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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ADEL SOMO et al.,

Plaintiffs and Appellants,

v.

CHEVRON PRODUCTS, U.S.A.,

Defendant and Respondent.

D050939

(Super. Ct. No. GIS19614)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Cannon, Judge. Reversed and remanded with directions.

Plaintiffs Adel Somo and Muntaha Somo appeal from a summary judgment in favor of defendant Chevron Products U.S.A. (Chevron) as well as orders denying their requests to file a motion for leave to amend and denying their discovery motion to compel. Plaintiffs, lessors under a lease for property on which Chevron operated a gas station, sued Chevron, the lessee, for damages relating to Chevron's contamination of the property and sought a judicial declaration that Chevron did not restore the property to a

"clean condition" as required by the lease. In granting summary judgment, the trial court ruled as a matter of lease interpretation that Chevron had no contractual duty to remediate any contamination, and also that the statute of limitations had run on plaintiffs' tort causes of action for negligence, negligence per se, and permanent nuisance.

On appeal, plaintiffs contend the court erred in granting summary judgment due to (1) its erroneous lease interpretation and improper consideration of the evidence, including the court's consideration of subjective opinion testimony of a former Chevron employee; and (2) the existence of triable issues of material fact as to whether the statute of limitations barred their tort causes of action. Plaintiffs further contend the court abused its discretion by refusing to shorten time for, and then taking off calendar, their motion for leave to amend their complaint to allege, inter alia, a continuing nuisance. Finally plaintiffs contend the court erred by denying their motion to compel production of certain discovery.

We conclude the court erred by interpreting the lease as a matter of law in view of ambiguity in the relevant language and the existence of conflicting extrinsic evidence relevant to its interpretation. We hold that although the plaintiffs' tort causes of action accrued in October 1995, there are triable issues as to whether defendants should be estopped from asserting a statute of limitations defense. We further hold the trial court erred in rejecting plaintiffs' efforts to bring a motion for leave to amend a second amended complaint, and that its discovery order is not supported by substantial evidence. We reverse the judgment and remand with directions set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and Chevron, lessors and lessee respectively, are successors in interest to a lease of real property in Chula Vista, California. Chevron's predecessor in interest, Standard Oil Company of California (Standard Oil), signed the lease in 1969 to build and operate a gas station, and in 1970 installed underground storage tanks as well as other materials on the property. The lease provides in part that on the lessor's notice at a specified time before lease termination, the lessee must remove buildings, improvements, fixtures and equipment "within a reasonable time following termination of this lease or any extension thereof including underground tanks and lines all at its sole cost and expense, and Lessee shall restore said premises to a level and clean condition and shall either compact the fill placed upon such premises or fill said tanks with sand."

In 1995, Chevron removed its underground storage tanks on the property. The removal was observed by an outside contractor who reported the presence of petroleum hydrocarbons in the soil due to the underground tank systems. In October 1995, the San Diego County Department of Environmental Health (County) sent a "Notice of Corrective Action and Reimbursement Responsibility" to both Chevron and the then property owner, Elvin Anderson (as trustee for his family trust), advising them they would be responsible for corrective action including environmental investigation and cleanup. In December 1996, Chevron's environmental project manager, Michael Bauer, wrote a letter to Anderson notifying him of the existence of contaminants and the fact the

County had opened a case on the site.¹ Chevron's consultant removed fuel impacted soils before it replaced the underground storage tanks in 1995. After County opened its case, Chevron continued to conduct site assessment and monitoring on the property.

In April 2004, plaintiffs purchased the property. The lease term ended in February 2005. That month, after unsuccessfully attempting to purchase the station improvements, plaintiffs sued Chevron seeking declaratory and injunctive relief. Plaintiffs alleged that after purchasing the property, they learned it had been contaminated by fuel and other petroleum products, and sought an injunction in part to prevent Chevron from demolishing the property improvements because the demolition would deprive them of the opportunity to fully investigate the extent of the contamination. Eventually, plaintiffs and Chevron stipulated that Chevron had the right to remove the improvements. By December 2005, Chevron had removed all station improvements including the underground storage tanks, compacted the soil, and removed the surrounding fence.

¹ Bauer wrote: "I am writing in regards to the Chevron facility referenced above. I am the project manager responsible for the assessment and cleanup of leaks occurring at our facilities in San Diego County. During the station reconstruction activities of last year, new underground tanks and product lines were installed. In removing the old facilities, petroleum hydrocarbons were discovered in the surrounding soil, prompting [County] to open a case at the site. We will be required to fully assess the extent of hydrocarbons and, if necessary, perform remediation. [¶] Part of our assessment will be the installation of groundwater monitoring wells on and possibly off the property. To do this we must obtain permits from the county. Part of the permit package is a form to be signed by the property owner, informing them that they may be held responsible for maintenance or destruction of any wells installed on their property if the party who installed the wells cannot be located. You are protected by Chevron under the terms of our lease but the form is still required. I have attached the form to this letter. Please read, sign, and return it to me at your earliest convenience. We will begin the assessment process at that time."

In April 2006, plaintiffs filed a first amended complaint against Chevron asserting causes of action for breach of contract, negligence, negligence per se, permanent nuisance and waste, and alleging damages as a result of the contamination. Plaintiffs alleged that at the time of its complaint, Chevron had not obtained a "closure" letter from County indicating no further action was required, and it continued to maintain and use groundwater monitoring wells on the property for testing, causing them to be burdened by the presence of wells, the need to give Chevron access, and limits on the property's use, development and/or sale. Plaintiffs alleged Chevron had breached the lease by "inter alia, contaminating the Property and failing to restore the Property to a 'clean condition' as required by paragraph 6 of the Lease." They further alleged Chevron breached its duty of due care by failing to ensure that contamination did not leak and migrate into the soils and groundwater, and by "failing to take adequate, reasonable and sufficient steps to remediate the spill or leak and to prevent its migration on and off the Property." In a cause of action labeled permanent nuisance, plaintiffs alleged Chevron operated or permitted the gas station's operation in an unreasonable manner in that it "knowingly created the condition of nuisance at the Property"; that Chevron had "taken as much action as they intend to take in remediating the contamination at the Property, but have not removed all of the contamination therein."

Chevron moved for summary judgment or alternatively summary adjudication of issues. With respect to plaintiffs' breach of contract cause of action, it argued the applicable lease terms did not contemplate or address environmental conditions; that the provision that Chevron "restore said premises to a level and clean condition" referred

only to the removal of buildings, equipment and structures, the removal or sand-filling of underground storage tanks, and the restoration of the property to a flat, level condition free from deconstruction debris. It maintained that filling tanks with sand would not be an option if environmental concerns were at issue. Alternatively, Chevron argued that to the extent the parties' intent and industry custom were relevant to interpret the lease, it presented evidence demonstrating that the language in paragraph 6 of the lease was intended to mean that on the lessor's request Chevron would remove the station improvements and restore the premises to a flat, compacted condition free from debris (also known as "flat-lotting") without environmental cleanup or remediation.

Defendants relied primarily on the declaration of retired Chevron employee Ben Smith, who averred that paragraph 6 of the Chevron/Somo lease was common in ground leases entered into in the 1960's by Standard Oil and its division, Signal Oil Company (Signal Oil). He explained the language was intended to mean that Standard Oil would restore the property to a flat, compacted condition free from debris, also known as "flat-lotting." Smith stated that as of about 1977 in San Diego County, there was no governmental environmental oversight of the closure of retail gas station properties, and that in California, cities and counties only began requiring soil and groundwater testing for such closures in the early to mid-1980's.

As for the remaining causes of action for negligence, negligence per se, waste and permanent nuisance, Chevron argued the applicable three-year statute of limitations for each commenced to run no later than either October 1995, when petroleum hydrocarbons

were found and County opened its case on the property, or December 1996, when Chevron advised the previous property owner of the open case.

Plaintiffs opposed the motion and submitted evidentiary objections to defendants' evidence. In particular, they asserted Smith's interpretation of the lease and testimony as to the absence of governmental oversight lacked foundation, was speculative and constituted inadmissible opinion in part because Smith could not identify any other similar lease and had not seen one since about 1982, he was not a party to the lease and did not negotiate it on Chevron's behalf, and he was unaware of pollution laws in California. Plaintiffs also argued their causes of action did not accrue until 2004 or 2005 because additional fuel releases had occurred. Finally, plaintiffs argued that even assuming the prior owner had actual or inquiry notice of contamination, it would not bar their claims because he was not aware of permanent or appreciable damage to the property because Chevron led him to believe the 1995 release was minor and resolved shortly thereafter. They sought leave to amend to add causes of action for continuing nuisance and trespass in the event the court found its permanent nuisance cause of action time-barred.

Overruling the parties' evidentiary objections, the trial court granted summary judgment in Chevron's favor. As a matter of contract interpretation, it ruled there was no triable issue of material fact as to plaintiffs' breach of contract and declaratory relief causes of action because the lease did not obligate Chevron to remove contamination or other "foreign objects" and that plaintiffs' proposed construction would not permit

Chevron to fill the underground tanks with sand.² It further agreed there was no triable issue that the three-year statute of limitations had run on plaintiffs' remaining causes of action because the property had suffered immediate and permanent injury before February 25, 2002, three years before they filed their complaint. It rejected plaintiffs' arguments as to tolling of the statute of limitations, pointing to the absence of evidence that all fuel contaminated soil had been removed from the premises or that Chevron made representations leading the prior owner to believe the property either was not contaminated or had been cleaned. Plaintiffs filed the present appeal.

DISCUSSION

I. *Summary Judgment*

A. *Standard of Review*

A defendant moving for summary judgment must show either (1) one or more elements of the plaintiff's cause of action cannot be established or (2) there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851; *Guz v. Bechtel National, Inc.*

² The court reasoned: "The lease does not obligate [Chevron] to remove petroleum hydrocarbons from the soil before returning the property to the lessor. Paragraph 6 deals with buildings, improvements, equipment, etc. that defendant placed on the property. The first sentence addresses defendant's right to remove such items if it wants to, while the second sentence applies when the lessor wants defendant to remove the items. Defendant's obligation to 'restore said premises to a level and clean condition and shall either compact the fill placed upon said premises or fill said tanks with sand' must be considered within this context. The above quoted language cannot be interpreted as requiring [Chevron] to remove all foreign objects because that would contradict the provision which allows [Chevron] to leave the tanks in the property and fill them with sand. If, as plaintiff contends, restoring to a clean condition means returning the property to the original condition as when first leased then defendant would not be allowed to leave the tanks in the ground and add sand to them."

(2000) 24 Cal.4th 317, 334 (*Guz*.) When the motion is based on the assertion of an affirmative defense, the defendant has the initial burden to demonstrate that undisputed facts support each element of the affirmative defense. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289; see *Aguilar*, at p. 850, fn. 11.) "The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. [Citation.] If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does 'the burden shift[] to plaintiff to show an issue of fact concerning at least one element of the defense.' " (*Anderson*, at pp. 289-290.)

On appeal, we independently review the parties' supporting and opposing papers, liberally construing the evidence in support of plaintiffs as the opposing parties (*Guz*, *supra*, 24 Cal.4th at p. 334; *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal. 4th 1138, 1142), and assess whether the evidence would, if credited, permit the trier of fact to find in their favor under the applicable legal standards. (Cf. *Aguilar*, *supra*, 25 Cal.4th at p. 850.) We do not weigh the evidence and inferences, but merely determine whether a reasonable trier of fact could find in plaintiffs' favor, and we must deny the motion when there is some evidence that, if believed, would support judgment in their favor. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.)

B. *Statute of Limitations on Tort Causes of Action*

Plaintiffs contend the trial court erred when it concluded the statute of limitations barred their tort claims. They maintain first that Anderson, the prior property owner, was not put on notice in 1995 that he had suffered any immediate or permanent injury to his property so as to commence the statute of limitations. Plaintiffs further argue they

presented factual support for the proposition that the property had contamination as a result of not only the 1995 release, but also due to releases occurring in 1997, and at various times from 2003 to 2004.³ Based on these later releases, plaintiffs seek to avoid application of the rule that immediate and permanent injury to real property will cause the limitations period to commence, regardless of the identity of the property owner. (E.g., *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1534-1535 (*CAMSI*); *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1216.) Further, plaintiffs argue Chevron should be estopped from asserting a statute of limitations defense because it concealed the extent of the

³With respect to these arguments, plaintiffs have moved to augment the record with several documents, including two new documents not before the trial court at the time of the summary judgment hearing: (1) a November 2003 letter from Ted Park to Sean Sullivan, counsel for the prior property owner; and (2) County's September 19, 2007 "closure" letter. Plaintiffs assert that Park's letter, which was produced in connection with a different lawsuit they have pending against Anderson, suggests the possibility of a new release, and County's closure letter marks the earliest time that Chevron's "holdover tenancy" could end. Plaintiffs provide no authority for the proposition that these matters are the proper subject of augmentation, nor do they explain with any reasoned argument or authority why the circumstances justify this court taking new evidence under Code of Civil Procedure section 909. "Augmentation does not function to supplement the record with materials not before the trial court." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Further, the power to take new evidence on appeal is to be used " 'sparingly,' " and is only appropriately exercised when required by " 'the interests of justice.' " (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1257, 1259; see also *Vons Companies*, at p. 444, fn. 3 [requiring exceptional circumstances to take evidence under Code of Civil Procedure section 909].) Because plaintiffs have not made any showing of exceptional circumstances justifying our taking new evidence in the interests of justice, we deny the augmentation request as to these documents. The remaining documents attached to plaintiffs' request (page 6 of the March 2007 declaration of plaintiffs' counsel in support of plaintiffs' motion for leave to file a second amended complaint and the entirety of exhibit C, portions of the deposition of Elvin Anderson) were before the trial court but inadvertently omitted from the appendix. Chevron does not oppose augmenting the record with these items, and we grant plaintiffs' request as to these documents.

contamination problem from the prior property owner.

Preliminarily, we address Chevron's assertion that plaintiffs' arguments are unaccompanied by any citation to the record. Based on the assertedly deficient briefing, Chevron argues plaintiffs have not overcome the presumption of correctness that we afford to judgments and orders. Plaintiffs concede the omissions, stating they were "inadvertent[]." Chevron also argues there is no record support at all for plaintiffs' assertions that it withheld material information from the prior property owner.

We agree that as to the factual predicates for plaintiffs' arguments on the statute of limitations and estoppel to assert that defense, the opening brief is deficient in omitting exact citations to the evidence demonstrating the existence of disputed issues of material fact. (See Cal. Rules of Court, rule 8.204(a)(1)(C).) Such inadequacies generally permit courts to deem appellants as abandoning arguments challenging the trial court's summary judgment ruling or disregard those portions of an appellant's brief. (E.g., *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [scope of review on appeal is limited to those issues adequately raised and supported in opening brief, even where review is de novo]; *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205 [summary judgment affirmed where appellant's brief did not include exact page citations to the record; problem is "especially acute" when considering an appeal from a summary judgment].)

However, in the "Statement of the Case" portion of their brief, plaintiffs provide record citations to their separate statement in connection with the facts underlying the

statute of limitations question. Those citations (as well as the summary judgment papers themselves, which we assess de novo) permit us to analyze plaintiffs' contentions.

Further, plaintiffs repeat their arguments in their reply brief with corresponding record citations to evidence they presented in opposition to facts set forth in Chevron's separate statement. We proceed to the merits of the statute of limitations arguments.

1. *General Principles of Accrual/Property Damage Cases*

A statute of limitation will not commence until a cause of action accrues. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) In general a cause of action accrues at " 'the time when the cause of action is complete with all its elements' " including a wrongful act, causation, and injury. (*Ibid.*; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 389, 397-398; *Shamsian v. Atlantic Richfield Company* (2003) 107 Cal.App. 4th 967, 979-980 (*Shamsian*)). An important exception is the discovery rule, a common law rule designed to protect a plaintiff who is " 'blamelessly ignorant' " of the existence of a cause of action. (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 408, disapproved on another point in *Trope v. Katz* (1995) 11 Cal.4th 274, 292; *Shamasian*, at p. 980.) The discovery rule postpones accrual of the cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (*Fox v. Ethicon*, at p. 807.) "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' " (*Ibid.*; *Norgart v. Upjohn Co.*, *supra*, at pp. 389, 397-398.)

The California Supreme Court has explained that application of the discovery rule should not be subject to a "hypertechnical" approach. (*Fox v. Ethicon*, *supra*, 35 Cal.4th

at p. 807.) Under the rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations. (*Ibid.*) However, "[r]ather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Ibid.*)

"The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have 'information of circumstances to put [them] *on inquiry*' or if they have 'the opportunity to obtain knowledge from sources open to [their] investigation.' [Citations.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox v. Ethicon, supra*, 35 Cal. 4th at pp. 807-808; *Shamsian, supra*, 107 Cal.App.4th at p. 980.) It is the discovery of the facts, and not their legal significance, that starts the running of the statute. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1113.) The question of when a party actually discovered or reasonably should have discovered his or her cause of action is a question of fact unless the undisputed facts can support only one reasonable conclusion. (*Jolly*, at p. 1112; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 640 [resolution of limitations issue can be a matter of law where "uncontradicted facts established through discovery are susceptible of only one legitimate inference"].)

In the case of damage to real property, a cause of action accrues when the defendant's act causes " 'immediate and permanent injury' " or when there is actual and appreciable damage to the property, so long as the owner "discovered, or ought to have discovered," the harm. (*CAMSI, supra*, 230 Cal.App.3d at p. 1534; *Siegal v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994, 1005, 1009, 1014 [in case of latent defects or contamination, the cause of action belongs to the owner who first discovered, or ought to have discovered, the property damage; it is only then that some entity capable of maintaining a legal claim will have suffered a compensable injury].) If, however, "the defendant has caused injury by a series of acts, the orthodox rule suggests an action could be brought within the limitation period running from the last act." (*CAMSI*, at p. 1534; see *Mills v. Forestex Co., supra*, 108 Cal.App.4th at p. 650, fn. 15 [progressively developing or continuing wrong may give rise to new cause of action and start a new limitation period running with each successive manifestation of a latent defect].) These rules are applicable to causes of action for a nuisance on real property. (*Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 868-869; *KFC Western, Inc. v. Meghriq* (1994) 23 Cal.App.4th 1167, 1180.) However, even in cases of progressive or continuing injury where the " 'nature, extent or permanence of the harm are difficult to discover' the running of the statute is postponed 'until the time of discovery of (or opportunity to discover) the facts.' " (*Bradler v. Craig* (1969) 274 Cal.App.2d 466, 471; *Mills v. Forestex Co.*, at pp. 649-650.) This is because "[a] duty of inquiry arises independently of a particular plaintiff's subjective knowledge." (*Mills v. Forestex Co.*, at p. 649.)

2. The Statutes of Limitation for Permanent Nuisance and Negligence Accrued When the Prior Owner was Notified of the Release of Petroleum Hydrocarbons on his Property

In making its statute of limitations argument, Chevron argued each of the elements of plaintiffs' negligence, negligence per se, waste, and permanent nuisance causes of action arose at the latest on Anderson's discovery of impacted soil in October 1995. It relied on its disclosure to Anderson of the detection of petroleum hydrocarbons and the need for groundwater monitoring well installation permits, and Anderson's signature on a letter acknowledging his responsibility for the wells if Chevron could not be located. In opposition, plaintiffs pointed to Chevron's December 6, 1996 letter to Anderson in which its environmental project manager Bauer advised him of the need to install groundwater monitoring wells, asking Anderson to sign a form indicating his responsibility for maintenance or destruction of any wells, and stating, "You are protected by Chevron under the terms of our lease, but the form is still required." Plaintiffs also cited Anderson's deposition testimony in which he testified he had read Chevron's letter to mean that Chevron was going to clean up any leaks, and it was Chevron's responsibility to "take care of it." Anderson explained that he understood Chevron's 1996 letter as admitting to the leak and advising him they were going to clean it up; after he received that 1996 letter, he had every reason to believe the contamination had been contained because he had heard nothing to the contrary. Anderson also testified that on October 30, 1995, after he received County's letter, he spoke with Bauer and ended the conversation with the understanding that Chevron had "accepted responsibility for the replacement of

tanks or whatever they were doing." Anderson's handwritten note on the October 1995 letter reads: "10/30/95. Talked to Bauer. They are putting in new tanks and remodeling station and notices sent to all interested people. Chevron's responsibility." It is undisputed that after County forwarded its notice of corrective action, Chevron undertook an investigation including by installing groundwater monitoring wells on the property. Anderson testified that based on Chevron's lack of communication, he assumed the soil had been cleaned up shortly after 1996.

The threshold question is whether Chevron's evidence was sufficient to meet its initial summary judgment burden of showing Anderson had notice of " *'immediate and permanent injury'* " or "actual and appreciable" harm so as to trigger the statute of limitations at that time. (*CAMSI, supra*, 230 Cal.App.3d at p. 1534; *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223, 1228 [if moving defendant fails to meet its initial burden, the burden never shifts to the opposing party to raise a factual issue].) Here, plaintiffs pleaded theories of permanent nuisance and negligence. We conclude Chevron's evidence that as of October 1995, Anderson was advised of the release of hydrocarbons on his property, that the City had opened a case on the matter, and that he would bear responsibility for implementing environmental investigation and correction, met that burden. For purposes of these causes of action, the harm to the property—the release of petroleum hydrocarbons—was actual and, by virtue of the City and Chevron's notice, "appreciable" to Anderson, putting him on inquiry notice to pursue his remedies. Thus, Chevron met its threshold burden to show the statute of limitations

commenced for Anderson and all subsequent owners, including plaintiffs. (*CAMSI, supra*, 230 Cal.App.3d at pp. 1534-1535.)

Pointing out Chevron never provided Anderson with test results or otherwise indicated the extent of the contamination, plaintiffs maintain their evidence demonstrates that Anderson was never aware the release of petroleum hydrocarbons caused him actual damage, or an immediate and permanent injury to his property, so as to start the limitations period. They concede that the necessary threshold to trigger the limitations period can be actual and appreciable harm, but argue the harm must be more than " 'symbolic' "; it must reach the point where Anderson was entitled to a legal remedy. The question — for purposes of plaintiffs' permanent nuisance and negligence claims — is whether plaintiffs raised a triable issue of material fact as to whether Anderson was put on inquiry notice to pursue his remedies when he was advised by both Chevron and County that there had been an unauthorized release of petroleum hydrocarbons on the property and that County considered him a responsible party. We conclude as a matter of law based on these facts a reasonable property owner knowing of an unintended release of petroleum on his property would consider it "actual" physical harm to his or her property, putting that owner on inquiry notice to undertake a reasonable investigation further into the matter. (*Fox v. Ethicon, supra*, 35 Cal.4th at pp. 807-808; accord, *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1323-1330 [for a building constructed with asbestos-containing materials, actual injury occurred, and statute of limitations accrued, when asbestos fibers become airborne and contamination occurs].) "[O]nce plaintiff has suffered actual and appreciable harm,

neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514; *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 255.)

Chevron's failure to inform Anderson of the *extent* of contamination does not impact our analysis. There is no evidence Chevron and Anderson had a unique, confidential or fiduciary relationship in which Chevron undertook a duty to inform Anderson of the facts, relieving Anderson's duty of inquiry. (Cf. *Mills v. Forestex, supra*, 108 Cal.App.4th at p. 649 [rejecting plaintiffs' assertion they had no duty of inquiry absent factual or legal support they were in a confidential relationship with the defendant]; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513 [landlord and tenant do not generally stand in a confidential relationship]; *Girard v. Delta Towers Joint Venture* (1993) 20 Cal.App.4th 1741, 1749 [fiduciary relationship is not established merely because parties reposed trust and confidence in each other; rather, courts have not extended special relationship doctrine to include ordinary commercial contractual relationships such as a landlord-tenant relationship in a commercial setting].)

Further, as we explain below, Chevron's representations as to its responsibility for the problem do not go to accrual of the limitations period, but to the fairness of its reliance on a limitations argument; i.e., whether Chevron should be estopped from asserting the statute of limitations against plaintiffs. Absent application of equitable tolling or estoppel to assert the statute of limitations, plaintiffs' causes of action for negligence and permanent nuisance, first filed in April 2006, are barred as untimely filed.

Plaintiffs' arguments relating to the permanency and minor nature of the harm raise a separate issue: whether the harm suffered was continuing, giving rise to a new limitations period for each successive manifestation of injury. But for purposes of summary judgment, the trial court was limited to the theories set forth in the pleadings in which plaintiffs claimed a permanent nuisance. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) On remand, plaintiffs may seek leave to amend to add a claim of continuing nuisance to avoid the statute of limitations bar raised by Chevron.⁴

3. *Equitable Estoppel*

Plaintiffs contend Chevron should be estopped from asserting the statute of limitations because it concealed the nature, extent and duration of the contamination from all of the "interested parties" and, in particular, misled Anderson to believe that the contamination was minor and would be remedied by 2002. Again, plaintiffs rely on Anderson's deposition testimony.

" "Equitable estoppel . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period.

[Equitable estoppel] is wholly independent of the limitations period itself and takes its

⁴ Property may be subject to a continuing nuisance even where a defendant's offensive conduct ended years ago. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1147.) "That is because the 'continuing' nature of the nuisance refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur." (*Ibid.*)

life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' ' " (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383; see also *Atwater Elementary School Dist. v. California Dept. Of General Services* (2007) 41 Cal. 4th 227, 232.) " 'To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." . . . "Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." ' ' " (*Atwater*, at pp. 232-233; see also *Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1165-1166 [elements of estoppel]; *Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.) Bad faith or an intent to deceive is not necessary. (*Jordan v. City of Sacramento*, at p. 1496; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43.)

Whether equitable estoppel applies is normally a question of fact, unless the material facts are undisputed. (*Sofranek v. Merced County* (2007) 146 Cal.App.4th 1238, 1251; *Jordan v. City of Sacramento*, *supra*, 148 Cal.App.4th at p. 1496.) Viewing plaintiffs' evidence liberally as we must, we conclude a reasonable trier of fact could infer based on Bauer's oral and written representations to Anderson in 1995 and 1996 that Chevron explicitly acknowledged and accepted responsibility to remediate any contamination problem. Specifically, the evidence shows that in the face of the unauthorized release and County's commencement of a case on the matter, Bauer advised Anderson initially by telephone that Chevron was "responsibl[e]" (as evidenced by Anderson's contemporaneous notes), and later, in 1996, that Anderson was "protected

under the lease," assurances on which Anderson relied to conclude Chevron would "take care" of any problems. Anderson's lease with Chevron provided that Chevron would, on the lease's termination, restore his property to a "level and clean condition," bolstering the reasonableness of Anderson's reliance and understanding. Indeed, after making these representations, Chevron undertook to comply with County's required investigation by removing impacted soil and installing groundwater monitoring wells. In response to plaintiffs' showing, Chevron argued that these were merely additional "irrelevant" facts, and that Anderson's subjective belief that Chevron would take responsibility was irrelevant. We disagree.

These facts are akin to cases in which courts have estopped defendants from invoking the statute of limitations due to assurances made to the plaintiff that they would repair defects in construction. In *Lantzy v. Centex Homes*, the court explained that if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, the plaintiff reasonably relies on this representation to refrain from bringing a timely action, the representation proved false after the limitations period has expired, and the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action. (*Lantzy v. Centex Homes, supra*, 31 Cal.4th at p. 384.) In *Shaffer v. Debbas, supra*, 17 Cal.App.4th 33, a dispute over construction defects to the plaintiffs' home, the court applied equitable estoppel where the defendant builder repeatedly promised that certain defects would be fixed, inducing the plaintiffs to refrain from instituting legal

proceedings. The Court of Appeal held the promises estopped the defendants from relying on the statute of limitations defense for plaintiffs' causes of action, including the plaintiffs' personal injury causes of action, reasoning, "Where a potential defendant has promised to remedy a portion of the damages suffered by the plaintiff, it would be unreasonable to expect the plaintiff to jeopardize the possibility of repair by filing a lawsuit as to items of damage not covered by the defendants' promise." (*Id.* at p. 43; see also *A&B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 354 [citing cases in which tolling of the statute applies, explaining that "[t]olling during a period of repairs rests upon the same basis as does an estoppel to assert the statute of limitations, i.e., reliance by the plaintiff upon the words or actions of the defendant that repairs will be made"]; 3 Witkin, *Cal. Procedure* (4th ed. 1997) *Actions*, § 686, pp. 873-874 [estoppel applied where defendant makes representations to the effect that he will perform his contractual obligation, and the plaintiff in reliance forbears to sue in time].)

Chevron argues there is "no evidence that Chevron made any representations that could have reasonably lead Anderson to believe the Property was not contaminated or that contamination had been cleaned up, instead he came to believe the issue had been resolved, not because of anything he was told but because he heard nothing." It would have us view Anderson's deposition testimony in such a way to conclude that he reached an unreasonable understanding or belief absent any representation from Chevron. But we are not to weigh inferences or strictly interpret Anderson's testimony in Chevron's favor. (*Alexander v. Codemasters Group Limited, supra*, 104 Cal.App.4th at p. 139; *Aguilar*,

supra, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).) Further, the question is not whether Anderson believed the property had been cleaned, but instead, whether he reasonably believed Chevron would assume responsibility for any environmental obligations and relied on that representation to forego filing suit. The inferences reasonably drawn from Anderson's testimony permit the jury to reach such a conclusion, which would render it unreasonable to expect Anderson to bring an action against Chevron while Chevron was actively undertaking to investigate the contamination, clean up impacted soils, and monitor the situation. In sum, plaintiffs raise triable issues of material fact as to whether Chevron should be estopped to rely on its statute of limitations argument that plaintiffs' tort causes of action accrued in 1995 or 1996 when County disclosed the release of petroleum hydrocarbons to Anderson.

C. Breach of Contract Cause of Action

Paragraph 6 of the lease provides:

"Lessee shall have the right at any time during Lessee's occupancy of the leased premises, or within a reasonable time thereafter, to remove any and all buildings, improvements, fixtures and equipment owned or placed by Lessee, its Sublessees or Licensees, in, under or upon the leased premises or acquired by Lessee whether before or during the term thereof. Provided further that Lessee must, if required by Lessor by notice in writing at least thirty (30) days prior to the termination of this lease or any extension thereof, remove any and all such buildings within a reasonable time following termination of this lease or any extension thereof including underground tanks and lines all at its sole cost and expense, and Lessee shall restore said premises to a level and clean condition and shall either compact the fill placed upon such premises or fill said tanks with sand."

Plaintiffs advance a series of arguments challenging the trial court's ruling that this provision cannot be interpreted to require Chevron to remediate pollution. In part, they argue the trial court ignored the lease's plain language and the ordinary and popular

meaning of the words "restore" and "clean"; it ignored case law interpreting the word "restore" to mean that Chevron was required to remediate pollution on the property and was a holdover tenant until doing so; and the court made an improper factual determination on the ambiguity in the lease terms, a question that was not properly resolved on summary judgment. Plaintiffs further argue the court erred as a matter of law by failing to interpret the lease in light of antipollution laws existing at the time of the lease signing, with which Chevron agreed to comply. Plaintiffs maintain the trial court erred by admitting the subjective opinion testimony of Ben Smith as to Chevron's intent or the specialized meaning of the lease language. Finally, plaintiffs argue the court erred by misinterpreting the lease to allow Chevron to leave the property in an unmarketable condition due to pollution, requiring Chevron to be deemed a nonconsensual holdover tenant.

1. *Contract Interpretation Principles*

"The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) "When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. (Civ. Code, § 1639.)" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) The interpretation of a contract generally presents a question of law unless the interpretation turns on the credibility of conflicting extrinsic evidence. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266 (*ASP Properties*); *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th

1351, 1356 [summary judgment context].) When a contract is reasonably susceptible to different interpretations based upon conflicting extrinsic evidence requiring the resolution of credibility issues, its interpretation evolves into a question of fact. (*ASP Properties*, at pp. 1266-1267.) Where the evidence is undisputed and the parties draw conflicting inferences, the reviewing court will independently draw inferences and interpret the contract. (*Id.* at p. 1267.) On appeal, a "trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

Based on the above principles, we decide first as a matter of law whether the lease is ambiguous, either from its terms alone or the extrinsic evidence offered by the parties. If we conclude it is reasonably susceptible to either of the meanings urged by plaintiffs and Chevron, we then look to the proffered extrinsic evidence to interpret the contract. (*ASP Properties, supra*, 133 Cal.App.4th at p. 1266.) If the material extrinsic evidence is not in conflict, we decide the meaning of the phrase as a matter of law. (*Ibid.*) If the evidence presents a genuine issue of material fact, that factual issue must be resolved by a jury before the court can interpret the contract. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1359.)

2. *The Lease Is Ambiguous*

Plaintiffs contend that paragraph 6's phrase, "Lessee shall restore said premises to a level and clean condition" must be interpreted solely from the contract and using the

ordinary and popular meaning of the terms "restore" and "clean"⁵ to mean that Chevron was to return the property to its original, unblemished and uncontaminated condition as when it was first leased. In moving for summary judgment, Chevron argued the lease as a whole indicates the parties did not contemplate environmental remediation because the lease was silent on that point; it maintained, based on Ben Smith's declaration as to the intent of the language, paragraph 6 dealt exclusively with removal of improvements such as buildings, equipment, and structures and restoring the premises to a flat, level condition free from surface debris.⁶ Pointing to Smith's declaration, Chevron asserted that if environmental conditions were a concern, filling the underground storage tanks

⁵ Citing the 1989 edition of "Webster's Encyclopedic Unabridged Dictionary of the English Usage," plaintiffs point to definitions of the word "restore" as including "to bring back to a former, original, or normal condition" and "to put back to a former place" and the word "clean" as "unsoiled, unstained; free from foreign or extraneous foreign matter; free from blemish or defect."

⁶In part, Smith averred: "Paragraph 6 of the Lease includes language that was very common in ground leases entered into by both Signal Oil and [Standard Oil] during the 1960[']s. At the time, Signal Oil used lease forms that were virtually identical to those used by [Standard Oil]. In the 1960[']s, [Standard Oil's] standard ground leases provided that during the term of the lease, or within a reasonable time thereafter, [Standard Oil] would have the right, but not the obligation, to remove the buildings, improvements and Underground Storage Tanks ('USTs') (collectively, the 'Station Improvements'). Paragraph 6 of the Lease includes additional language that [Standard Oil] would use if the property owner negotiated for the lease to require [Standard Oil] to remove the Station Improvements if the owner so requested. The language in that paragraph stating that [Standard Oil] 'shall restore said premises to a level and clean condition, and shall either compact the fill placed upon said premises, or fill said tanks with sand' was language commonly used in [Standard Oil's] ground leases at that time. [¶] The language in Paragraph 6 referring to restoring the premises to a 'level and clean condition' was intended to mean that, if so requested by the lessor, upon termination of the Lease, [Standard Oil] would remove the Station Improvements and restore the property to a flat, compacted condition free from debris—commonly known as 'flat-lotting.' "

with sand would not have been a viable option.

We acknowledge the terms "restore" and "clean" have plain and ordinary meanings, as shown by the above-referenced dictionary definitions. But these definitions do not compel application of the plain meaning rule as plaintiffs assert, rendering parol evidence inadmissible. Paragraph 6 initially addresses removal of "buildings, improvements, fixtures and equipment," and then later separately refers to underground storage tanks, suggesting the parties may have considered the tanks outside the category of surface improvements. Viewing the entirety of the provision, a "clean" condition could be interpreted to mean cleared of surface improvements and debris. In that sense, we cannot agree with plaintiffs that the phrase "[l]essee shall restore said premises to a clean and level condition," in the context of the provision, is so clear that reasonable minds cannot differ as to its interpretation. (*Denver D. Darling, Inc. v. Controlled Environments Const., Inc.* (2001) 89 Cal.App.4th 1221, 1235; *Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 46.)

On the other hand, we do not agree with the trial court's conclusion that the lease is not reasonably susceptible to plaintiffs' interpretation, i.e., that it unambiguously means Chevron was *not* required to remediate environmental contamination from the soil. The court reasoned that plaintiffs' interpretation of the word "restore" as putting the property in its original condition was inconsistent with the lease term permitting the lessee to leave sand-filled underground tanks on the premises. But paragraph 6 permits the lessor to demand that the lessee remove all buildings "*or any extension thereof including underground tanks and lines*" (italics added), and it continues, "and Lessee shall restore

said premises to a level and clean condition and shall either compact the fill placed upon said premises or fill said tanks with sand." Thus, the lessor had the *option* of demanding removal of buildings alone (in which case it would accept the continued existence of sand-filled underground tanks), or the buildings along with the underground storage facilities. Under either option, however, it is facially reasonable to read the lease as providing that, on removal of all buildings and improvements (including underground storage tanks), the lessee must leave the premises in a condition that is "clean," i.e., "free from matter that adulterates, contaminates or pollutes." (Webster's Third International Dictionary (1968), p. 418.) Nor does the lease's use of the term "restore" compel a different result. The lease language is qualified: it requires the lessee to restore the premises to a clean condition, not to its original, unimproved condition. In short, plaintiffs' interpretation of the phrase "clean condition" does not involve an absurdity (Civ. Code, § 1638), nor does it violate the principle that a contract's interpretation must give effect to all of the contract's terms. (Civ. Code, § 1641; *Falkowski v. Imation Corp.* (2005) 132 Cal.App.4th 499, 509.) Because the contract is susceptible to two different reasonable interpretations, it is ambiguous. (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847-848.)

We turn to the extrinsic evidence proffered by the parties to determine if it is conflicting, preventing summary judgment. "Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." (*Wolf v. Superior Court, supra*, 114 Cal.App.4th at p. 1351.) "Extrinsic

evidence can include the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980-981 (*Cedars-Sinai*).

To the extent Chevron proffered Smith's declaration as extrinsic evidence of the parties' mutual intent, it was not competent evidence. Smith admitted in his deposition that he did not negotiate or draft the language of the lease at issue, and thus he had no personal knowledge of the parties' intent at the time the lease was executed. (Accord, *General Motors Corporation v. Superior Court* (1993) 12 Cal.App.4th 435, 442 (*General Motors*)). Further, "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." [Citation.] 'The parties' undisclosed intent or understanding is irrelevant to contract interpretation.' (*Cedars-Sinai, supra*, 137 Cal.App.4th at p. 980; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., supra*, 109 Cal.App.4th at p. 956.) Smith's subjective understanding of the meaning of lease terms, absent evidence it was communicated to the other parties to the lease, is irrelevant to contract interpretation. (*Founding Members*, at pp. 956, 960; *Winet v. Price, supra*, 4 Cal.App.4th at p. 1166, fn. 3.) The trial court erred in overruling plaintiffs' objections to his conclusions on these grounds.

Chevron argues Smith's declaration demonstrates industry usage and custom (Code Civ. Proc., § 1856, subd. (c)) so as to establish that the phrase "level and clean condition" had a particular or specialized meaning for retail gas station properties in San

Diego County in the late 1960's and into the 1970's. In his declaration, Smith explained that Chevron operated retail gas station operations in various ways, including by leasing the real property on which it would build and operate a station facilities, as was the case for the lease at issue. He averred: "[Paragraph 6's] language was not intended to require any environmental cleanup or remediation of the station premises. From the 1960[']s until the early 1980[']s, closure of stations [*sic*] facilities in California generally did not involve any environmental cleanup or remediation. In my many years of experience with ground leases for station sites in California, I do not recall any ground leases that [Standard Oil] entered into in the late 1960[']s that contemplated any such environmental remediation." Smith averred that between 1974 and 1977, he oversaw numerous station closures in San Diego including stations in which the ground leases included language similar or identical to that in Paragraph 6 of the Chevron/Somo lease, and that, in most instances, consistent with industry practice at the time, Standard Oil would fill the tanks with sand rather than remove them. He averred that this practice "reflects the fact that neither property owners nor governmental authorities were concerned at the time with potential petroleum hydrocarbon contamination." Chevron maintains this evidence of custom and usage demonstrates that the term "clean condition" did not include environmental remediation.

The threshold question is whether Smith's declaration is competent extrinsic evidence on that question. We conclude it is not. "Under the 'trade usage' rule, extrinsic evidence is admissible to show that words in a contract have by 'trade usage acquired a different meaning [than their plain, ordinary, popular or legal meaning], and [when] *both*

parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in different sense.' " (*General Motors, supra*, 12 Cal.App.4th at p. 442, fn. 3, italics added, quoting *Ermolieff v. R.K.O. Radio Pictures* (1942) 19 Cal.2d 543, 550-551.) While the lease shows that Standard Oil was a signatory to the lease, Smith does not state that the original signatory lessors (twelve individuals, Carl Engler, Bernard Durkin, Twila Durkin, James Durkin, Mary F. Durkin, Malcolm Winslow, Bunny Winslow, Lino Trombetta, Leo Durkin, Mary N. Durkin, Albert Schuss, and Helene Schuss) were engaged in the gasoline service station industry or that they intended the lease to operate according to some particular trade meaning. (E.g. *General Motors*, at p. 442, fn. 3.) Nowhere in Smith's declaration is an explanation of whether these parties understood the phrase "level and clean condition" in a specialized or technical sense. In *General Motors*, the court rejected as competent extrinsic evidence an attorney's statement that release forms were commonly used by insurance adjusters and routinely exchanged without any thought as third party beneficiary contracts. (*Ibid.*) The court held the declaration did not establish there was a particular trade usage for the release language, nor was there any showing the other parties to the release were engaged in the insurance industry. (*Ibid.*)

This case presents circumstances like those in *General Motors*, where the record is devoid any direct evidence of the parties' intentions at the time the lease was negotiated

in 1969. Chevron is thus left with the surrounding circumstances and other extrinsic evidence from which to demonstrate the meaning of the contract as a matter of law. On that point, Smith averred: "In California, cities and counties began requiring soil and groundwater testing in connection with the closure of gas station properties in the early to mid-1980[']s. Before that time, pollution caused by gas station properties was not generally a concern of property owners or governmental entities in California to the best of my recollection." Plaintiffs objected to this portion of Smith's declaration on grounds it lacked foundation, was speculative and inadmissible opinion. We conclude these objections had merit in view of Smith's other deposition testimony in which he admitted he did not consider himself an expert in environmental science or other environmental matters, including governmental oversight. Smith testified that while he had knowledge relative to Chevron's policies, procedures and operations, his first personal involvement in Chevron's "environmental section" of handling petroleum products was in 1974, well after execution of the lease at issue.

Even if we were to assume Smith's declaration amounted to competent extrinsic evidence, we would hold plaintiffs proffered competent conflicting extrinsic evidence that prevents a court from deciding the meaning of paragraph 6 as a matter of law. This evidence includes Smith's own deposition admission that he understood that Chevron's policy prior to the lease's execution in 1969 was to comply with all city and county building standards, and other regulations and statutes (including pollution laws) in effect where it did business at any given time; the existence of nuisance or anti-pollution laws that Chevron is presumed to know and have in mind (*Castillo v. Express Escrow Co.*

(2007) 146 Cal.App.4th 1301, 1308; *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71); and Chevron's subsequent conduct of removing impacted soil and complying with County's investigation requirements at its own effort and expense. (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 [construction given to contract by parties by acts and conduct of parties with knowledge of the contract terms and before controversy arises is relevant to contract interpretation]; see also *Fisher v. Allis-Chalmers Corp.* (2002) 95 Cal.App.4th 1182, 1192; *Southern Cal. Edison Co. v. Superior Court, supra*, 37 Cal.App.4th at p. 851.) A reasonable trier of fact could conclude based on Chevron's efforts to remediate that it understood its lease obligation was to leave the premises free from pollution. All of this extrinsic evidence is relevant to contract interpretation.

Accordingly, we cannot agree with the trial court that the contract is subject to interpretation as a matter of law regarding whether Chevron was required by paragraph 6 to merely clear the surface of the property free of construction debris, or whether it was required to remediate environmental contamination stemming from its underground storage tanks. The conflicting extrinsic evidence prevents the trial court from declaring the meaning of the lease as a matter of law. (*Southern Cal. Edison, supra*, 37 Cal.App. 4th at pp. 851-852.) The summary judgment must be reversed.

II. *The Court Erred by Denying Plaintiffs' Requests to Set a Hearing on Their Motion for*

Leave to File Second Amended Complaint

A. *Background*

On March 7, 2006, approximately two weeks before the summary judgment hearing, plaintiffs sought an ex parte order to shorten time for a motion for leave to file a second amended complaint to add causes of action for continuing nuisance in the event the trial court rejected their permanent nuisance claim on statute of limitations grounds, as well as intentional interference with economic advantage and contract. The court summarily denied the application, stating any amendments "should have been done months ago, if not years." However, the court invited plaintiffs to bring a noticed motion on the matter, warning their counsel it believed his attempt to add a "punitive damage cause of action" would "alter the entire theory of this case and require us to start over again." The court stated, "We are not going to do that." Thereafter, faced with an April 30, 2007 trial date, plaintiffs served a motion for leave to file their second amended complaint with the hearing date left blank, along with an additional ex parte application to set a hearing date before what they and Chevron understood to be the March 30, 2007 (or March 29, 2007, accounting for the holiday) cut-off date. Plaintiffs' counsel explained in an accompanying declaration that he had been unable to obtain a hearing date from the court clerk before that date. In the assigned superior court judge's absence, a different judge granted plaintiffs' application and set the motion on an expedited briefing schedule for March 23, 2007, the day of the summary judgment hearing. However, upon return, the judge assigned to the case ordered the motion off calendar on Chevron's ex parte request, commenting it was "too late" to file an amended complaint and finding it was "not entirely appropriate to shove [the motion] onto our calendar in a

shorter period of time with an order shortening time, as I assume that occurred, because we did not have time to put it on there before the trial date."

B. *Analysis*

Plaintiffs contend the trial court abused its discretion by denying their ex parte request to shorten time, and then when they filed a timely noticed motion, by taking the motion off calendar. They point out that the court ignored their request for leave to amend asserted in opposition to Chevron's motion for summary judgment. In response, Chevron maintains plaintiffs made a "tactical" decision to plead a permanent nuisance, and they "had no right to change that election on the eve of the summary judgment hearing." It argues plaintiffs never filed a timely motion for leave to amend but rather brought only procedurally improper ex parte applications for leave to file their second amended complaint, which the trial court was within its discretion to deny. Further, Chevron maintains that even if the trial court should have permitted the motion to go forward, it would have had the discretion to deny it on grounds of plaintiffs' unwarranted delay in bringing the motion and resulting prejudice to it.

Chevron's arguments as to the timing of plaintiffs' requests to amend and their procedural propriety are without merit. Plaintiffs' ex parte applications were, first, to shorten time for a motion seeking leave of court and, later, to obtain a hearing date; plaintiffs did not attempt to make substantive amendments directly through an ex parte procedure, as Chevron suggests. Further, amendment of a complaint should be allowed at any stage of the proceedings up and including trial, where no prejudice is shown to the adverse party. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.) "[Code of Civil

Procedure section 473 provides that 'in furtherance of justice' a court may allow a party to amend its pleadings. When a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. This conflict 'is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing of prejudice from the ruling.' [Citation.] Unfair surprise to the opposing party is also to be considered." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296; see also *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663-1664 [if either party wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend, and such requests are "routinely and liberally granted"].) Indeed, "[i]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment." (*Atkinson*, at p. 761.)

Here, the record shows the parties operated under the erroneous belief that plaintiffs' motion for leave to amend would be untimely unless it was set for a noticed hearing more than 30 days from the date of trial. Thereafter, the trial court assumed, incorrectly, that plaintiffs could not obtain a hearing date with statutory notice before the April 30, 2007 trial date. Chevron now argues there is no reason plaintiffs could not have obtained a hearing date after the summary judgment hearing. It faults plaintiffs' counsel for failing to timely schedule a noticed motion for leave to amend, pointing out the record does not contain a court-imposed motion cut-off date and there is no statutory cut-off

date for filing such a motion. However, in its opposition to plaintiffs' ex parte application to set a hearing date, Chevron had taken a contrary position so as to convince the trial court any such motion would be untimely, asserting: "This case is set for trial on April 30, 2007, making March 29, 2007 the last day for hearing any non-discovery motion." Chevron argued that plaintiffs' attempt to set a hearing for its motion was simply a "back-door attempt to obtain a different result in [the trial court's] absence" Under the circumstances, the trial court had no sound basis for refusing to set plaintiffs' motion for hearing on timeliness grounds (or vacating the hearing date already granted to plaintiffs for that matter). In that respect, its orders were an abuse of discretion.

Further, the record indicates plaintiffs requested in their summary judgment opposition to amend their complaint to add a continuing nuisance cause of action, a request that was itself timely. (See *Dorado v. Knudsen Corp.* (1980) 103 Cal.App.3d 605, 611 ["If either party finds, on the hearing of [a summary judgment] motion, that his pleading is not adequate . . . the court may and should permit him to amend; but in the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings'"].) On a motion for summary judgment "[w]here the complaint is challenged and the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend." (*Soderberg v McKinney* (1996) 44 Cal.App.4th 1760, 1773; *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067; *Williams v. Braslow* (1986) 179 Cal.App.3d 762, 773-774.) And, as plaintiffs point out, motions to amend a pleading have been appropriately granted as late as the first day of trial or even during trial in the

furtherance of justice. (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965.)

Chevron has not explained in any meaningful way how plaintiffs exercised unwarranted delay presenting their proposed amended complaint. Referring us only to plaintiffs' first amended complaint, it asserts without explanation that plaintiffs "had been aware of the facts forming the basis of their claims of a continuing nuisance since, at the latest, the filing of the [first amended complaint] in April 2006." This bare assertion does not compel a finding of delay. And unlike the parties in *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, on which Chevron relies, plaintiffs' counsel explained that new facts demonstrated intentional conduct by Chevron; counsel provided a detailed explanation as to the parties' discovery efforts and how plaintiffs gleaned these facts through depositions that had taken place in January and February 2007 after Chevron's environmental consultant had finally produced documents in December 2006. Even Adel Somo's deposition was not conducted until November 2006. We are not persuaded that plaintiffs' requests for leave to amend should be rejected for unwarranted delay.

The question that the trial court was required to, but did not, address was whether plaintiffs' proposed amendments sought to change the essential facts underlying their causes of action or assert different injuries, and whether the amendments would unduly prejudice Chevron. (*Honig v. Financial Corp. of America, supra*, 6 Cal.App.4th at p. 965.) "The same general set of facts includes the same operative facts; a change in legal theory is permissible. [Citation.] A claim for different damages does not indicate there are different injuries. Rather, injuries may encompass the same primary rights." (*Honig*,

at p. 966; *Atkinson v. Elk Corp.*, *supra*, 109 Cal.App.4th at p. 761; *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945 [on a party's motion for leave to amend his or her pleading, "it is irrelevant that new legal theories are introduced as long as the proposed amendments "relate to same general set of facts" ' "].) In denying plaintiffs' request for a shortened hearing date, the trial court concluded that the addition of punitive damages would change the "entire theory" of the case, but as stated, a claim for different damages does not amount to a change in the operative facts on which they are based. However, because the court rejected plaintiffs' requests on timeliness grounds, it did not analyze or consider the underlying facts supporting plaintiffs proposed causes of action or apply settled principles pertaining to requests for leave to amend pleadings. (Code Civ. Proc., § 473.)

Finally, Chevron would have us uphold the trial court's orders on grounds plaintiffs should be held to their "election" of a permanent nuisance theory. But to the extent that cause of action is barred by the statute of limitations (a question that depends on whether or not estoppel applies, presenting triable issues of material fact), plaintiffs' election is illusory. If that is the case, they should not be deemed bound to that election. (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 684 [court in case involving contamination from fuel tank leakage held that even if plaintiffs had purported to elect a theory of permanent nuisance, they could not be deemed bound because the purported election would have been barred by the statute of limitations and thus illusory; "California courts have made clear that a plaintiff's decision to pursue, even to a defense

judgment, a theory that was not available to him or her at the time of suit will not bar subsequent pursuit of a viable alternative theory"].)

Whether plaintiffs may amend cannot be determined at this stage of the proceedings because Chevron has not had an opportunity to oppose plaintiffs' motion. On remand, should plaintiffs "in fact file a motion to amend, the superior court should decide the motion by applying the established rules governing leave to amend . . . and the relation back of amended complaints." (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 239.) To avoid prejudicing the trial court's decisions, we will not attempt to render an advisory opinion on plaintiffs' motion. (See *Branick*, at p. 243.) However, we emphasize that for purposes of plaintiffs' nuisance theory, in cases of doubt as to the permanency of injury caused by a nuisance, courts are inclined to favor the right to successive actions. (*Mangini v. Aerojet-General Corp.*, *supra*, 230 Cal.App.3d at p. 1148.) And courts should "be particularly cautious not to enlarge the category of permanent nuisances beyond those structures or conditions that truly are permanent. Where some means of abatement exists, there is little or no incentive to make remedial efforts once the nuisance is classified as permanent." (*Baker v. Burbank-Glendale-Pasadena Airport Authority*, *supra*, 39 Cal.3d at p. 872; *Mangini v. Aerojet-General Corp.*, at p. 1148.)

III. *Plaintiffs' Motion to Compel Discovery*

Plaintiffs moved to compel compliance with document requests they had propounded on Chevron, as well as a document subpoena they served on SECOR International Incorporated (SECOR), a company retained by Chevron in part to prepare a

site closure request letter to County, to which Chevron and SECOR had responded by producing privilege logs. Plaintiffs also sought to compel answers to deposition questions asked of Brian Londquist, a SECOR project manager that assertedly reflected communications by him or other SECOR representatives with Chevron attorneys. Chevron and SECOR withheld documents on grounds they were protected by attorney-client privilege and constituted attorney work product. Chevron also asserted privileges over documents that it claimed reflected communications between its counsel and The Staubach Company (Staubach), a company that Chevron had retained in June 2004 "to provide Chevron with selected real estate services including administering its service station ground lease portfolio." Chevron argued its attorneys had communications with Staubach and SECOR, who Chevron asserted were its agents, so as "to further Chevron's interests" or that "were necessary for the accomplishment of the purpose of the attorney-client communication."⁷

⁷Chevron asserted blanket attorney-client privilege (and work product protection) for documents relating to Staubach, including those assertedly containing communications between Staubach personnel but copied to Chevron in-house counsel (e.g., CUSA document Nos. 03372-03374, 03421), communications between Staubach personnel and Chevron in-house counsel (e.g., CUSA document No. 03365-03367) and communications between Chevron in-house counsel that were copied to Staubach personnel (e.g., CUSA document No. 03382-03384). Many of these are described as "Email[s]" or "Email chain[s]." The communications contain two documents dated in November 1984 and others falling between August 2003 and October 2006. Chevron's privilege log contains two footnotes stating, "Unless otherwise noted, all non-attorneys listed are or were at the time employees or consultants of Chevron" and, "All listed communications listed [*sic*] with Staubach Co. employees are privileged, as such individuals were acting as consultants to Chevron."

SECOR also asserted attorney-client privilege over documents authored by SECOR employees that assertedly record conversations with Chevron's outside counsel (e.g., CUSA document Nos. 03259-03267), email communications between SECOR employees that assertedly "include[]" communication with Chevron's outside counsel or

To provide the foundational facts for its claims of privilege and work product protections Chevron ultimately relied on three declarations: two from Chevron employees Peter Martin and Dana Thurman, and one from its outside counsel, Stefan Teichert, submitted as part of a supplemental showing.

Martin, Chevron's area manager for "property and facilities optimization," averred that Chevron had a standard practice of hiring third-party contractors to act on Chevron's behalf in "certain respects regarding its ground leases, including lease negotiations, the sending of certain notifications to lessors, and the exercising of options." Martin averred that in June 2004, Chevron had engaged Staubach to act as Chevron's agent "with respect to real estate services regarding the Lease, including lease negotiations and the exercise of options" and that, "[d]uring the course of that agency relationship, employees of Staubach commonly communicated with Chevron attorneys regarding lease options and negotiations, and such communications were necessary to further Chevron's interests with respect to the Lease." Thurman, a property specialist for Chevron Environmental Management Company, averred Chevron's standard practice was to hire such third-party contractors "to perform site assessment and remediation activities at properties that Chevron owns and leases." He stated: "In 2004, Chevron retained SECOR . . . to oversee site assessment and mitigation activities at the Property and ensure compliance with the guidelines and recommendations set forth by [the County Department of

"referenc[e]" advice or communication with counsel (e.g., CUSA document Nos. 03274-03288, 03292-03294, 03375-03384), and communications between SECOR employees and Chevron outside counsel (e.g. CUSA document Nos. 03289-03291, 03295-03297, 03300-03317).

Environmental Health, Site Assessment and Mitigation Division (SAM)] in order to obtain a closure letter for the Property." Thurman averred that while SECOR had conducted earlier assessment activities at the property, in 2004, SECOR was retained "specifically to take the Property to closure" and since then it "acted as Chevron's agent with respect to site assessment activities at the Property, ensuring that Chevron has complied with the regulatory requirements outlined by SAM and representing Chevron's interests before SAM." Thurman concluded: "In order to efficiently and accurately comply with those regulations, it is often necessary for SECOR to communicate with Chevron attorneys."

In Chevron's supplemental showing, Stefan Teichert, Chevron's outside counsel, averred that "[Outside] attorneys have had communications (often outside the presence of Chevron) with representatives of SECOR, which communications were necessary to assist [outside counsel's] representation of Chevron. [Outside] attorneys understood the Chevron-SECOR agency relationship to be such that those communications with SECOR with respect to this lawsuit would be confidential, and that such confidentiality would be maintained." Chevron also submitted a revised privilege log and a redacted copy of a January 4, 2007 retainer letter presumably from David Logan, one of Chevron's outside attorneys to a SECOR representative indicating that SECOR and its individual employees had been served with subpoenas for the production of business records and stating, "We believe that it would be mutually beneficial for SECOR to have joint representation with [Chevron] in this case. By this letter, SECOR agrees that the Firm will represent SECOR regarding these matters and regarding any such further issues that may arise in this case

concerning which SECOR and the Firm agree that the Firm will undertake on SECOR's behalf."

Though the trial court was initially inclined to reject Chevron's claims of privilege due to the lack of an apparent agency relationship with Staubach and SECOR, after supplemental briefing and further argument it denied plaintiffs' motion. It reasoned the attorney-client privilege applies to agency or third-party relationships "where the participation of the agent/third party is reasonably necessary to assist the corporation or its attorneys in achieving the purpose of the legal consultation" and that the "privilege extends to communications between counsel and the client's consultants and agents where the consultants and agents . . . were necessary to enable counsel to provide information and guidance to their client and their client's agents." The court ruled: "To the extent the documents in question reflect communications with third party agents or consultants, (in particular, employees of SECOR and Staubach), the circumstances were such that the communications were intended to remain confidential and were necessary to enable counsel to further the legal interests of defendant. [¶] For the same reasons, and the fact that defendant's counsel also represents SECOR, the court is persuaded [SECOR employee Brian Londquist] was properly directed to assert the attorney-client privilege."

A. *Standard of Review*

We review the superior court's discovery orders for abuse of discretion. (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 171.) Where there is a basis for

the trial court's ruling and its factual findings are supported by substantial evidence, we will not substitute our opinion for that of the trial court. (*Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529, 533; *2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 Cal.App.4th 1377, 1387 (*2,022 Ranch*)).

The burden of establishing immunity from disclosure rests with the party resisting discovery. (*HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 59-60.) In the case of the attorney-client privilege, the party asserting the privilege need only present facts that " 'support a prima facie claim of privilege.' [Citation.] " "The party opposing the privilege must bear the burden of showing that the claimed privilege does not apply or that an exception exists or that there has been an express or implied waiver." " (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 894 (*OXY Resources*)). Nevertheless, evidentiary privileges such as the attorney-client privilege (*HLC Properties*, at p. 59) should be narrowly construed because they prevent otherwise admissible and relevant evidence from coming to light. (*McKesson HBOC v. Superior Court* (2004) 115 Cal.App.4th 1229, 1236 (*McKesson*); *People v. Sinohui* (2002) 28 Cal. 4th 205, 212.)

B. *Principles of Attorney-Client Privilege and Attorney Work Product Doctrine*

The attorney-client privilege only protects confidential communications between a client and his or her attorney during the course of an attorney-client relationship. (*2,022 Ranch, supra*, 113 Cal.App.4th at p. 1388.) It " 'covers all forms of communication, including transactional advice and advice in contemplation of threatened litigation' " (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1495 (*Zurich*

American) The privilege is codified in Evidence Code sections 950 through 962. (*Scripps Health v. Superior Court, supra*, 109 Cal.App.4th at p. 533.) Relevant here, Evidence Code section 952 expressly contemplates protection over communications to certain third persons; under that section, "confidential communications include information transmitted to persons 'to whom disclosure is reasonably necessary for the transmission of the information,' and those to whom disclosure is reasonably necessary for 'the accomplishment of the purpose for which the lawyer is consulted.' [The section] expressly includes legal opinions and advice given by a lawyer within the definition of confidential communication." (*Zurich American*, at p. 1495; Evid. Code, § 952.)

"Thus . . . the 'privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys *on matters of joint concern*, when disclosure of the communication is reasonably necessary to further the interest of the litigant.' " (*OXY Resources, supra*, 115 Cal.App.4th at pp. 890-891, italics added, quoting *Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 767 (*INA*); see also *Zurich American, supra*, 155 Cal.App.4th at p. 1496; *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588 (*Cooke*).) " 'While involvement of an *unnecessary* third person in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication.' " (*OXY Resources*, at p. 890; *Zurich American*, at p. 1496.) Accordingly, "[i]f a disclosing party does not have a reasonable expectation that a third party will preserve the confidentiality of the information, then any

applicable privileges are waived. An expectation of confidentiality . . . is not enough to avoid waiver." (*OXY Resources*, at p. 891.) The question of whether mutual disclosures are reasonably necessary to accomplish the purpose for which attorneys were consulted is one of fact. (*Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 688.)

The work product doctrine, codified in Code of Civil Procedure section 2018, "reflects 'the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts.' [Citation.] The doctrine protects the ' "mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." ' [Citation.] [¶] Code of Civil Procedure section 2018, subdivision (c) absolutely bars the use of statutory discovery procedures to obtain an attorney's 'core' work product, defined as '[a]ny writing reflecting an attorney's impressions, conclusions, opinions, or legal research or theories.' [Citation.] By contrast, there is only a conditional or qualified protection for 'general' work product, which bars discovery of other aspects of an attorney's work product unless denial of discovery would unfairly prejudice a party or result in an injustice." (*2,022 Ranch, supra*, 113 Cal.App.4th at p. 1390; *McKesson, supra*, 115 Cal.App.4th at p. 1238.)

"Waiver of work product protection . . . is generally found under the same set of circumstances as waiver of the attorney-client privilege — by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the

protection. [Citations.] Waiver also occurs by an attorney's 'voluntary disclosure or consent to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing.' " (*McKesson, supra*, 115 Cal.App.4th at p. 1239; *Roush v. Seagate Technology* (2007) 150 Cal.App.4th 210, 222.)

Recently, this court explained that "[i]n certain instances it is difficult to determine if the attorney-client privilege (or work product privilege) attaches to a communication, particularly where there may be more than one purpose for that communication: ' " 'Where it is clear that the communication has but a single purpose, there is little difficulty in concluding that the privilege should be applied or withheld accordingly. If it appears that the communication is to serve a dual purpose, one for transmittal to an attorney "in the course of professional employment" and one not related to that purpose, the question presented to the trial court is as to *which purpose predominates*. . . . ' " [Citation.]' [Citation.] This 'dominant purpose' test not only looks to the dominant purpose for the communication, but also to the dominant purpose of the attorney's *work*. [Citations.] Thus, 'the attorney-client privilege [would] not apply without qualification where the attorney was merely acting as a negotiator for the client [citation], or merely gave business advice [citation], or was merely acting as a trustee for the client [citation].' " (*2,022 Ranch, supra*, 113 Cal.App.4th at pp. 1390-1391.)

C. *Analysis*

1. *Attorney-Client Privilege*

We face the assertion of attorney-client privilege over corporate communications involving two third-party entities, Staubach and SECOR, raising the question of whether disclosure of otherwise confidential attorney-client communications to those entities (or in SECOR's case, direct communications with Chevron's outside counsel), or their participation in communications with Chevron counsel, constitutes a waiver of the privilege. We also are presented with claims of privilege over communications solely between Staubach (or SECOR) representatives that were either copied to Chevron's in-house counsel or that which assertedly "reflect" legal advice. The latter presents questions similar to those raised in *Zurich American, supra*, 155 Cal.App.4th 1485.

Plaintiffs contend Chevron did not meet its burden to establish that the SECOR and Staubach documents it withheld are subject to any attorney-client privilege. Citing *McCaugherty v. Siffermann* (N.D. Cal. 1990) 132 F.R.D. 234 (*McCaugherty*), as well as *Zurich American* and *2,022 Ranch, supra*, 113 Cal.App.4th 1377, they maintain the privilege does not apply when the communications with the attorney are for business purposes or compliance with regulatory requirements and not to generate legal advice. Plaintiffs argue Smith's and Thurman's declarations do not establish that Chevron's in-house attorneys were providing legal advice or doing anything more than acting as negotiators or giving business advice, and there is no indication by Chevron's in-house attorneys that they were doing more than those kinds of tasks. Plaintiffs assert that each document and deposition question must be analyzed to determine the predominant purpose of the attorney's work to determine if legal advice was given.

Plaintiffs contend further that even assuming Chevron showed its counsel did more than provide negotiating or business advice, it did not establish that Staubach or SECOR were hired for legal purposes or that either entity was acting as a necessary intermediary for any legal purpose, including a legal purpose for which Chevron's counsel was consulted. Finally, plaintiffs contend Chevron waived any possible privilege because there is no evidence indicating either Staubach or SECOR's communications were intended or understood to be confidential.

Referring to Evidence Code section 951,⁸ Chevron responds that for purposes of application of attorney-client privilege, a client includes *authorized representatives* or agents, and that in the corporate context, the privilege attaches to those third persons or consultants, like Staubach and SECOR, whose participation "is reasonably necessary to assist the corporation or its attorneys in achieving the purpose of the legal consultation." For this position, it relies primarily on *McCaugherty, supra*, 132 F.R.D. 234 and *INA, supra*, 108 Cal.App.3d 758, as well as federal authorities that assertedly follow *INA (Bank of the West v. Valley National Bank* (N.D. Cal. 1990) 132 F.R.D. 250, and *In re Bieter Co.* (2d Cir. 1994) 16 F.3d 929, 936-937). Chevron argues it met its burden to establish preliminary facts showing the documents fell within the attorney-client privilege, providing a presumption of confidentiality that plaintiffs did not rebut.

⁸Evidence Code section 951 provides in part: "As used in this article, 'client' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity" There is no indication in Chevron's privilege log that any Staubach representative ever directly contacted Chevron's outside counsel for any matter. Thus, under this definition, Staubach cannot fall within the definition of client at least with respect to preserving communications with Chevron's outside counsel.

Chevron also argues there is no evidence in the record demonstrating its in-house counsel acted as negotiators or gave business advice, and on that ground seek to distinguish cases finding an implied waiver of attorney-client privilege where corporate counsel performed business functions for the company such as quality control or check disbursement, or where counsel's activities "were so intertwined with activities that were wholly business or commercial that a clean distinction between the two roles became impossible to make." (*Chicago Title Ins. Co v. Superior Court* (1985) 174 Cal.App.3d 1142, 1151-1154.)

For purposes of asserting attorney-client privilege over communications between Chevron in-house or outside counsel on the one hand and SECOR and Staubach representatives on the other (or even communications among SECOR and Staubach representatives), it is not enough for Chevron to merely assert that either Staubach or SECOR — both third party entities — were its consultants or agents. (See *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 732 (*Chadbourne*) [fact that a corporation can speak only through some natural person should not "lead to the conclusion that the privilege attaches to every report or statement made by a corporate agent and furnished to the corporation's attorney"]; *Zurich American, supra*, 155 Cal.App.4th at pp. 839-840.) *INA, supra*, 108 Cal.App.3d 758 does not permit such a result.⁹ As Chevron acknowledges, *INA* specifically addressed the involvement of third-

⁹*INA, supra*, 108 Cal.App.3d 758 involved disclosures between employees of parent and wholly-owned subsidiary corporate entities; the court found the parties did not waive the attorney-client privilege where the parent corporation's vice president and a member of its reserve committee attended a legal briefing session run by an attorney engaged by the wholly-owned subsidiary. (*INA*, at pp. 762-765.) The court concluded these individuals

party entities in attorney-client communications, explaining that the key concept was the third party's "need to know" the disclosed information. (*INA, supra*, 108 Cal.App.3d at p. 765.) The court focused on the unity of interests between the entities, explaining that communications of one corporation will remain confidential if relayed to a related (i.e., subsidiary or parent) corporation. (*Id.* at p. 767.) It adopted the reasoning of federal authorities: " 'A community of interest exists among different persons or separate corporations where they have an *identical legal interest* with respect to the subject matter of a communication between an attorney and a client concerning legal advice. The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving legal advice and may be [non-parties] to any anticipated or pending litigation. *The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial* ' " (*INA*, at p. 769, italics added, quoting *Duplan Corporation v. Deering Milliken, Inc.* (D.S.C. 1975) 397 F.Supp. 1146, 1172.) *INA* indicates that the communications must be intended to be confidential on a matter of joint concern. (*INA, supra*, 108 Cal.App.3d at pp. 766-767; see also *Cooke, supra*, 83 Cal.App.3d at p. 588; Evid. Code, § 952.) Thus, *INA* held that absent conflict of interest or antagonism between corporate entities, "disclosure of

were not "outsiders" at the briefing based on a specific factual showing they were functioning in the capacity of "counsel, officers, agents or consultants to INA." (*Id.* at p. 765.) As to one of the individuals who was a reserve committee member, the court concluded his formal status in relation to INA was "that of a part-time expert consultant and adviser on reserve policies and sound actuarial practices, whose position was equivalent and comparable to that of a full-time expert employed by INA to give actuarial advice." (*Ibid.*) "Viewed in this light, [the person]'s attendance at the conference was that of a temporary employee and consultant to INA present to advise it whether it should modify its reserve policies by reason of [outside counsel's] legal presentation." (*Ibid.*)

counsel's legal opinion to holding company and affiliated company officers and employees *who need to know this information in order to perform their duties* is a disclosure which is reasonably necessary to accomplish the purpose for which counsel have been consulted." (*INA*, at p. 769, italics added.)

SECOR and Staubach are independent companies unrelated to Chevron, and they are not parties to plaintiffs' lawsuit. There is no evidence from which to infer either SECOR or Staubach, or the employees of those companies to whom assertedly privileged information was shared, had identical or even similar *legal interests* with respect to lease negotiations or site assessment matters, about which Chevron obviously was receiving advice from its own in-house and outside counsel. Chevron's declarations on these points were conclusory; neither Martin nor Thurman gave any *facts* showing the involvement of Staubach or SECOR was necessary for Chevron's legal counsel to do their jobs, or that representatives of either Staubach or SECOR needed to know the information provided to them by Chevron's counsel to perform their duties. There is insufficient evidence their involvement "further[ed] the interest of the client *in the consultation*" with counsel or that disclosure of attorney-client communications to them was "reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (Evid. Code, § 952, italics added.)

McCaugherty, supra, 132 F.R.D. 234 does not support Chevron's position. There, two individuals were hired by the Federal Asset Disposition Association (FADA), a wholly-owned subsidiary of the Federal Savings and Loan Insurance Corporation (FSLIC), as consultants to help arrange for the sale of a bank in receivership (FSB).

(*McCaugherty*, at pp. 235-236.) While the court found "fully coterminous interests" and thus an agency relationship between the subsidiary and parent FADA and FSLIC for purposes of their communications with outside counsel, it could not conclude that all of the communications between outside counsel and FADA that were shared with the consultants were privileged, given the ultimate goal of FSLIC and FADA's work was a business goal to sell the bank. "In this setting (where there is a clear business purpose in the environment in which the communications occurred), the court should sustain an assertion of privilege only when there is a clear evidentiary predicate for concluding that *each* communication in question was made *primarily* for the purpose of generating legal advice. No privilege can attach to any communication as to which a business purpose would have served as a sufficient cause, i.e., any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice." (*Id.* at p. 238.)

Further, while *McCaugherty* found attorney-client privilege *could* attach to communications to the consultants, who were charged with advancing the interests of FADA and FSLIC in, for example, looking for prospective buyers in an environment "dense with regulations,"¹⁰ that conclusion itself did not compel a finding of privilege. (*McCaugherty, supra*, 132 F.R.D. at p. 239.) The court proceeded to look at the

¹⁰ The court inferred it would be necessary for both consultants to provide information to outside counsel in order for that law firm to be in a position to provide its client with fully informed legal advice with respect to the bank's sale, and that it would be necessary for the outside attorneys to provide information and guidance to the consultants. (*McCaugherty, supra*, 132 F.R.D. at p. 239.) Thus, the court concluded the consultants *could* be treated as employees of FADA and FSLIC to whom the privilege could be extended. (*Ibid.*)

declarations submitted by the consultants, observing they supported a finding that the individuals intended the communications given to and received from outside counsel to be confidential. (*Ibid.*) But the consultants' declarations were *not* sufficient to support a finding that the people at the bank who were privy to communications involving the consultants and outside counsel shared those understandings about confidentiality: "[T]he fact that [explicit steps to maintain confidentiality] were not taken in regard to communications with [outside counsel] and one or both consultants fatally compromised their confidentiality and deprived them of protection by the privilege." (*Ibid*, citing *Upjohn Co. v. United States* (1981) 449 U.S. 395 [permitting extension of privilege over communications with non-control group employees where such communications were considered "highly confidential" when made and where company took explicit steps to maintain such confidentiality].) Given the bank was a separate corporate entity and FSLIC did not exercise direct, day to day control over it, the court declined to assume the bank would perceive that communications with FADA and FSLIC's outside counsel were expected to be confidential, even when they were related to the sale efforts. (*McCaugherty*, at p. 241-242.)

Chevron's evidence is considerably less than that presented in *McCaugherty*. Specifically, Chevron has not shown Staubach or SECOR understood their communications with Chevron's counsel (some of which are dated as early as 1984) were to be kept confidential. In that vein, it is notable that outside counsel's letter offering SECOR legal representation was not written until *after* each of SECOR's documents were created. No SECOR or Staubach representative provided a declaration describing *their*

understanding of the confidential nature of their communications (for those communications between SECOR and Staubach representatives that were copied to counsel, or those communications between SECOR and Staubach representatives on the one hand and Chevron's in-house or outside counsel on the other) or what the basis for any such understanding might have been. We are presented with only outside counsel's representation that it was his *law firm's understanding* that the SECOR-Chevron relationship was such that communications with SECOR would be maintained as confidential. A mere expectation of confidentiality is not enough to avoid waiver. (*OXY Resources, supra*, 115 Cal.App.4th at p. 891.)

The *McCaugherty* court additionally found the declarations from each consultant insufficient to support a finding that all of the communications were made primarily for the purpose of generating legal advice, given the fact that the ultimate goal of the work performed by each obviously was a business goal. (*McCaugherty, supra*, 132 F.R.D. at p. 240.) "Mr. Zech [one of the consultants] declares that 'on occasion' he communicated with Pettit & Martin for the purpose of helping generate legal advice, but he does not declare that *all* of his communications with that law firm were for that purpose. Nor does he state explicitly that the *primary* purpose of any of his communications was to aid in generating legal advice. [The other consultant's] declaration ignores the issue altogether" (*Ibid.*) The court found this to be an "important shortfall" in establishing privilege. (*Ibid.*) Thus, the court in that case ordered the defendants to produce competent declarations (in the form of a declaration signed by the communicator or the person at whose direction the communication was made) showing that each

withheld communication was made primarily for the purpose of generating legal advice.
(*Ibid.*)

Contrary to Chevron's argument, the evidence in the record supports an inference that Chevron in-house counsel may have been performing business functions, raising a question about whether the communications between Chevron in-house counsel and Staubach or SECOR representatives involved legal opinions or advice. It is plain from Chevron's showing (as well as the retainer letters presented by plaintiffs) that the purposes for which both Staubach and SECOR were retained were business or regulatory purposes, i.e., lease negotiation and exercise of lease options as well as environmental site assessment and mitigation. Because Chevron did not present any declarations from its corporate counsel or other evidence as to its in-house counsel's role in these matters, it did not show that its internal counsel's involvement was primarily for purposes of providing legal advice, as opposed to business advice or corporate policies relating to Chevron's real estate activities and regulatory compliance. Absent such evidence, we must conclude the record lacks substantial evidence for the trial court's finding of privilege.¹¹

¹¹ This conclusion is consistent with federal authorities in similar contexts involving consultants hired to conduct environmental studies and undertake remediation. (See *United States Postal Service v. Phelps Dodge Refining Corp.* (E.D.N.Y. 1994) 852 F.Supp. 156.) In *Phelps Dodge*, the federal district court undertaking an in camera review of challenged documents refused to apply the privilege to communications made by two environmental consultants to the defendants and their in-house counsel. The consultants had been retained to conduct environmental studies and to develop a remedial program for cleaning up the defendants' property in connection with a request from the New York State Department of Environmental Conservation. (*Phelps Dodge*, at pp. 159, fn. 1, 161.) The district court refused to extend the attorney-client privilege because neither consultant fell within any of the recognized categories of representatives or agents

Nor does *Bieter, supra*, 16 F.3d 929 assist Chevron. *Bieter* held a client's relationship with its independent contractor justified application of the privilege where the contractor had been involved on a daily basis with the partnership's principals and on behalf of the partnership in the unsuccessful development that served as the basis for the litigation, he had been intimately involved with the sole objective of the partnership: to develop the parcel of land, and because he was the partnership's sole representative at meetings with potential tenants and other officials, he likely possessed information that no one else knew. (*Bieter*, 16 F.3d at p. 938.) Thus, the *Bieter* court concluded that the contractor "was in all relevant respects the functional equivalent of an employee." (*Ibid.*)

for purposes of the attorney-client privilege. (*Id.* at p. 161.) The court observed the consultants "were not employed by [the defendants'] attorneys specifically to assist them in rendering legal advice . . . [but] were hired by [the] defendants to formulate a remediation plan acceptable to the [state agency] and to oversee remedial work at the Property." (*Ibid.*) It further noted "these consultants based their opinions on factual and scientific evidence they generated through studies and collected through observation of the physical condition of the Property, information that did not come through client confidences." (*Id.* at p. 162.) The court found that "none of the documents revealed any confidential communications by the defendants or their attorneys to the consultants" and concluded that the notations on the documents by the attorneys did not amount to legal advice. (*Ibid.*; see also *In re Grand Jury Matter* (E.D.Pa. 1992) 147 F.R.D. 82, 85-86 [court denied a motion to quash a subpoena duces tecum directed at documents that had been compiled by an expert environmental consultant for a company to achieve regulatory compliance for the company's waste disposal practices; even though the consultant had been paid with the company's funds through a law firm escrow account, the court determined the documents had been "made solely in the course of the expert consultant's preparation of a waste management plan that would achieve regulatory compliance for the company's waste disposal practices. That is, the documents were made in the course of the expert consultant's provision of environmental services to the company, and not for the purpose of assisting the law firm in providing legal advice to the company"].)

Here, unlike *Bieter*, Chevron made no particularized showing about the roles of Staubach or SECOR with respect to their duties on Chevron's behalf; indeed the declarations from Chevron representatives contain conclusory and generalized statements that these companies were retained to act as Chevron's agents for business (real estate or lease related) or environmental compliance purposes. Chevron's evidentiary showing does not indicate the sort of intimate involvement by Staubach and SECOR in Chevron affairs that would avoid a waiver of the attorney-client privilege.

Chevron had two opportunities in the trial court below to make a sufficient evidentiary showing justifying application of the attorney-client privilege to the disputed documents and deposition questions. Because we conclude it did not make a prima facie case for application of attorney-client privilege, we remand the matter with directions that the trial court order it to produce those documents. For the same reasons, the trial court is ordered to grant plaintiffs' motion to compel answers to questions posed to Brian Londquist at his deposition regarding communications with Chevron's attorneys, as long as the questions do not ask him to disclose advice given to him by counsel concerning how he should respond to questions during the deposition.¹²

2. *Asserted Work Product Protection*

In addition to all of the Staubach documents (see fn. 10, *ante*), Chevron has asserted work product protection over many of the withheld SECOR documents, including documents exchanged between SECOR personnel Maurice Baron and Brian

¹² At Londquist's deposition, Londquist was asked whether he was represented by counsel, and responded, "I don't know." Chevron's outside counsel then corrected his answer, stating his firm was representing him and SECOR "for the deposition."

Londquist or Dana Thurman (e.g., SEC document Nos. 03270, 03276-03288), notes taken by SECOR representatives that purportedly reflect attorney work product (e.g., SEC document Nos. 03268, 03269), and communications between SECOR personnel and Chevron outside counsel (e.g., SEC document Nos. 03290-03291, 03295-03297, 03300-03310, 03312-03317).

Plaintiffs challenge Chevron's assertion of work product protection on similar grounds as it challenged its assertion of privilege: that Chevron did not show its in-house attorneys were performing legal services with regard to their communications, and that such protection is not available when the attorney provides non-legal services. Chevron's sole response is that there is no evidence in the record that Chevron's counsel were performing non-legal services. As we have stated, however, it is *Chevron's* burden to establish application of work product protection on a document by document basis. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 124; *2,022 Ranch, supra*, 113 Cal.App.4th at p. 1397.) In the face of the existing declarations showing that Staubach and SECOR were retained for business or regulatory purposes and the absence of any declarations of Chevron's in-house counsel clarifying their role, we conclude Chevron's bare assertion is insufficient and that work product protection has been waived.

DISPOSITION

The judgment is reversed and the matter remanded with directions that the trial court grant plaintiffs' applications to file their motion for leave to amend their complaint

and order Chevron to produce the documents that are the subject of plaintiffs' motion to compel and answer deposition questions posed to Londquist to the extent they do not ask him to disclose advice given to him by counsel concerning how he should respond to questions during the deposition. Plaintiffs shall recover their costs on appeal.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.