

## Kelly v. House

Court of Appeal of California, First Appellate District, Division One

March 23, 2020, Opinion Filed

A153735 & A153184

### **Reporter**

47 Cal. App. 5th 384 \*; 2020 Cal. App. LEXIS 277 \*\*; 260 Cal. Rptr. 3d 405

LINDSAY KELLY, as Executor, etc., Plaintiff, Cross-defendant and Respondent, v. GREGORY HOUSE et al., Defendants, Cross-complainants and Appellants.

**Notice:** As modified Apr. 1, 2020.

**CERTIFIED FOR PARTIAL PUBLICATION\***

**Subsequent History:** [\*\*1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published April 2, 2020.

**Prior History:** Superior Court of Solano County, No. FCS029760.

[Kelly v. Gregory House, 2020 Cal. App. Unpub. LEXIS 1865 \(Cal. App. 1st Dist., Mar. 23, 2020\)](#)

## **Core Terms**

trespass, lease, farmable, parcel, agricultural, vineyard, contractual, cultivation, corral, winery, prevailed, deposit, farm, tangible, forage

## **Case Summary**

### **Overview**

HOLDINGS: [1]-Lessees who were not actively farming the acreage could recover attorney fees for trespass to agricultural land under [Code Civ. Proc., § 1021.9](#), because the trespasses, committed by prospective buyers of the property, caused tangible economic harm that included loss of organic certification status; [2]-Although the trespasses did not disrupt existing agricultural operations, statutory attorney fees were recoverable because the damaged land was under cultivation and intended for animal foraging.

### **Outcome**

Affirmed in part, reversed in part, and remanded.

## **LexisNexis® Headnotes**

Civil Procedure > Appeals > Standards of Review

### [HN1](#) Appeals, Standards of Review

Under well-established appellate principles, the facts are recited in the light most favorable to the judgment.

\*Pursuant to [California Rules of Court, rules 8.1105\(b\) and 8.1110](#), this opinion is certified for publication with the exception of parts I., II., IV., and V. of the Discussion.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Torts > Premises & Property Liability > Trespass to Real Property > Remedies

Real Property Law > Torts > Trespass to Real Property

## [HN2](#) Basis of Recovery, Statutory Awards

In cases falling within the intent of [Code Civ. Proc., § 1021.9](#), there must be some tangible harm done to real or personal property as a result of the trespass. The phrase "damages to personal or real property" is most reasonably read as requiring proof of some actual, compensable injury to real or personal property before an attorney fee award may be made.

Civil Procedure > Appeals > Standards of Review

## [HN3](#) Appeals, Standards of Review

A trial court's judgment is presumed correct on appeal and all intempts and presumptions are indulged in favor of its correctness.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Torts > Premises & Property Liability > Trespass to Real Property > Remedies

Real Property Law > Torts > Trespass to Real Property

## [HN4](#) Basis of Recovery, Statutory Awards

The plain language of [Code Civ. Proc., § 1021.9](#), provides that statutory attorney fees may be recovered for trespass on lands either under cultivation or intended or used for the raising of livestock. There is no requirement in [§ 1021.9](#) that the property be used at the time of the wrong for raising livestock—the statute provides that the property be intended for such use.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Torts > Premises & Property Liability > Trespass to Real Property > Remedies

Real Property Law > Torts > Trespass to Real Property

## [HN5](#) Basis of Recovery, Statutory Awards

Fees may be awarded under [Code Civ. Proc., § 1021.9](#), for trespass on agricultural land being cultivated, even where the defendants did not damage crops themselves or interfere with agricultural operations. That the trespass did not interfere with an active agricultural operation is not a bar to recovery of fees under [§ 1021.9](#).

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

## [HN6](#) Basis of Recovery, Statutory Awards

When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation on an issue common to both causes of action in which fees are proper and those in which they are not. Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units.

## Headnotes/Summary

### Summary

[\*384] CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court awarded damages to lessees of agricultural land after they prevailed on claims for trespass and conversion. The trial court did not award attorney fees ([Code Civ. Proc., § 1021.9](#)). (Superior Court of Solano County, No. FCS029760, D. Scott Daniels, Judge.)

The Court of Appeal affirmed in part, reversed in part, and remanded. The court held that although the lessees were not actively farming the acreage, they could recover statutory attorney fees for trespass to agricultural land because the trespasses, committed by prospective buyers of the property, caused tangible economic harm that included loss of organic certification status. Although the trespasses did not disrupt existing agricultural operations, statutory attorney fees were recoverable because the damaged land was under cultivation and intended for animal foraging. (Opinion by Sanchez, J., with Humes, P. J., and Banke, J., concurring.)

## Headnotes

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

#### CA(1) (1)

##### **Costs § 20—Attorney Fees—Statutory Provisions—Agricultural Trespass.**

Lessees of agricultural land prevailed on all of their claims and were awarded damages for trespass and conversion. The incursions resulted in the loss of certified organic status. The trial court awarded damages for the trespass, including lost income, lost sheep forage, and organic recertification. However, following the entry of judgment, the successor trial court judge concluded the lessees were not entitled to attorney fees because they had not shown any tangible harm to personal or real property caused by the trespass ([Code Civ. Proc., § 1021.9](#)). The trial court erred.

[[Cal. Real Estate Law & Practice \(2020\) ch. 384, § 384.02](#); [Levy et al., Cal. Torts \(2020\) ch. 50, § 50.33](#); [Cal. Forms of Pleading and Practice \(2020\) ch. 174](#), [Costs and Attorney's Fees, § 174.62](#); [2 Cathcart et al., Matthew Bender Practice Guide: Cal. Trial and Post-Trial Civil Procedure \(2020\) § 25A.10](#).]

#### CA(2) (2)

##### **Costs § 20—Attorney Fees—Statutory Provisions—Agricultural Trespass.**

In cases falling within the intent of [Code Civ. Proc., § 1021.9](#), there must be some tangible harm done to real or personal property as a result of the trespass. The phrase “damages to personal or real property” is most

reasonably read as requiring proof of some actual, compensable injury to real or personal property before an attorney fee award may be made.

#### CA(3) (3)

##### **Costs § 20—Attorney Fees—Statutory Provisions—Agricultural Trespass.**

The plain language of [Code Civ. Proc., § 1021.9](#), provides that statutory attorney fees may be recovered for trespass on lands either under cultivation or intended or used for the raising of livestock. There is no requirement in [§ 1021.9](#) that the property be used at the time of the wrong for raising livestock—the statute provides that the property be intended for such use.

#### CA(4) (4)

##### **Costs § 20—Attorney Fees—Statutory Provisions—Agricultural Trespass.**

Fees may be awarded under [Code Civ. Proc., § 1021.9](#), for trespass on agricultural land being cultivated, even where the defendants did not damage crops themselves or interfere with agricultural operations. That the trespass did not interfere with an active agricultural operation is not a bar to recovery of fees under [§ 1021.9](#).

#### CA(5) (5)

##### **Costs § 29—Attorney Fees—Procedure—Hearing and Determination—Apportionment.**

When a cause of action for which attorney fees are [\*386] provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation on an issue common to both causes of action in which fees are proper and those in which they are not. Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units.

**Counsel:** Hayes, Scott, Bonino, Elingson, Guslani, Simonson & Clause and Mark G. Bonino for Plaintiff, Cross-defendant and Respondent.

Black Rice & Luna, Robert N. Black and Autumn E. Luna for Defendants, Cross-complainants and Appellants.

**Judges:** Opinion by Sanchez, J., with Humes, and Banke, JJ., concurring.

**Opinion by:** Sanchez, J.

## Opinion

**SANCHEZ, J.**—Defendants, cross-complainants, and appellants Gregory House and Jennifer House successfully sued respondent Lindsay Kelly's predecessors in interest, decedents Edward and Dana Foss, for interfering with the Houses' contractual option to purchase an agricultural parcel. In these consolidated appeals,<sup>1</sup> the Houses challenge the trial court's denial of statutory and contractual attorney fees. They also contend the court undervalued their damages for lost profits. We conclude the lower court erred in failing to award statutory attorney fees but properly denied the Houses' claim for contractual attorney fees. We also conclude the damages award is supported by substantial evidence. Accordingly, we affirm in part, reverse in part, and remand for a determination of reasonable attorney fees under [Code of Civil Procedure section 1021.9 \(section 1021.9\)](#).

## FACTUAL AND PROCEDURAL BACKGROUND

---

<sup>1</sup> Kelly dismissed her appeal of the judgment in appeal No. A153184, after the Houses filed a cross-appeal in that action. We consolidate on our own motion that cross-appeal with the Houses' appeal No. A153735.

**HN1** Under well-established appellate principles, we recite the facts in the light most favorable to the judgment. ([People v. Bogle \(1995\) 41 Cal.App.4th 770, 775 \[8 Cal. Rptr. 2d 739\]](#).) The Houses [\*2] own and operate a 40-acre organic [\*387] farm in Dixon, adjacent to a 47-acre property (the Property) formerly owned by Paul Moller. The farm's primary crop is Gala apples. The Houses also maintain an agricultural consulting business and teach organic farm management at the University of California at Davis.

In 2002, the Houses entered into a six-year agricultural lease with Moller for 35 farmable acres of the Property. These acres included a large field, a small field, and a corral area. The lease was set to expire in December 2007. Under the lease, the Houses agreed to transition the farmable parcel to certified organic status over a three-year period. The lease included an option for a six-year extension "provided Lessor and Lessee agree to any modifications of terms requested by either party." The lease also gave the Houses the right of first refusal of any offer to sell the Property during the term of the lease or any lease extension. Over time, the Houses successfully converted the farmable acreage to certified organic status. The farmable parcel became an integral part of their own farm operation and they had every expectation that they would continue to farm the land into the future. [\*3] They were on good terms with Moller and were never delinquent on their rent payments.

In Spring 2007, Moller was facing a judgment lien of around \$250,000. With no notice to the Houses he decided to sell the Property, entering into a purchase agreement with Dana and Edward Foss for \$1.25 million. The transaction was a "cash out sale" requiring an initial deposit of \$1,000, with an additional deposit of \$224,000 to be paid on or before May 1, 2007. The "down payment" would be secured by a third deed of trust on the Property. After transferring the deposits to Moller, the Fosses recorded the deed of trust. The trial court later found that the \$225,000 payment to Moller was a loan, and not a downpayment on the Property.

The Fosses were both California real estate licensees. Moller had initially asked Dana Foss to help him find a buyer. When a potential buyer pulled out, the Fosses offered to buy the Property. Dana Foss prepared the purchase agreement, designating herself as the agent for both buyer and seller. The purchase agreement made the sale contingent on the sale of the Fosses' residence, which was reportedly "in escrow." At trial, however, Foss admitted her residence had never

been [\*\*4] placed in escrow. Effectively, then, the purchase agreement did not contain a fixed closing date.

In May 2007, Gregory House received a voicemail from Moller notifying him of the decision to sell the Property. House called Moller and reminded him that the lease contained a right of first refusal. Moller stated he had forgotten about that provision. He indicated he would be out of the country for the next three weeks. Moller then called Dana Foss to tell her about the Houses' right of first refusal. By this time, the Fosses had already transferred \$225,000 to Moller.

[\*388]

House then called Dana Foss. She denied that she was Moller's agent and demanded to see the original copy of the lease. She faxed him a copy of the purchase agreement and told him in a cover letter that he would have one day to accept the offer and three weeks to make the \$225,000 downpayment. The purchase agreement she forwarded to House contained the requirement that closing was contingent upon the sale of the Fosses' residence. She had not prepared a new purchase agreement with terms applicable to the Houses. Foss did not include any of the required supplemental statutory disclosures, and House was not offered the right [\*\*5] to conduct a walk-through inspection.

Foss's cover letter contained several omissions and misrepresentations about the Fosses' agreement with the Mollers. For example, Foss asserted that Moller had been given only one day to accept the purchase agreement when in fact he was given a week. The cover letter represented that there was a three-week deadline to perform on the deposit when the purchase agreement provided for 30 days. She also suggested that the Houses would be unable to exercise their right of first refusal because the Fosses had already loaned money to Moller and taken out a deed of trust against the Property.

Four days later, the Houses sent a letter to Moller declaring their intent to exercise their contractual right to purchase the Property. They indicated they were working to secure financing to match the Fosses' offer. The Houses intended to acquire the Property to expand their apple production from their neighboring farm. Later, after seeing the Fosses move into a residence on the Property, Gregory House left two phone messages for Moller reiterating the Houses' intent to exercise their right of first refusal. He requested a meeting and asked

for clarification regarding [\*\*6] certain confusing terms contained in the purchase agreement. Moller did not respond.

On June 13, 2007, Jennifer House went to see Moller. He said he could not talk to her but revealed that the Fosses' attorneys were working on a strategy. Moller predicted there would be a lawsuit between the Fosses and the Houses over the right to purchase the Property. He indicated the Fosses intended to offer things that the Houses could not match in order to prevent the Houses from acquiring the Property.

Five days later, Jennifer hand-delivered a letter exercising the right of first refusal provision along with a check for the initial \$1,000 deposit called for in the purchase agreement. The Houses did not give Moller \$225,000 because they understood only \$1,000 was necessary to start the process and they were not going to risk that amount of money with no contract. However, they were taking steps to acquire all the necessary funds to complete the purchase. Moller rejected the Houses' offer in writing, stating that the required deposit [\*389] was \$225,000 per his agreement with the Fosses. The Houses filed a lawsuit against Moller for specific performance, breach of contract, and declaratory relief.

While [\*\*7] the Houses' lease remained in effect, the Fosses entered the Property and sprayed nonorganic herbicides in the corral area of the farmable parcel, cut down several trees, and altered the corral fencing with prohibited paints. Edward Foss drove his pickup onto the large field and fenced off a one-acre portion. The Houses' attorney wrote to the Fosses warning them about the fragility of organic certification and insisting they not trespass on ground controlled by the Houses.

In June 2007, the Fosses filed suit against Moller and the Houses alleging claims for specific performance, negligent misrepresentation, declaratory relief, and to quiet title. In November 2008, the Houses filed a first amended cross-complaint against Moller and the Fosses, alleging claims for intentional interference with contractual economic relations, intentional interference with prospective economic advantage, trespass to land, conversion, and negligence. Moller later filed for bankruptcy and the case was removed to federal district court.

Following bankruptcy proceedings, the district court remanded the case to the superior court in April 2014. The Property was foreclosed on and sold to a third party in March [\*\*8] 2015. Moller and the Houses settled their

lawsuit.

After a bench trial, the trial court issued a tentative statement of decision finding the Fosses liable for inducing a breach of contract by improperly interfering with the Houses' right of first refusal. The court also found the Fosses had intentionally interfered with the Houses' prospective economic advantage by thwarting their plans to cultivate organic apples on the farmable parcel. The Houses also prevailed on their claims for conversion, trespass, and negligence.

The Houses sought \$2,558,173 in total damages, primarily consisting of lost apple profits that would have accrued had they begun planting apple trees in Spring 2008. Relying on "all of the evidence presented during the trial," including a damages estimate prepared by Gregory House, the trial court found the Houses would have planted apple trees on the farmable acreage by 2009 and would have accrued \$1.4 million in profits by 2016 had it not been for the Fosses' interference. Judgment was entered based on the tentative statement of decision. The Houses were awarded total compensatory damages of \$1,669,705 and \$1,000 in punitive damages.

The Houses filed a motion for attorney [\*\*9] fees and costs. By then, the original trial judge had retired and the motion was heard by a successor judge. The [\*390] court denied the motion, concluding the Houses had not demonstrated any right to statutory or contractual attorney fees. As to contractual fees, the court found the Houses were not signatories or intended third party beneficiaries to the purchase agreement and they could not establish that the Fosses would have been entitled to attorney fees against *them* had the Fosses prevailed, a prerequisite for reciprocal application of [Civil Code section 1717](#). As for statutory fees, the court found [\*\*10] [section 1021.9](#), which authorizes attorney fees in agricultural trespass cases, inapplicable because they had not demonstrated that the trespass caused tangible harm to personal or real property. The Houses appeal in case No. A153735 from the denial of their request for attorney fees, and their cross-appeal in case No. A153184 challenges the trial court's calculation of lost profits.

## DISCUSSION

### I., II.\* [NOT CERTIFIED FOR PUBLICATION]

#### III. *The Denial of Section 1021.9 Attorney Fees Was Error*

##### A. *Relevant Authorities*

[Section 1021.9](#) provides: "In any action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended [\*\*11] or used for the raising of livestock, the prevailing plaintiff shall be entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law." The statute is intended to ensure that farmers are able to protect their land from trespassers through civil litigation. ([Quarterman v. Kefauver \(1997\) 55 Cal.App.4th 1366, 1370 \[64 Cal. Rptr. 2d 741\]](#).) We conclude the Houses are entitled to attorney fees under this statute.

**CA(1)[↑] (1)** At trial below, the Houses prevailed on all of their claims and were awarded damages for trespass and conversion. The Fosses' trespasses included boarding their own animals on the farmable parcel, painting the corrals, disk-plowing the fields, applying prohibited pesticides, and cutting down oak and buckeye trees cultivated by the Houses. These incursions resulted in the loss of the Houses' certified organic status. The trial court awarded damages for the trespass, including \$65,730 in lost corral rental income, \$7,725 in lost small field rental income, \$10,000 in lost sheep forage, and \$1,500 for organic recertification. However, following the entry of [\*391] judgment, the successor trial court judge concluded the Houses were not entitled to attorney fees because they had not shown any "tangible harm [\*\*12] to personal or real property caused by the trespass" as required under [Belle Terre Ranch, Inc. v. Wilson \(2015\) 232 Cal.App.4th 1468, 1477 \[182 Cal. Rptr. 3d 393\]](#) (*Belle Terre*). The trial court erred.

*Belle Terre* concerned a boundary dispute between a vineyard and a neighboring winery. The rear of the winery's building backed up to the vineyard, with a pathway in between. ([Belle Terre, supra, 232 Cal.App.4th at p. 1470](#).) The winery's owners regularly used the pathway to access the building during renovations. The vineyard's owner initially did not object to the use but became concerned when a cement truck

---

\* See footnote, *ante*, page 384.

kicked up dust that settled on his grape vines. The parties could not agree on the boundary between their properties and the vineyard's owner filed a complaint to quiet title as to the disputed strip of land and for trespass. The complaint did not seek damages. (*Id. at p. 1472.*) After trial, the trial court entered judgment quieting title. It permanently enjoined the winery from trespassing on the vineyard's property and awarded the vineyard \$1 in nominal damages for trespass and \$116,920 in attorney fees under [section 1021.9](#). (*Belle Terre, at p. 1475.*) The winery appealed.

**CA(2)↑ (2)** In reversing the attorney fee award, the appellate court noted the trial court had awarded only nominal damages because the vineyard had not offered proof of actual injury. (*Belle Terre, supra, 232 Cal.App.4th at p. 1476.*) The court concluded [\*\*13] this type of award did not support the recovery of attorney fees under [section 1021.9](#). While the winery was the prevailing party, nominal damages did not qualify as "damages to personal or real property." (*Belle Terre, at p. 1476; see id. at pp. 1476–1477.*) The court explained:

**HN2↑** "In cases falling within the intent of the statute, there must be some tangible harm done to real or personal property as a result of the trespass. The phrase 'damages to personal or real property' is most reasonably read as requiring proof of some *actual, compensable injury* to real or personal property before an attorney fee award may be made." (*Id. at p. 1477.*) Because the winery had not presented any evidence of damages to personal or real property and had not prayed for any compensatory damages, attorney fees were not obtainable under [section 1021.9](#). (*Belle Terre, at p. 1476.*)

*Belle Terre* is readily distinguishable from the present case. Unlike the vineyard, the Houses prayed for compensatory damages in their amended cross-complaint and were awarded \$83,455 in damages for trespass. While a portion of the damages award consisted of lost rental income, the Houses offered evidence of tangible harm to the farmable parcel, including the removal of trees, the Fosses' use of prohibited chemicals, and other trespasses that resulted [\*\*14] in the destruction of the farmable acreage's organic certification [\*392] status and the destruction of animal forage. Accordingly, unlike the facts of *Belle Terre*, the Houses demonstrated concrete injury to real or personal property. The Houses were entitled to attorney fees under a plain reading of [section 1021.9](#).

Kelly challenges the factual basis for the trial court's

award of damages for trespass, characterizing them as speculative and asserting it is undisputed the Houses did not suffer any actual damage to real or personal property during the term of the lease. She contends, for example, that the \$10,000 award for lost sheep forage constituted only "nominal" damages. We disagree. The Houses suffered tangible economic harm—as reflected in a damages award of \$83,455—due to trespasses which destroyed their organic certification status and animal forage and deprived the Houses of their use of the corral and small field. And, having abandoned her appeal of the judgment, Kelly is in no position to question the sufficiency of the evidence to support the trial court's damages findings or its determination that the Fosses had no legal right to possess the Property. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [275 Cal. Rptr. 797, 800 P.2d 1227] (Arceneaux) [HN3↑] the court's judgment [\*\*15] is presumed correct on appeal and all intentions and presumptions are indulged in favor of its correctness].)

**CA(3)↑ (3)** Kelly also asserts there was no evidence that the Houses were utilizing the land as they had never rented the corral and only intended to graze sheep in the future. She ignores **HN4↑** the plain language of [section 1021.9](#), which provides that statutory attorney fees may be recovered for trespass "on lands either under cultivation or intended or used for the raising of livestock . . ." (Italics added; see *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 465 [102 Cal. Rptr. 3d 32], disapproved on other grounds in *Sholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1117 [Cal.Rptr.3d , 458 P.3d 860] ["[T]here is no requirement in [section 1021.9] that the property be used at the time of the wrong for raising livestock—the statute [provides] that the property be 'intended' for such use."].)

**CA(4)↑ (4)** We reject for similar reasons Kelly's contention that statutory fees are not recoverable because the Fosses' trespass did not disrupt existing agricultural operations. *Hoffman v. Superior Ready Mix Concrete, L.P.* (2018) 30 Cal.App.5th 474 [241 Cal. Rptr. 3d 476] is instructive. In *Hoffman*, the plaintiffs owned a landlocked parcel on which they maintained a sizeable inventory of plants, intending to open a commercial nursery. The defendant trespassed and damaged five areas of the plaintiffs' parcel by constructing dirt berms [\*\*16] that caused erosion and silt runoff onto the Hoffmans' property. (*Id. at p. 479.*) It was undisputed that the trespass did not disrupt any existing agricultural cultivation. (*Id. at p. 481.*) The trial court nevertheless awarded \$16,178 in compensatory

damages and \$289,153 in attorney fees under [section 1021.9](#). (*Hoffman, at p. 481.*) The appellate court affirmed, holding that [HN5](#) “fees may be awarded under [section 1021.9](#) for trespass on agricultural land being cultivated, even where the defendant[s] did not damage crops themselves.” (*Hoffman, at p. 484.*) Here, the record establishes that the Fosses trespassed on the farmable parcel held under the Houses’ lease and damaged land that was under cultivation and intended for animal foraging. That the trespass did not interfere with an active agricultural operation is not a bar to recovery of fees under [section 1021.9](#).

#### B. The Houses Did Not Forfeit Their Claim

Kelly also maintains that the Houses forfeited their claim for attorney fees under [section 1021.9](#) because they sought to recover all of their attorney fees generated in this matter rather than limiting their request for fees incurred in connection with their trespass claim. Kelly further asserts that if the Houses are entitled to statutory fees, the award is subject [\[\\*\\*17\]](#) to allocation because the vast majority of the issues addressed at trial did not relate to trespass but rather to the Fosses’ interference with the right of first refusal.

[HN6](#) [CA\(5\)](#) (5) “When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees.’ [Citation.] ... Such fees need not be apportioned when incurred for representation on an issue common to both causes of action in which fees are proper and those in which they are not. [Citation.] Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney’s time into compensable and noncompensable units.” (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686–687 [98 Cal. Rptr. 2d 263].)

We need not address Kelly’s forfeiture claim as the trial court found the Houses ineligible for attorney fees and did not address apportionment. Given the relatively small percentage of overall damages attributable to the Fosses’ trespass, it is conceivable that not all of the attorney fees incurred in this matter [\[\\*\\*18\]](#) are recoverable under [section 1021.9](#). However, resolution of this question is best left to the trial court to determine in the first instance whether fee apportionment is appropriate under the circumstances. On remand, the

Houses bear the burden of demonstrating the amount and reasonableness of their attorney fees and costs recoverable for trespass under [section 1021.9](#). (See *Christian Research Institute v. Alnor* (2008) [165 Cal.App.4th 1315, 1320](#) [81 Cal. Rptr. 3d 866].)

[\*394]

IV., V.\* [NOT CERTIFIED FOR PUBLICATION]

#### DISPOSITION

The order denying the Houses attorney fees under [section 1021.9](#) is reversed. The matter is remanded to the trial court to calculate a reasonable attorney fee award under this provision. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

Humes, J., and Banke, J., concurred.

---

End of Document

\* See footnote, *ante*, page 384.