fire insurance, ultimately leaving Atlas uninsured when the August 2018 fire destroyed Atlas a second time.

In sum, the *Rowland* factors strongly support imposing a duty on landowners to prevent trespassers from rendering their property a fire hazard to their neighbors.[5]

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[5] The trial court held that a defendant has a duty to protect a plaintiff from third-party conduct only if it has a "special relationship" with either the third party or the plaintiff. (AA 015.) As discussed, that premise is not true in the property context, where the landowner's right to control carries with it the duty to protect neighbors from trespassers on its land.

But that premise is also at odds with this Court's precedent, under which the *Rowland* factors—not special relationships—dictate a duty to protect plaintiffs from third parties. (See *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 37, 410–411 ["[T]he use of special relationships to create duties has been largely eclipsed by the more modern use of balancing policy factors enumerated in *Rowland*."]; *Adams v. City of Fremont* (1968) 68 Cal.App.4th 243, 286 ["[P]edantic use of the" special-relationship doctrine "to establish the parameters of tort duty, while eschewing public policy concerns, is contrary to modern jurisprudential duty analysis."].)

B. UPI had a duty to prevent the natural condition of its field from exposing its neighbors to fire danger.

Even if UPI did not have a under Civil Code section 1714 "to prevent homeless people from entering the property, camping there, and creating a fire hazard for neighboring landowners" (AA 028), UPI certainly had a duty to "clear debris," "mow dry grass," "perform weed abatement," and undertake other similar measures to reduce the risk that "fires occurring on its property" would "spread[] to the Atlas property." (AA 031.)

Indeed, California tort law "imposes upon property owners an independent duty to prevent the accumulation of inflammable materials on their premises; and in case of violation of this duty they are liable for damages even if the fire was caused by a third person." (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 817, citing *Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 Cal.App.2d 60.)

Thus, under this rule, UPI could be held liable for at least some of Atlas's damages if a jury determines (1) that UPI was negligent in failing to clear the tall dry grass from its field, and (2) that the presence of the tall, dry grass was a factor in causing the fire in UPI's field to spread to Atlas's property.

But the trial court categorically rejected the idea that a property owner's "independent duty to prevent the accumulation of inflammable materials on their premises" includes a duty to mitigate "overgrown dry grass." (AA 119.) In the trial court's view, recognizing a duty to mitigate overgrown dry grass would "subject the owners or operators of huge swaths of grassland realty (and probably forest too), throughout much of the county and the state,

to liability for spreading fires on undeveloped land." (*Ibid.*) Here, the trial court offered a hypothetical: "If lightning strikes a tree in unmown and ungrazed ranch land, and the uncut grass causes the fire to spread to nearby housing developments, is the rancher to be liable to the homeowners for not mowing his ranch?" (*Ibid.*) Finding "no authority for such a startling imposition of tort responsibility for fires that … landowners had nothing to do with starting," the trial court rejected this theory of the case. (*Ibid.*)

There are two problems with the trial court's analysis:

First, contrary to the trial court's belief that there is "no authority for such a[n] … imposition of tort responsibility," there is in fact at least one case directly on point: The Illinois Court of Appeal's decision in *Dealers*, *supra*, 508 N.E.2d 1241.

Recall that in *Dealers*, a fire started in a vacant lot, then spread to a building on a neighboring property. Similar to UPI's field here, the defendant's lot in *Dealers* was "full of high weeds," "[u]nknown parties ... dumped trash and refuse in this general area," and "[t]here was also references to … hoboes in this general area." (*Id.* at p. 1243.) And, as with this case, "there were previous ... weed fires on the vacant land in this general area." (*Ibid.*)

Like Atlas here, the plaintiff in *Dealers* sued the owner of the vacant lot, alleging that it "negligently and carelessly maintained [its] property so as to create a condition hazardous to plaintiff's property because of the threat of fire." (*Id.* at p. 1242.)

The *Dealers* court agreed. Citing an Oregon case and three California cases—*Sprecher*, *supra*, 30 Cal.3d 358; *Scally*, *supra*, 23 Cal.App.3d 806; and *Reid*, *supra*, 134 Cal.App.2d 60—*Dealers* held

that landowners have "a duty to maintain their premises in a reasonably safe condition to avoid the spread of fire therefrom." (*Dealers*, *supra*, 508 N.E.2d at pp. 1244–1245.) With that in mind, *Dealers* held that, under those circumstances, "the logical preventative measure to avoid the risk of fire spreading to an adjoining landowner's premises would simply be to regularly cut the weeds on and near the boundary line." (*Id.* at p. 1245.)

Second, and more fundamentally, the trial court's assumption that recognizing a duty by UPI to mitigate overgrown grass would necessarily "subject the owners or operators of huge swaths of grassland realty … throughout much of the county and the state[] to liability for spreading fires on undeveloped land" (AA 119), was woefully misplaced.

For one, recognizing a duty of care to abate overgrown dry grass *under these circumstances* does not support the trial court's assumption that it would likewise support a similar duty in every instance. Indeed, the entire purpose of the *Rowland* analysis is to provide "factors which may in particular cases warrant a departure from" a tort duty that might otherwise arise. (*Sprecher*, *supra*, 30 Cal.3d at p. 1128.)[6]

Moreover, even "[r]ecognizing a … duty of care … does not prevent" a defendant from "from arguing in a given case that it did not breach its duty." (*T.H.*, *supra*, 4 Cal.5th at p. 188.) Rather, "the reasonableness of the use of land … must be determined according

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[6] The *Rowland* analysis in Part I.A.2 applies with equal force to UPI's duty to mitigate the fire hazard to neighbors presented by the overgrown vegetation on its property.

to the circumstances of each case." (*Reid*, *supra*, 134 Cal.App.2d at 67, internal quotes omitted, quoting 1 Am.Jur., 1954 Supp., p. 53.) Thus, even in the face of a general duty of care to mitigate a fire hazard posed by overgrown vegetation, "owners or operators of huge swaths of grassland realty" would have an opportunity to demonstrate they acted reasonably under *their* circumstances.

Notably, "the burden of reducing or avoiding the risk," "the possessor's control over the risk-creating condition," and "the location of the land," are "among the factors to be considered by the trier of fact in evaluating the reasonableness of the defendant's conduct." (*Sprecher*, *supra*, 30 Cal.3d at p. 1129.) Thus, a jury would presumably treat a rancher whose "ungrazed ranch land" caught fire after a "lightning strike[]" (AA 119), very differently from a defendant in a more urban area who knew vagrants were setting fires among the tall, dry grass in its field, one of which destroyed a neighboring business in the past. (Rest.2d Torts, § 364, com. k, p. 262 ["One having possession of land in a populous city may well be required to exercise a greater attention to its condition than ... an owner of waste land in a thinly populated district."].)

Ultimately, the concern that liability for failing to clear vegetation may not be fair in a hypothetical case, does not justify a categorical rule in which landowners *never* have a duty to maintain vegetation under *any* circumstances. Indeed, such an approach would unduly "eliminate the role of the jury in negligence cases." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 773, quoting *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 724, fn. 13.)

II. UPI had a duty to prevent its property from posing a fire hazard to its neighbors under Health & Safety Code sections 13007 and 13008.

Under California law, tort duties may also be directly "imposed by statute." (*United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594; see also Evid. Code, § 669 ["The failure of a person to exercise due care is presumed if … [h]e violated a statute …."].)

Here, two statues—sections 13007 and 13008 of the Health and Safety Code—gave UPI an affirmative duty to mitigate fire hazards on its property that might threaten neighboring properties. (AA 036, AA 102.)

Under **section 13007**, "[a]ny person who personally or through another … negligently … allows fire to be set to … the property of another … is liable to the owner of such property for any damages to the property caused by the fire."

This is broad language. And plainly read, it certainly imposes a duty of reasonable care on property owners to mitigate conditions on their property that pose a foreseeable risk of fire to their neighbors. Moreover, section 13007 expressly includes the duty to control the conduct of third parties. (Health & Saf. Code, § 13007 ["Any person who *personally or through another* …."].)

Tellingly, the trial court never addressed section 13007 in either of its orders. (See AA 013–017 [order sustaining demurrer to first complaint]; AA 117–121 [order sustaining demurrer to second complaint].)

UPI only briefly mentioned section 13007 in its notice of demurrer. There, UPI seemed to imply that because (in its view) it

did not have a *common-law* duty to prevent "the fire" that destroyed Atlas, any claim under section 13007 must also be lacking in the "essential element" of "duty." (AA 040.)

But the flaw in UPI's logic is that section 13007 *itself* imposes a legal duty of care. Indeed, a judicial determination that Civil Code section 1714 does not impose a particular duty of care would not prevent the Legislature from enacting a statute that does. (*Haidinger-Hayes*, *supra*, 1 Cal.3d at 594 [tort duties may be "imposed by statute"].) Thus, a judicial determination that Civil Code section 1714 does not impose a duty of care on landowners to mitigate conditions that expose their neighbors to a fire hazard, cannot justify ignoring a statute that clearly does.

Of course, the same can be said for **section 13008**.

Under that section, "[a]ny person who allows any fire burning upon his property to escape to the property of another … without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire."

This, too, is broad language. And plainly read, it certainly imposes a duty on property owners to exercise due diligence in order "to control" the foreseeable risk of fire to their neighbors.

Conceivably, a landowner could be liable under section 13008 for negligently withholding fire-fighting efforts once a fire is already underway, *or* by negligently failing to take prophylactic measures "to control" the spread of any fire that starts, such as sprinklers or alarms (for structures), or by clearing brush or cutting fire-breaks (for open land). (See *Dealers*, *supra*, 508 N.E.2d

at p. 1245 ["[T]he logical preventative measure to avoid the risk of fire spreading to an adjoining landowner's premises would simply be to regularly cut the weeds on and near the boundary line …."].)

The trial court—emphasizing that UPI did not start the fire here—rejected that reading of section 13008. It the trial court's view, "that statute cannot plausibly be read to create strict-liability responsibility for the consequences of any fire on one's property." (AA 017, italics added.)

There are two problems with the trial court's analysis:

First, the trial court's concern that section 13008 might give rise to "strict-liability responsibility" (AA 017), is misplaced. On its face, section 13008 only imposes liability where the defendant fails to "exercis[e] due diligence." That language is synonymous with *negligence*, not strict liability. (E.g., *Richmond v. Sacramento Valley R. Co.* (1861) 18 Cal. 351, 358 ["Whether due diligence or negligence has been shown, is a question of fact for the jury, depending upon the particular circumstances."].)

Second, the trial court's assumption that section 13008 only imposes liability for fires started *by the defendant* is contradicted by the statute's plain text. On its face, section 13008 imposes liability on "any person who allows *any fire* burning on his property to escape." (Italics added.) Thus, contrary to the trial court's claim that section 13008 "cannot plausibly be read to create … responsibility for the consequences of *any fire*" (AA 017, italics added), that is, in fact, *exactly* how the statute was written.

If the Legislature intended to limit liability under section 13008 to fires *started by the defendant*, it presumably would have

used such language. But it did not, and the trial court was duty-bound to apply the statute as it was written, not as the trial court thinks it should have been written. (*Lucent Technologies, Inc. v. Board of Equalization* (2015) 241 Cal.App.4th 19, 38, quoting *Community Development Com. v. County of Ventura* (2007) 152 Cal.App.4th 1470, 1483].)

III. UPI's duty to prevent its property from posing a fire hazard to its neighbors also supports claims against UPI for premises liability, nuisance, and trespass.

In addition to negligence claims under Civil Code section 1714, and Health and Safety Code sections 13007 and 13008, Atlas also alleged claims against UPI for premises liability (AA 028), trespass (AA 034), and nuisance (AA 035).

Like a landowner's liability for negligence, "[p]remises liability is grounded in the possession of the premises and the attendant right to control and manage the premises." (*Kesner*, *supra*, 1 Cal.5th at p. 1158, internal quotes omitted, quoting *Preston v. Goldman* (1986) 42 Cal.3d 108, 118.) Accordingly, a determination that UPI had a duty of care to mitigate a hazard on its property that exposed Atlas to an unreasonable risk of fire would, if breached, also support a premise-liability theory against UPI.

Similarly, "it is now established that the spread of a negligently set fire to the land of another constitutes a trespass." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 460, disapproved on other grounds by *Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094.) Accordingly, a determination that UPI had

a duty of care to mitigate a hazard on its property that exposed Atlas to an unreasonable risk of fire would, if breached, also support a trespass theory against UPI.

Finally, it is settled that where a landowner's "negligence concerning a … condition of his land injuriously invades another's right to the use and enjoyment of his property, nuisance liability may arise." (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 101, citing *Sprecher*, *supra*, 30 Cal.3d 358; see also *Leslie Salt*, *supra*, 153 Cal.App.3d at pp. 619–620.) Accordingly, a determination that UPI had a duty of care to mitigate a hazard on its property that exposed Atlas to an unreasonable risk of fire would, if breached, also support a nuisance theory against UPI.

CONCLUSION

The trial court erred in holding that UPI was immune from liability for the August 2018 fire simply because a trespasser started it. Landowners have a duty to mitigate hazardous conditions on their property, "even though the condition was created … by the unauthorized conduct of some third person." (*Sprecher*, *supra*, 30 Cal.3d at p. 369.)

The trial court also erred in holding that UPI was immune despite the role its overgrown grass played in the August 2018 fire. Property owners have a "duty to prevent the accumulation of inflammable materials on their premises; and in case of violation of this duty they are liable for damages even if the fire was caused by a third person." (*Scally*, *supra*, 23 Cal.App.3d at p. 817.)

If the foregoing duties do not arise under Civil Code section 1714, they certainly arise under Health and Safety Code sections 13007 and section 13008,

Finally, the conclusion that UPI had a duty to mitigate conditions on its property that exposed Atlas to a risk of fire also supports claims for premises liability, trespass, and nuisance.

Accordingly, this Court should reverse and remand this case with directions to the trial court to enter an order overruling UPI's demurrer, or at worst, sustaining with leave to amend.

Dated: July 30, 2020

By: */s/Benjamin I. Siminou*
Benjamin I. Siminou
SIMINOU APPEALS, INC.

Counsel for Plaintiff & Appellant
ATLAS PALLET CORP.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that this brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word-processing program used to generate the brief, is **10,189** words, exclusive of the material that may be omitted under rule 8.204(c)(3) of the California Rules of Court.

/s/Benjamin I. Siminou
Benjamin I. Siminou

CERTIFICATE OF SERVICE

I, Benjamin I. Siminou, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to this action. My business address is 2305 Historic Decatur Rd., Suite 100, San Diego, California 92106.

On July 30, 2020, I served the **Appellant's Opening Brief** and **Appellant's Appendix** on all counsel of record via the Court's electronic filing system, operated by TrueFiling.

On the same date, I served a copy of the **Appellant's Opening Brief** by first class U.S. mail on the trial court, as follows:

Hon. Charles S. Treat
Contra Costa County Superior Court
725 Court St.
Martinez, CA 94553

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 30, 2020, at San Diego, California.

/s/Benjamin I. Siminou
Benjamin I. Siminou