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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WATSON LAND COMPANY, Plaintiff and Appellant, v. SHELL OIL COMPANY, Defendant and Appellant.	B155019 (Los Angeles County Super. Ct. No. BC150161)

APPEAL from a judgment of the Superior Court of Los Angeles County. Wendell J. Mortimer, Judge. Affirmed with modifications.

Caldwell, Leslie, Newcombe & Pettit, Michael R. Leslie, Mary Newcombe, Cara A. Horowitz, Andrew Esbenshade, Sandra L. Tholen; Greines, Martin, Stein & Richland, and Feris M. Greenberger for Plaintiff and Appellant.

Bright and Brown, James S. Bright, Maureen J. Bright and Brian L. Becker for Defendant and Appellant.

Mayer, Brown, Rowe & Maw and Gregory R. McClintock for Western States Petroleum Association as amicus curiae on behalf of Defendant and Appellant.

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* Pursuant to California Rules of Court, rules 976(d) and 976.1, this opinion is certified for partial publication. The portions directed to be published are the Introduction, Facts, part 4 of Shell's Appeal, and the Disposition.

INTRODUCTION

When respondent Watson Land Company (Watson) discovered groundwater and soil contamination under its land (the Watson Center), it claimed that appellant Shell Oil Company (Shell), among others, was responsible. A jury awarded Watson $3,915,851 for the cost of clean up of contamination caused by the leakage of leaded gasoline from pipelines Shell was operating under the Watson Center. Additionally, the jury found that Shell derived a $14,275,237 benefit when it failed to clean up the contamination and awarded that amount to Watson pursuant to Civil Code section 3334. Shell appeals and urges reversal on the following grounds: (1) Because Atlantic Richfield Company (ARCO) settled with Watson and agreed to pay for the entire clean up of the Watson Center, ARCO was the real party in interest and Watson lacked standing to sue; (2) at a minimum, ARCO should have been joined as a coplaintiff at trial as an indispensable party; (3) Watson's evidence of causation was based on inadmissible evidence; and (4) the 1992 amendment to Civil Code section 3334 allowing a plaintiff to recover the benefits obtained by a trespasser should not have been applied because Shell was not benefited when its pipelines leaked. Therefore, even if there was causation, the judgment must be reduced by $14,275,237.

Watson challenges two orders on cross-appeal. According to Watson: (1) the trial court improperly denied a motion for sanctions against Shell for bad faith conduct under Code of Civil Procedure section 128.7,[1] and (2) the trial court erroneously gave Shell a credit for the litigation costs ARCO agreed to pay Watson through settlement and then reduced Watson's recoverable costs by half.

In part 4 of Shell's appeal, we hold that for the purposes of Civil Code section 3334, Shell did not obtain any benefits when its pipelines leaked onto the Watson Center. As a consequence, the judgment in favor of Watson must be reduced by $14,275,237. In the unpublished portion of this opinion, we explain that Watson's cross-appeal, as well as

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

the rest of Shell's appeal, lack merit. As modified, the judgment is affirmed in all other respects.

FACTS

The Watson Center is a fully developed commercial and industrial park with over 50 lots, most of which have been improved with buildings. Watson leases those buildings to various tenants. ARCO owns a refinery (the ARCO Refinery) across the street from the Watson Center and uses it for processing, storing and transporting crude oil, gas and petroleum products. There are two major pipeline corridors that run under the Watson Center. The first is commonly referred to as the "Utility Way Pipeline Corridor,"[2] and the second is commonly referred to as the "DWP Pipeline Corridor."[3] At times relevant to this appeal, Shell operated pipelines in both of those corridors.

In 1996, Watson sued, inter alia, Shell and ARCO pursuant to 11 causes of action, including trespass and nuisance. The first amended complaint alleged: Since some time prior to 1977, the operations of ARCO contaminated the groundwater beneath the ARCO Refinery. ARCO has been actively recovering free-floating petroleum product and removing contamination from the groundwater beneath the ARCO Refinery. In 1985, ARCO began conducting its remediation efforts under order of the Los Angeles Regional Water Quality Control Board (RWQCB). The RWQCB directed ARCO to create a subsurface barrier to prevent the migration of groundwater contamination to the Watson Center. Based on ARCO's remediation efforts and its representations, Watson believed that the contamination had not migrated to the Watson Center. However, in 1995, a prospective tenant at the Watson Center conducted an environmental site investigation and discovered contamination. In 1996, Watson engaged an independent environmental consulting firm to investigate the contamination and its sources. The ARCO Refinery

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[2] The Utility Way Pipeline Corridor is a portion of the Watson Center that is subject to a pipeline easement held by Shell.

[3] The DWP Pipeline Corridor is property owned by the Los Angeles Department of Water and Power. The corridor cuts through the Watson Center.

and three other off-site properties were found to be likely contributors to the groundwater contamination. As well, Watson learned that the Shell pipelines running beneath the Watson Center may also be contributors.

Watson and ARCO entered in a settlement agreement (the settlement agreement) with an effective date of November 1, 2000. The settlement agreement provided that Watson would continue to diligently pursue its claims against the other defendants in the case and deposit the proceeds into a cleanup fund (the cleanup fund). ARCO agreed to be responsible for the remediation of the Watson Center, subject to a specified right of reimbursement from the cleanup fund. The parties divided the Watson Center into three areas: Area A, Area B and Area C. Pursuant to the parties' agreement, ARCO was entitled to 100 percent reimbursement of cleanup expenses related to Area A, 90 percent related to Area B, and 5 percent related to Area C.

The trial court granted ARCO's motion for determination of good faith settlement with Watson. The order specified that none of the nonsettling defendants was entitled to any set-off or credit as a result of the settlement between ARCO and Watson, that Watson would seek to "recover from the remaining defendants only their proportionate shares of liability for contamination of [the Center]," and the trial court would retain jurisdiction over the cleanup fund.

Prior to trial, Shell moved to exclude evidence of remediation costs on the theory that they would be paid by ARCO and ARCO was the real party in interest. In the alternative, Shell argued that ARCO had to be joined as an indispensable party. Shell's motion was denied.

At trial, Watson expert Jeffrey Dagdigian (Dagdigian) explained that when enough gasoline contaminates soil, the gasoline will float on top of the groundwater and become a source of contamination. The gasoline slowly dissolves into the groundwater, becomes a plume, and moves in the direction of the groundwater flow. The contamination is most concentrated at the source. Then, following the second law of thermodynamics, the contamination moves from a concentrated state to a random, dissolved state.

Watson produced maps displaying three plumes of gasoline contamination: Plume A (a medium sized plume at the northern end of the Watson Center over the Utility Way Pipeline Corridor), Plume B1 (a small plume in the southern half of the Watson Center over the DWP Pipeline Corridor at 233rd Street), and Plume B2 (a large plume in the southern half of the Watson Center over the Utility Way Pipeline Corridor at 233rd Street).[4] Dagdigian testified that he was able to verify the accuracy of the plume maps by checking and rechecking facts and figures derived from unidentified "laboratory reports." He explained that overlapping concentrations of chemicals indicate a common source and then analyzed the plumes in terms of overlapping concentrations of benzene, diisipropyl ether (DIPE), methyl tertiary butyl ether (MTBE), and lead scavengers known as ethylene dichloride (EDC) and ethylene dibromibe (EDB).

According to the maps, Plume A contained concentrations of benzene, DIPE and EDC, Plume B2 contained concentrations of benzene, DIPE, EDC, and EDB, and Plume B1 contained concentrations of benzene, DIPE and MTBE. The absence of MTBE in Plume A and Plume B2 suggested to Dagdigian that the contamination in those plumes was a leaded gasoline. Further, the presence of DIPE suggested to Dagdigian, based on his research of Shell facilities, "that this gasoline came from one of those facilities."[5] He testified that Shell's pipelines carried the type of gasoline found in those plumes.

Dagdigian went on to explain that the gasoline in Plume B2 contained a mixed alkyl lead package comprised of: tetraethyl lead, methyltriethyl lead, dimethyldiethyl lead, trimethylethyl lead, and tetramethyl lead. In contrast, the only lead compound that

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[4] In their briefs, the parties concentrate on Plume A and Plume B2. GATX Terminals Corporation, one of the defendants below, settled with Watson and agreed to remove jet fuel from the same area as Plume B1.

[5] A Shell chemist, Ileana Rhodes, testified that Shell manufactured DIPE at one of Shell's nearby refineries. Shell's quarterly reports to the Environmental Protection Agency in 1979 listed DIPE as an additive in Shell's gasoline. Rhodes acknowledged these reports. Dagdigian testified that DIPE was found at Shell facilities to the north and south of the Watson Center, and also at Morman Island, where Shell stored gasoline.

was discovered under the ARCO Refinery was tetraethyl lead. When asked what that meant, he stated: "It means that the gasoline that was released underneath the ARCO Refinery is different than the gasoline that was released underneath the Watson Center."

Nancy Beresky (Beresky), another Watson expert, opined that the Plume B2 was caused when a Shell pipeline leaked leaded gasoline. She based her opinion on four lines of evidence. Shell transported leaded gasoline through the Utility Way Pipeline Corridor. There was no evidence that there were any other pipelines in that corridor that were used to carry the same type of material. The hot spot of the plume was centered immediately underneath the Utility Way Pipeline Corridor. Additionally, the plume was comprised of leaded gasoline that contained DIPE. The same material was found underneath the Shell refinery to the north and the one to the south. Those two refineries are interconnected via the Utility Way Pipeline Corridor.

According to Beresky, there was evidence that Plume B2 was not caused by contamination migrating from the ARCO Refinery. Points between Plume B2 and the ARCO Refinery revealed no detection of the chemicals found in Plume B2. Based on the second law of thermodynamics, it would be impossible to have high concentrations at Plume B2 and lesser concentrations between Plume B2 and the ARCO Refinery if the refinery was the source. Beresky explained that the hydrology of the area supported her position. She thought that if there was migration, "we would see some smearing in this area. We don't see that."

Continuing on to Plume A, Beresky stated that it was also caused by a leaded gasoline leak from a Shell pipeline in the Utility Way Pipeline Corridor. She based her opinion on several facts. The plume was elongated in a north and south direction and the hot spot was near the corridor. The contamination contained DIPE which, again, was the same material found at the local Shell facilities. According to Beresky, the contamination did not come from the ARCO Refinery because it was too far to migrate, and the material differed.

Charles Schmidt (Schmidt), a third Watson expert, testified regarding the results he obtained using "downhole flux" testing.[6] He testified that "the source of the B2 Plume is [the] Shell pipeline in [the] Utility Way [Pipeline] Corridor." He reached this conclusion because his tests showed a "top-down source" for the contamination that was above the groundwater. Further, he stated that he was able to exclude the ARCO Refinery as a source. Based on other data he collected, Schmidt opined that Plume A was created by a leak from Shell's pipeline. Subsequently, Dagdigian was asked about Schmidt's downhole flux data. Dagdigian noted that soil gas was first detected at 15 feet. He agreed, when asked by counsel, that this was evidence of a "top-down pipeline leak coming from the Utility Way Pipeline Corridor."

The jury found that Watson failed to prove a continuing nuisance, but that it did prove a continuing trespass. According to the jury, the amount Watson should receive for remediation was $3,915,851, and the value of the benefits obtained by Shell as a result of the gasoline contamination it caused at the Watson Center from June 1, 1993, to June 30, 2001, was $14,275,237.

The trial court entered judgment in favor of Watson in the amount of $18,191,088 and awarded $87,183.22 in costs. After the denial of various posttrial motions, these appeals followed.

Upon application, we allowed Western States Petroleum Association to file an amicus curiae brief regarding the proper interpretation of the "benefits obtained" measure of damages in Civil Code section 3334.

SHELL'S APPEAL

1. Watson has standing to sue.

Shell contends that ARCO was the real party in interest at trial because ARCO agreed to pay for the clean up and that therefore Watson lacked standing to prosecute its claims. This contention fails.

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[6] Downhole flux is measured by lowering a chamber into the ground and taking samples of the molecules of contaminants.

We briefly survey the law. Every action must be prosecuted in the name of the real party in interest. (§ 367.) "'[T]he purpose of [section 367] is readily discernible. . . . It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand.' [Citations.]" (*Keru Investments, Inc. v. Cube Co.* (1998) 63 Cal.App.4th 1412, 1424.) "'Generally, "the person possessing the right sued upon by reason of the substantive law is the real party in interest." [Citations.]' [Citation.]" (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566.) An assignee of a claim can sue in its own name. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 108, p. 168.) If the assignor makes a complete assignment of the beneficial interest in a claim, then the assignor no longer has standing to sue. (*Id*. at § 112, p. 170.)

"[I]f an assignee consents that the suit be brought by his assignor, an objection that the plaintiff is not the real party in interest will not be ground for reversal because the defendant is fully protected from future action, and the purpose of any objection to the suit upon that ground has been served. [Citations.] Moreover, if the assignment occurs after suit has been filed the action may be continued in the name of the assignor, or the court may permit the assignee to be substituted therein [citation], and a judgment in favor of the assignor under these circumstances, when no change of party plaintiff has occurred, will be sustained." (*Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 687 (*Greco*).) The last two sentences from *Greco* quoted above echo the former section 385, which was reenacted in section 368.5. (Stats. 1992, ch. 178, § 11.) The reenacted version of the statute provides: "An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

Watson owns the Watson Center and was the party injured by the contamination. There is no dispute that it was the real party in interest when this action commenced. Though Watson assigned certain claims to ARCO in the settlement agreement, Watson

did not assign its claim against Shell. Therefore, Watson remained the real party in interest. Even if Watson had assigned its interest in the settlement agreement, the assignment would have taken place while the case was pending and Watson would have been permitted to continue prosecuting the claim under the auspices of *Greco* and section 368.5. Shell's citation to *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144 (*Vaughn*) is unavailing. The *Vaughn* court stated: "While ordinarily the owner of the real property is the party entitled to recover for injury to the property, the essential element of the cause of action is injury to one's interests in the property -- ownership of the property is not. It has been recognized in many instances that one who is not the owner of the property nonetheless may be the real party in interest if that person's interests in the property are injured or damaged. [Citations.]" (*Id*. at p. 148.) Shell argues that *Vaughn* applies because ARCO had a pecuniary interest in the outcome of the trial. But that interest is not synonymous with an interest in the Watson Center.

2. The trial court was not required to join ARCO as a coplaintiff.

Shell lobbies for a reversal on the theory that ARCO was in indispensable party under section 389 and should have been compelled to join the trial as a coplaintiff because it agreed to be responsible for remediation of the Watson Center. Shell complains that it might be sued by ARCO for reimbursement. After review, we conclude that there is no basis for reversal on this ground.

Subdivision (a) of section 389 provides: "A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (§ 389, subd. (a).)

Next, subdivision (b) of section 389 establishes the following. "If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court

shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (§ 389, subd. (b).)

Apropos to this case, our Supreme Court explained that there are "reasons to be cautious in requiring joinder[] under subdivision (a)(2)(ii) of section 389. . . . The subdivision specifies that the risk of multiple liability must be 'substantial.' Courts construing identical language in rule 19 of the Federal Rules of Civil Procedure (28 U.S.C.), from which the present version of section 389 was derived in 1971 [citation], correctly point out that a 'substantial risk' means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter. [Citations.]" (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 21 (*Union Carbide*).)

Tailored to the issue presented, we must consider (1) the extent to which the judgment rendered in ARCO's absence prejudices Shell; and (2) the extent to which the relief afforded among the parties protects Shell.[7] In other words, we must determine whether there is more than a theoretical possibility of ARCO asserting a claim against Shell that would result in multiple liability.

In its opening brief, Shell failed to present a legal theory upon which it could be sued by ARCO. Shell argued that Watson and ARCO have a "complete identity of interest" and that there is a possibility that "a court will allow Watson and ARCO to

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[7] Shell did not ask us to consider prejudice to either Watson or ARCO. In our view, they have not been prejudiced.

pursue their claims in seriatim lawsuits if ARCO does not like the results of this action." Then, Shell misguidedly relied on *Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588. In that case, the plaintiff sued a bank after one of its managers embezzled the plaintiff's money. The court held that because the plaintiff's insurer was a partial assignee of the claims, it was an indispensable party that had to be joined. (*Id*. at pp. 595-597.) Pivotally, ARCO is not a partial assignee of Watson's claims against Shell. Because Shell did not offer a cognizable legal theory upon which ARCO might sue, we consider Shell's arguments premised on subdivision (a)(2)(ii) of section 389 to be waived. As oft noted by appellate courts, "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) Further, "'every brief should contain a legal argument with citation to authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] It is the duty of appellant's counsel, not the courts, 'by argument and the citation of authorities to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

In Shell's reply brief, Shell suggests that ARCO might pursue a claim for equitable indemnity on the theory that it and Shell are joint tortfeasors and that, as a consequence, ARCO is an indispensable party. Fairness militates against our consideration of arguments appellant raised for the first time in its reply brief. (See *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) As an academic matter only, we take the time to reject Shell's theory.

What Shell tells us in its reply is that there is a substantial risk that it might be sued by ARCO in a subsequent action. But this is a straw man argument. Following *Union Carbide*, the question is whether there is a substantial risk that ARCO will assert a claim *that will result in multiple liability*. Because Shell did not purport to answer the question presented, our analysis could end here.

Ironically, Shell suggests that ARCO could not prevail if it sued. In a footnote in the reply brief, Shell posits: "Shell is not conceding that any such claim would be

successful. In fact[,] Shell would have contested any claim by ARCO vigorously during the Watson trial based on a number of factual and legal defenses, and would do so now were ARCO to bring a lawsuit. In addition, Shell does not waive any arguments that ARCO is bound by the judgment under principles of res judicata or claim-splitting in view of the fact that ARCO is in privity with Watson. However, just because Shell has valid defenses does not mean that ARCO won't sue Shell. Watson's comments that this risk is small carry no weight, as the risk is that ARCO, not Watson, may harass Shell by a subsequent suit." In essence, Shell contends that the risk of multiple liability is anything but substantial.

Even if Shell suggested that there was a risk of multiple liability, it would only be a theoretical possibility.

"Equitable indemnity as now fashioned in California allows one tortfeasor to seek either full or partial indemnity from a joint tortfeasor on a comparative fault basis. [Citations.]" (*Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1990) 221 Cal.App.3d 1601, 1611.) "'Quite simply, equitable indemnification is a matter of fairness. "'[I]n the great majority of cases . . . equity and fairness call for an apportionment of loss between the wrongdoers in proportion to their relative culpability, rather than the imposition of the entire loss upon one or the other tortfeasor.'" [Citation.]'" (*Id*. at pp. 1611-1612.)

"The concept of joint tortfeasors for the purpose of indemnity is explained in the restatement as '. . . two or more persons who are liable to the same person for the same harm. *It is not necessary that they act in concert or in pursuance of a common design, nor is it necessary that they be joined as defendants*. The rule stated applies to all torts, including not only negligence but also misrepresentation, defamation, injurious falsehood, nuisance or any other basis of tort liability.' [Citation.]" (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 212.) In the absence of joint and several liability, there can be no claim for indemnity. (*Ibid*.)

At this juncture we highlight a few salient points. In its discussion of section 389 in its reply brief, Shell did not advert to any evidence establishing that it and ARCO are

joint tortfeasors. We decline to make any assumptions. Furthermore, if they are joint tortfeasors, we have not been directed to any evidence establishing that the cleanup costs were not properly allocated between Shell and ARCO by virtue of the jury verdict and the settlement agreement. As a result, the risk of Shell being subjected to multiple liability is only a theoretical possibility.

Also in the reply brief, Shell contends that it might be sued by ARCO for unjust enrichment or on a statutory cost recovery claim under state or federal law. We need not evaluate these last two arguments. They were belatedly asserted in the reply brief, and they are mere legal conclusions not supported by a critical analysis of how ARCO could assert these claims. (See *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624, fn. 2 [undeveloped arguments need not be considered].) Without legal citation, Shell argues that ARCO should have been joined based on matters of convenience and equity because it was involved in the case and was paying half of Watson's attorney fees. We decline to create a new joinder rule outside of the statutory bounds created by the Legislature.[8]

3. Shell waived its attack on the sufficiency of the evidence to prove causation.

Shell argues that the testimony from Watson experts[9] other than Schmidt should have been excluded because they relied on the inadmissible hearsay contents of reports from various laboratories. In other words, Shell attacks the foundation of the opinions of Watson's experts. The main focus of Shell's argument is directed at Dagdigian's

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8 In its opening brief, in connection with its argument regarding section 389, Shell adverted to "the trial court's repeated refusal to allow Shell to inform the jury of the fact that ARCO had agreed to clean up the [Watson Center] and would financially profit from any judgment against Shell, while Watson would never incur any costs or remediation obligations." Then, in its reply brief, Shell argued that reference to the settlement agreement should have been permitted. Shell never argued that the trial court committed reversible error, nor did Shell cite any law setting forth the rules for appellate review of evidentiary rulings. Because this argument is belated, and because it is not properly developed, we deem it waived.

9 Shell did not provide a list of these "experts."

testimony and his purported reliance on reports provided by Friedman & Bruya, Inc. (the F&B Lab). According to Shell, the F&B Lab reports did not qualify as business records, such that they could be relied upon by Dagdigian, and Dagdigian's testimony was wholly improper. Once Dagdigian's testimony is removed from the equation, Shell believes the record lacks substantial evidence that it was the cause of any of the contamination located beneath the Watson Center. Shell contends that Schmidt's testimony, standing alone, does not prove causation because his tests did not differentiate between divergent gasoline products. The problem is that Shell's record citations are so imprecise and elliptical that we are prevented from identifying the foundation of the expert testimony offered by Dagdigian, Beresky or anyone else, nor can we assess whether any of the laboratory reports were business records. In any event, contrary to Shell's position, Schmidt's testimony amounted to substantial evidence that leaks from Shell's pipelines caused Plume A and Plume B2.

In Shell's statement of facts, we are told the following: "Without identifying the tests or the laboratories that conducted the tests, Dagdigian testified that the tests confirmed the presence of benzene and certain lead alkyls contained in Shell leaded gasoline manufactured prior to 1980, as well as sporadic traces of an oxygenate known as [DIPE], which he claimed had been used exclusively by Shell in the manufacture of leaded gasoline." Shell went on to aver that because Watson did not designate the experts necessary to authenticate and admit any of this laboratory data or identify Shell gasoline as the source of the contamination, Watson simply subpoenaed test results from various outside laboratories and asked that they be produced at trial as business records.[10]

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10 Shell did not provide a record citation for this statement. As the court in *City of Lincoln v. Barringer* (2002) 102 Cal. App. 4th 1211, 1239, footnote 16 stated, "*any* reference in the brief must be supported by a citation, regardless of where in the brief that reference appears" so that "appellate justices and staff attorneys [can] locate relevant portions of the record expeditiously without thumbing through and rereading earlier portions of a brief." This rule is imperative in a complex case such as this one. The review process depends upon the assistance of counsel.

Shell added: "Dagdigian . . . simply asserted to the jury that the unnamed laboratory records he had reviewed conclusively established that Shell pipelines had caused both the A and B2 Plumes."[11]

None of these citations identify the foundation for Dagdigian's testimony,[12] or for the testimony of any other expert.

In a footnote, Shell posited that the "F&B Lab performed the testing of the hydropunch groundwater samples identified as the C series on Exhibits 1500, 1501, 1512, and 1513. . . . Those test results were subpoenaed for trial but were never admitted. See Exhs. 472, 1472. Dagdigian testified that the records indicated intermittent findings of DIPE and various lead alkyls and scavengers that he attributed to Shell. See RT 1445-46, 1450-55; App. (Exh 1501, 1513)."

This footnote suggests a nexus between Dagdigian's testimony and reports produced by the F&B Lab. But this suggestion falters under scrutiny.

Exhibits 1500, 1501, 1512 and 1513 are maps of plumes of contamination. They do not reveal any connection to tests performed by the F&B Lab. Exhibit 472 contains data produced by the F&B Lab, but it is over an inch thick and contains scientific data which is not decipherable to a lay person. Exhibit 1472, which was also produced by the

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11 Shell refers us to page 1483 of the reporter's transcript. This page, as represented, does contain testimony from Dagdigian. But nowhere on this page does Dagdigian state that unnamed laboratory records conclusively establish that Shell caused Plume A and Plume B2. On this page he discusses exhibit 1513, which he caused to be prepared. That exhibit illustrated Plume A.

12 When asked what kind of data he reviewed, Dagdigian testified that he "looked at data relating to historical operations, use of chemicals, where they were stored, where they were used. [¶] I looked at data concerning historical evaluations, where they took actual samples of soil, ground water, soil-gas, pre-product, possibly other materials that they sampled. I look at . . . this kind of sampling data from [the Center], from the neighboring sites which I just talked about, including a few Shell gas stations. [¶] I looked at physical data, boring logs, modeling studies, let's see, free product level heights, just a plethora of stuff related to environmental characterization of these properties."

F&B Lab, is over four inches thick and is similarly impenetrable. Without exact page citations, we cannot verify that these exhibits contain information that was extrapolated on the maps of plume contamination. It is axiomatic that an appellate court is not "'required to search the record on its own seeking error.'" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) If a party does not provide proper record citations, an appellate court may disregard the matter. (*Ibid*.)

At pages 1445-1446 and 1450-1455 of the reporter's transcript Dagdigian does in fact indicate that the DIPE contamination at the Watson Center came from Shell facilities. However, he never attributed his findings to exhibits 472 and 1472, or to any other reports produced by the F&B Lab.

The expert testimony in this case was complicated. It bears pointing out that the "duty to adhere to appellate procedural rules grows with the complexity of the record. [Citation.]" (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) An "appellant has the duty to fairly summarize the facts in the light favorable to the judgment." (*Ibid*.) The failure to do so "results in a waiver of evidentiary claims. [Citation.]" (*Ibid*.) Moreover, to enable an appellate court to properly review a case, an appellant must provide exact page citations to the record. (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) Too often Shell's statement of facts and arguments ignore these simple principles, thus presenting a muddied, biased picture in a case that, more than most, required scrupulous clarity. Having failed to establish the factual predicate for its attack -- that Dagdigian relied exclusively on a report from the F&B Lab, or that other Watson experts relied exclusively on unspecified laboratory reports -- Shell waived this portion of its appeal. Before we engage in an analysis of the foundation for an expert's opinion, an appellant must identify that foundation in the record. Otherwise, an appellate court is left with nothing more than supposition as to what underlies an expert's testimony.

A brief digression is in order. "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is

not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Using this directive from our Supreme Court as a springboard, we point out the following. There is no indication by either party that Watson laid a foundation for its experts' testimony regarding scientific data (except as to Schmidt), or that Shell objected if such an omission occurred. Consequently, we infer that this omission occurred, and that Shell did not object. Any such objection was waived. (Evid. Code, § 353; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 659, 660 ["Failure to make a timely motion to strike inadmissible evidence has long been regarded as a waiver of the right to complain of the erroneous admission of evidence. . . . [H]ad proper objection been made while plaintiffs' expert was still on the witness stand, and had an appropriate ruling been made sustaining the objection, plaintiffs would have had the opportunity to lay a sufficient foundation . . . or offer modified projections"].) This portion of the appeal is shrouded in perplexity because Shell silently bypassed its waiver and tried to move on to a secondary issue, the admissibility of the laboratory reports. But having failed to object to the lack of foundation, Shell cannot complain that the trial court allowed Dagdigian and Beresky, and possibly others, to testify. We are left with the realization that Shell's argument is a stealth red herring.

Even if Shell's record citations established that Watson's experts relied on unspecified laboratory reports, Shell's attack would still fail.

Dagdigian and other witnesses, as experts, could state the matters they relied on in forming their opinions. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal. App. 3d 388, 414-415.) There is an important limitation. While "'"an expert may state on direct examination the matters on which he relied in forming his opinion, *he may not testify as to the details* of such matters if they are otherwise inadmissible. [Citations.] The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, *he may not under the guise of reasons bring before the jury incompetent hearsay evidence*. [Citation.]'"" (*Id.* at pp. 414-415.)

Given these rules, it fell to Shell to demonstrate that the laboratory reports were incompetent hearsay evidence. In particular, the parties debate whether the laboratory reports qualified as business records.

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule if it qualifies as a business record. (Evid. Code, § 1271.)[13] Therefore, the experts could testify as to an act, condition, or event set forth in a business record. Shell contends that the F&B Lab reports, as well as the other laboratory reports relied upon by Watson, did not qualify as business records because they lacked the proper foundation. This is so, Shell posits, because there was no evidence regarding either the mode of preparation of the reports regarding DIPE or the sources of information used to create the reports. To demonstrate this fact, Shell stated that the declaration of James E. Bruya, the director of the F&B Lab, contains nothing more than conclusory generalities.[14] We are referred to exhibit 1472 without a page citation. That exhibit, as we have previously explained, is over four inches thick. We decline to

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[13] Evidence Code section 1271 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

[14] When a person or entity complies with a subpoena duces tecum for business records, Evidence Code section 1561, subdivision (a) provides that the "records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following: [¶] (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records. [¶] (2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be. [¶] (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event. [¶] (4) The identity of the records. [¶] (5) A description of the mode of preparation of the records."

analyze that exhibit without assistance from counsel. Moreover, we were not provided with the names of the custodians of records that provided declarations from the other laboratories, nor were we provided with record citations directing us to where those declarations can be found in the record. As a result, we have no occasion to analyze them and declare them to be defective.

Shell complains that "the laboratory reports" contained conclusions and were inadmissible for that reason. It is true, as stated in *People v. Reyes* (1974) 12 Cal.3d 486, 503, that for a record to qualify as a business record "'"it must be a record of an act, condition or event."'" But again, Shell briefs are bereft of record citations. This forecloses the possibility of appellate review.

Regardless of the foregoing, there is an additional reason to find a waiver. Shell made no attempt to apply the substantial evidence test (see *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769) and engage in a critical discussion as to why other evidence, such as Schmidt's testimony, did not support a finding of causation. Therefore, even if we were to exclude all but Schmidt's testimony, we would still be left with the presumption that the record contains sufficient evidence. (*Ibid.*)[15]

4. The $14,275,237 in "benefit" damages must be reversed.

The question presented is whether a gasoline leak from a pipeline constitutes "benefits" to Shell, as contemplated by Civil Code section 3334.

When interpreting a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) We must "look first to the words of the statute

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[15] Shell tries in its reply brief to attack the admissibility of Schmidt's testimony for the first time. This is too late. As we have already explained, it would be unfair to Watson for us to consider a belated attack. We note, generally, that Shell's reply brief is longer than its opening brief and advances a variety of new and more detailed assaults on the judgment. We consider all new arguments, authorities and record citations set forth in the reply brief to be waived.

themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]" (*Id*. at pp. 1386-1387.) A close cousin of the foregoing quote is the rule "'that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation.' [Citations.]" (*Wotton v. Bush* (1953) 41 Cal.2d 460, 467.)

Civil Code section 3334 reads: "(a) The detriment caused by the wrongful occupation of real property . . . is deemed to include the value of the use of the 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. [¶] (b)(1) Except as provided in paragraph (2), for purposes of subdivision (a), the value of the use of the property shall be the greater of the reasonable rental value of that property or the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation. [¶] (2) If a wrongful occupation of real property subject to this section is the result of a mistake of fact of the wrongful occupier, the value of the use of the property, for purposes of subdivision (a), shall be the reasonable rental value of the property." (§ 3343, subds. (a), (b)(1) & (b)(2).)

Shell's position is that though "benefits obtained" is not defined, "its plain meaning suggests that the provision acts as a disgorgement remedy forcing trespassers to give up wrongly obtained profits that accrue to the trespasser *as a direct result* of his or

her wrongful *trespass*." In counterpoint, Watson contends that a benefit is obtained by any polluter who keeps money that it should have spent remediating the trespass. In our view, Shell is correct. "Benefits" are not "obtained" by reason of a wrongful occupation unless the trespass itself provided the trespasser with a financial or business advantage.

We start with the plain meaning of the statute. The word "benefits" connotes something that is advantageous, and the benefits contemplated by the statute must be obtained by reason of the wrongful occupation. In other words, a trespass must result in something advantageous for the trespasser or it does not qualify as a benefit for purposes of the statute. Here, the question is whether Shell's pipeline leakage and the resulting contamination of Watson's land can be considered something advantageous for Shell. We think not. Not only did the gasoline leakage result in a loss of product for Shell, but it meant that pipelines either had to be repaired or abandoned and replaced by different pipelines at substantial cost.

We reject the notion that "benefits" includes the avoidance of remediation costs. "The value of the use" is a separate component of damages from "the reasonable cost of repair or restoration of the property to its original condition." Remediation costs fall within the umbrella of the "reasonable cost of repair or restoration." If "benefits" included the cost of remediation (and the value of the use of the money saved, as Watson suggests), then the language permitting recovery of "the reasonable cost of repair or restoration" would be surplusage. (Civ. Code, § 3334, subd. (a).)

According to Watson, "[Civil Code] section 3334 was amended to eliminate the incentive to trespass, including as only one example defendants who dumped toxic waste on worthless desert properties to avoid the proper disposal costs. Obviously, those toxic dumpers did not generate a 'direct profit' dumping the waste -- they simply avoided a cost thereby increasing their net profits. That is exactly what Shell did here. The value to Shell of the cleanup costs it never spent is many times the amount of the cleanup costs." This analogy fails. A polluter who dumps toxic waste in the desert instead of paying to properly dispose of toxic waste gains the financial advantage of getting either free disposal or cheaper disposal. No such financial advantage accrues to the owner of a

leaking pipeline, at least insofar as the owner was not using the leak to effectuate disposal or to obtain some other financial gain separate from the failure to remediate the trespass.[16] In the absence of an advantage, there is no need to impose a special disincentive to trespass.

Our interpretation is in harmony with the salutary purpose of the 1992 amendment that introduced the "benefits obtained" measure of damages to Civil Code section 3334.

The origins of the amendment can be found in Resolution 5-9-91, which was passed by the Conference of Delegates of the State Bar of California in the summer of 1991. In writing to the legislative counsel for the State Bar, the resolution's author explained that the resolution "provides a definition for the 'value of the use' which eliminates Section 3334's economic incentive to dump" toxic waste when the rental value is cheaper than the cost of disposal. "The 'value of the use' would be 'the greater of the reasonable rental value or the benefits obtained by the trespasser by reason of the trespass.' The measure of damages would take into account the benefit obtained by the trespass -- the cost saved by not properly disposing the pollutants."

Those connected to Assembly Bill No. 2663 (1991-1992 Reg. Sess.), the bill prompted by Resolution 5-9-91 and sponsored by the State Bar to amend Civil Code section 3334, discussed the purpose of the bill in a variety of ways and used the following language: (1) "trespassers [have] earned significant business revenue (benefits) from using the land to dispose of toxic wastes" (Amelia V. Stewart, legislative representative of the State Bar of California, letter of support for Assembly Bill No. 2663 to Assemblyman Phillip Isenberg, Chair of the Assembly Judiciary Committee, March 19, 1992); (2) "potential polluters would be required to disgorge the benefits obtained from any such wrongful occupation" (Michael D. Schwartz, letter of support for Assembly Bill No. 2663 to Amelia V. Stewart, legislative representative of the State Bar of California, March 20, 1992); (3) "the law should be clear that the damages recoverable in such cases is the economic benefit to the trespasser, if that is the greater value" (Assem. Com. on

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16 Watson does not attribute any such intent to Shell.

Judiciary, Analysis of Assem. Bill No. 2663 (1991-1992 Reg. Sess.), par. 6); (4) "the law should encourage proper disposal of toxic wastes. [¶] By statutorily allowing recovery of 'the benefits (profits) obtained by the occupier by reason of trespass,' courts in trespass actions will have the discretion to assess damages comparable to the benefit to the wrongful trespasser that is dumping toxic wastes" (Assem. Com. on Judiciary, 3d reading analysis of Assem. Bill No. 2663 (1991-1992 Reg. Sess.), pars. 4 and 5); (5) "in some cases trespassers find it to their advantage to intentionally use another's land, reap large benefits for that act, and then pay a relatively small amount of damages for the trespass" and that "polluters may find it cheaper to dump the waste on someone else's desert land and pay relatively minor damages for that trespass, than to pay the fees for the proper disposal of the waste" (Sen. Com. on Judiciary, comment on Assem. Bill No. 2663 (1991-1992 Reg. Sess.), as amended May 27, 1992, p. 2).

This history demonstrates that the legislature intended to eliminate financial incentives for trespass by eradicating the benefit associated with the wrongful use of another's land. This intent would not be furthered by applying the "benefits obtained" measure of damages to a trespass for which there was no financial or business advantage. In such a case, a plaintiff is limited to recovering under the other measures of damages contemplated by the statute, i.e., the reasonable rental value of the property and the cost of restoration and recovery. Thus, the $14,275,237 "benefits" damages awarded by the jury must be reversed.

WATSON'S CROSS-APPEAL

1. Sanctions.

During trial, on May 31, 2001, Shell moved to exclude evidence of Schmidt's scientific method and analysis on the theory that his method was not generally regarded as reliable in the scientific community and was inadmissible pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). The trial court set the motion to be heard on June 4, 2001. On that date, Watson filed a motion seeking sanctions under the auspices of section 128.7. Watson claimed that the *Kelly* motion was filed in bad faith and caused Watson to

incur $29,500 in expenses, plus $1,450 to prepare a motion for sanctions under section 128.7. The trial court denied the *Kelly* motion and the motion for sanctions.

Watson contends that the trial court abused its discretion when it declined to grant sanctions against Shell. In response, Shell contends that the motion lacked merit and that it was procedurally barred because it did not satisfy the safe harbor provision in section 128.7, subdivision (c)(1). Because we agree with Shell that the motion was procedurally barred, we need not discuss the merits. In its reply, Watson argues that Shell waived the procedural bar by not raising it below. However, if the facts are undisputed, then a party may raise a legal argument for the first time on appeal. (*Nippon Credit Bank v. 1333 North Cal. Boulevard* (2001) 86 Cal.App.4th 486, 500.) Whether an appellate court considers the matter is discretionary. (See *Gonzalez v. State Personnel Bd.* (1995) 33 Cal.App.4th 422, 431.) Here, the relevant facts are undisputed and we opt to reach Shell's argument.

Section 128.7 permits a party to move for sanctions for bad faith tactics. In 2001, subdivision (c)(1) provided in relevant part: "Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 30 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." (§ 128.7, subd. (c)(1).)

Because Watson filed its sanctions motion the same day the *Kelly* motion was heard, it failed to provide Shell with an opportunity to withdraw the challenged papers. As a result, section 128.7 could not be lawfully applied. (See *Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 424.) Watson contends that this result is unfair because, due to the timing of events, it was denied of the opportunity to move for sanctions. But there is no indication in the record that Watson sought an order from the trial court shortening the safe harbor time, which would have been permitted by the statute. Because Watson did not avail itself of that option, it cannot complain about unfairness. In the final analysis, however, whether the result was unfair to Watson is not a proper consideration. Quite simply, we have no power to rewrite the statute. That

power lies with the Legislature. On this record, we cannot conclude that the trial court abused its discretion. (See *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167 [setting forth the standard of review].)

2. Costs.

Watson submitted a cost bill for $189,285.70, and then revised it to claim $179,695.78. The trial found that the total costs were $174,366.45 and then ordered "that the entire cost bill be reduced by fifty percent. The settlement agreement with ARCO states that ARCO is required to reimburse Watson for fifty percent of its litigation costs. A double recovery of costs is precluded under California law. [Citation.]"

According to Watson, the trial court erred when it cut the costs in half and awarded only $87,183.22. We disagree.

The key to this issue is the settlement reached between Watson and ARCO and the trial court's order determining that the settlement was in good faith.

Before we delve into our analysis, a quick recapitulation of the law is in order. When a release is given in good faith, it does not discharge any other joint tortfeasors from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, or in the amount paid for it, whichever is greater. (§ 877, subd. (a).) Sections 877 and 877.6 together provide that "'while a good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant, the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff.' [Citation.] Section 877, subdivision (a) thus operates to reduce claims against other joint (as opposed to several) tortfeasors. [Citation.]" (*Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1700 (*Regan Roofing*).) If litigation costs are part of a settlement, a nonsettling defendant is entitled to an offset. (*Id*. at p. 1709.) If, however, costs are not part of a settlement, then a nonsettling defendant is not entitled to an offset. (*Reed v. Wilson* (1999) 73 Cal.App.4th 439, 445.)

We now turn to the settlement agreement and Watson's related admissions. Part 13 of the settlement agreement required ARCO to pay Watson $1.5 million and,

further, stated: "The payment by ARCO to Watson under this [part] 13 is in settlement and partial satisfaction of the damages which Watson attributes to ARCO only." In Watson's cross-appellant's opening brief, it states that as of the "Effective Date," which was defined in the settlement agreement as November 1, 2000, "Watson's total litigation expenses were approximately $3 million. . . . This amount . . . includes . . . expenses such as attorneys' fees and expert fees. Watson and [ARCO] agreed to include in the Settlement Agreement a mechanism by which Watson would recoup those litigation expenses. Pursuant to the Settlement Agreement and within days after the Settlement Agreement was entered into, [ARCO] reimbursed Watson in the amount of $1.5 [m]illion in partial satisfaction of unspecified expenses incurred by Watson." This is a concession that the payment of $1.5 million was for litigation costs. A similar concession appeared in Watson's opposition to Shell's motion to tax costs. These concessions may be taken as admissions by Watson. (See *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1097-1098.) Therefore, we view part 13 of the settlement agreement as a mechanism by which ARCO agreed to compensate Watson for half its pre-Effective Date litigation costs.

The settlement agreement gave Watson the chance to recoup the other half of its pre-Effective Date litigation costs through parts 17 and 18 of the settlement agreement. Part 17 of the settlement agreement provided that money payable to Watson from any defendant after the Effective Date shall be paid into the cleanup fund and that the fund shall be maintained for at least 10 years. Part 18, subsection 18.1, entitled Watson to be reimbursed from the cleanup fund for pre-Effective Date litigation expenses that were not already reimbursed.

Subsequent litigation expenses fell under part 15 of the settlement agreement. That part provided, in relevant part, that "ARCO shall be obligated to reimburse Watson for fifty percent (50%) of all of the litigation costs and expenses actually incurred by Watson for Watson to pursue the claims of Watson in the Watson Lawsuit from and after the Effective Date."

The next piece of the puzzle is the applicability or inapplicability of sections 877 and 877.6. The parties do not indicate whether a trier of fact, be it the trial court or the jury, ever determined whether ARCO and Shell were joint tortfeasors. Nonetheless, ARCO sought the protection of sections 877 and 877.6, and those sections only apply to joint tortfeasors. Moreover, part 7, subsection 7.1, of the settlement agreement provided: "ARCO shall obtain an order from the Court determining that the terms and conditions of settlement set forth in this Agreement constitute a good faith settlement under the provisions of . . . section 877.6, or in the alternative, obtain an order determining that the provisions of . . . section 877.6 are inapplicable to the settlement set forth in this Agreement." The trial court's order stated, inter alia, "Arco's settlement with Watson is a good faith settlement within the meaning of . . . [section] 877 and [section] 877.6 precluding any claim for contribution or indemnity against ARCO by any non-settling defendant." Impliedly, the trial court found that ARCO and the nonsettling defendants were joint tortfeasors for purposes of the ruling and order under sections 877 and 877.6.

Undaunted by the trial court's implied findings, Watson contends that the trial court's ruling was barred by the collateral source rule set forth in *Pacific Gas & Electric Co. v. Superior Court* (1994) 28 Cal.App.4th 174. Under that rule, if a plaintiff receives some compensation for its injuries from a source wholly independent of the tortfeasor, the tortfeasor is not entitled to an offset. (*Id*. at p. 178.) "The most obvious examples of sources *not* considered wholly independent of the tortfeasor are a cotortfeasor and a cotortfeasor's insurance carrier." (*Id*. at p. 180.) While Watson readily admits that Shell would be entitled to an offset if it was a joint tortfeasor, Watson states: "ARCO and Shell are not joint tortfeasors, as each of them caused separate and distinct harms to Watson's property interests as a result of unrelated oil and gas refining operations in the vicinity of the Watson Center."

In our view, Watson is barred from claiming that ARCO and Shell were not joint tortfeasors. Watson gained a benefit by settling with ARCO, and that settlement was conditional on an order determining the settlement to be in good faith or an order determining that sections 877 and 877.6 were inapplicable. Watson obtained what it

desired, i.e., a ruling that satisfied part 7, subsection 7.1 of the settlement agreement. Having obtained that benefit, Watson cannot elude the consequences. There are no cases directly on point, but our holding is consistent with the policies that underlie the doctrines of waiver and estoppel. (See *Telles Transportation. Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1166-1167 ["under general civil litigation principles, 'where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error'"]; *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178 ["fairness is at the heart of a waiver claim"]; and *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [stating that where "'a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal" and that "the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court"].)

Because the settlement agreement requires ARCO to cover half of Watson's pre- and post-Effective Date litigation costs, and because ARCO and Shell were impliedly treated as joint tortfeasors for purposes of the trial court's order determining that Watson entered into its settlement with ARCO in good faith, the trial court properly applied *Regan Roofing* and reduced Watson's costs.

Watson suggests that the trial court's decision to reduce Watson's costs conflicts with the good faith determination order. That order specifies that "[n]one of the non-settling defendants is entitled to any set-off or credit as a result of the settlement between ARCO and Watson" and that at trial "Watson will seek to recover from the remaining defendants only their proportionate share of liability for contamination on the [Watson Center]." On the surface of the two orders there is a potential conflict because the latter order gives Shell a set-off or credit even though the prior order prohibited any set-offs or credits. But this conflict fades away when the good faith determination order is scrutinized.

The trial court had no intention of permitting Watson to obtain a double recovery. Instead of permitting the nonsettling defendants to obtain a set-off or credit, Watson was

limited to seeking to recover only the proportionate shares of the nonsettling defendants' liability for the contamination. Properly understood, the portion of the good faith determination order proscribing any set-off or credit only pertained to findings of liability. It did not apply to costs. Rather, it was designed to honor the allocation of liability in the settlement agreement. However, there was no similar provision in the order for costs. Therefore, the way for the trial court to honor the cost allocation in the settlement agreement was to apply *Regan Roofing*.

DISPOSITION

The damages are reduced to $3,915,851. As modified, the judgment is affirmed. The parties shall bear their costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.*
NOTT

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.