***W&W El Camino Real, LLC v. Fowler*, 2014 Cal. App. LEXIS 425 (Cal. App. 4th Dist. May 16, 2014)**

Defendant was allowed to amend her pleading absent a showing of prejudice to plaintiff; agricultural activity alleged to be a nuisance must be defined before analysis of the Right to Farm Act can be applied.

FACTS AND PROCEDURAL POSTURE

In 1981, defendant Victoria Fowler, trustee of the Fowler Revocable Living Trust, purchased real property in Rancho Santa Fe and hired a company to plant lemon trees on four acres of the land. The company subsequently installed a drainage system in the center of the lemon grove that consisted of a 12-inch pipe that exited about three feet away from plaintiff's property line. In 2005, plaintiff W&W El Camino Real, LLC (W&W) purchased the land downhill from Fowler's lemon grove and constructed a new home for sale. On a day in January 2010, the area comprising both properties experienced heavy rains. As a result, a substantial amount of water was released at a high velocity through the drainage system pipe. Water, mud and debris flooded W&W's property and damaged the newly constructed house and its contents.

W&W's expert testified the soil that flowed onto and damaged W&W's property originated from Fowler's lemon grove. He also testified the drainage system's pipe was placed too close to the W&W property. Instead of three feet from the property line, the pipe should have been at least 15 feet away in order to reduce the velocity of downpouring water. Fowler's expert testified the lemon grove was shaped in a way that allowed drainage to naturally flow downwards. W&W built its property right in the middle of the drainage swale. He also testified that Fowler made many improvements to the grove to minimize erosion and slow down the water. He finally contended the source of dirt that damaged W&W's property came from a flowerbed inconsistent with the material found in the lemon grove.

W&W sued Fowler for negligence, nuisance, trespass, and an injunction. On the day trial was to start, the trial court granted Fowler's motion to amend her answer to allege the defense of *Civil Code § 3482.5*—the Right to Farm Act—after W&W filed a written opposition to the motion. In addition, it continued the trial for more than 90 days and reopened discovery. By special verdict the jury found that neither Fowler nor W&W were reasonable in the control and ownership of their properties, and that Fowler's conduct caused W&W damage. However, the jury also found *§ 3482.5* applied. As a result, the court entered judgment for Fowler. W&W appealed and contended that (1) the trial court erred when it allowed Fowler to amend her answer on the date trial was to start, and (2) *§ 3482.5* did not apply. The court of appeal reversed and remanded on the issues of liability and damages.

DISCUSSION

The first issue the court addressed was whether the trial court abused its discretion by allowing Fowler to amend her answer. *CCP § 473(a)(1)* permits a court, in furtherance of justice, to allow a party to amend any pleading. Motions to amend are appropriately granted as late as the first day of trial or even during trial if the defendant is alerted to the charges by the factual allegations, no matter how framed, and the defendant will not be prejudiced. The court found that W&W failed to make an adequate showing of prejudice, and thus the trial court did not abuse its discretion when it granted Fowler's motion to amend her answer.

The second issue the court addressed was whether *§ 3482.5* applied. This section provides: "No agricultural activity, operation, or facility…conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance…due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began."

The court found that the conduct of an encroaching landowner is not an element of *§ 3482.5*. Thus, whether W&W acted unreasonably in not installing a concrete drainage ditch to protect the home it built from storm water damage is irrelevant to the issue of whether *§ 3482.5* applies. The court also found there was a dispute between the parties regarding whether the "activity" on the lemon grove that led to the damage on W&W's property was an agriculture activity for purposes of *§ 3482.5*. On remand the activity alleged to be the nuisance should be defined for the jury in order for it to determine whether *§ 3482.5* applied. Finally, the court found that since the jury expressly found in the special verdict that Fowler was unreasonable in the ownership and control of her property and that her unreasonable conduct caused W&W to incur damages, that finding suggested Fowler did not operate and maintain her agricultural operation in a manner consistent with proper and accepted customs and standards. Thus, on remand the issue of whether *§ 3482.5* applied should be decided first before the jury reaches the issue of negligence/comparative fault of the parties.