S230104

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

JAIME A. SCHER, et al., Plaintiffs, Appellants and Respondents,

v.

JOHN BURKE, et al., Defendants, Appellants and Respondents.

On Review From The Court Of Appeal For the Second Appellate District,
Division Three, 2nd Civil No. B235892

After An Appeal From the Superior Court For The State of California,
County of Los Angeles, Case Number BC 415646,

Hon. Malcolm Mackey

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I.

INTRODUCTION

The amicus briefs filed in this case present two different perspectives. The Amici Curiae Brief of Keri Mikkelsen, *et al.* ("Mikkelsen Brief") presents a good analysis of the prior case law on implied dedication and the language and implications of *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 ("*Gion-Dietz*"), with a focus on interpretation of Civil Code section 1009, and the importance of recognizing distinctions between implied in fact and implied in law dedications. The Amicus Curiae Brief of Pacific Legal Foundation, California Farm Bureau Federation, and California Cattlemen's Association ("PLF Brief") presents a property owners' view of potential consequences arising from implied in law dedication, without expressing any position on the effect of Section 1009 on implied in fact dedication.

Both briefs, in different ways, call attention to the importance of Civil Code section 813 in understanding the Legislature's intent in enacting Section 1009, the Mikkelsen Brief by asking why amendments to Section 813 were necessary if Section 1009 completely repealed the law of implied dedication, the PLF Brief by failing to recognize that Section 813 is the answer to the concerns about implied in law dedication on which the PLF Brief focuses.

Further, the Mikkelsen Brief explores the implications of the different impacts of and perspective on implied in fact and implied in

law dedication reflected in both *Gion-Dietz* and Section 1009 and the court of appeal's failure to recognize the different sources and implications of those doctrines. Consideration of that aspect of the court of appeal's opinion highlights the flaws in the court of appeal's legal reasoning and analysis of the evidence.

II.

THE AMICUS BRIEFS HIGHLIGHT THE SIGNIFICANCE OF THE AMENDMENT TO CIVIL CODE SECTION 813 THAT OCCURRED CONCURRENTLY WITH THE ENACTMENT OF CIVIL CODE SECTION 1009

Both of the amicus briefs filed in this case highlight the importance of the amendment of Civil Code section 813 that was part of the legislation enacting Civil Code section 1009 to the interpretation of Civil Code section 1009. The Mikkelsen Brief does so intentionally; the PLF Brief does so unintentionally.

The Mikkelsen Brief directly addresses the fact that, if Section 1009 had in fact completely eliminated all common law implied dedication legal theories, Section 813, and in particular the Legislature's amendment of Section 813 concurrently with the enactment of Section 1009, would be superfluous. (Mikkelsen Brief, pp. 15-19.) That the Legislature took the trouble to amend Section 813 to make it more useful to property owners who wish to protect title to their property is a clear indication Section 1009 was not intended to eliminate implied in law dedication of non-coastal property, while at the same time providing a

mechanism for protecting title to coastal property as well. (*See* Reply Brief on the Merits, pp. 17-18.)

The PLF Brief, by contrast, highlights the importance of Section 813 by ignoring it. Focusing on concerns of property owners and raising the specter of takings without just compensation, the PLF Brief concludes the only possible solution is to interpret Section 1009 as eliminating all potential for implied dedication. Yet Section 813 addresses all of these concerns, as well as the concerns of commentators who concluded that *Gion-Dietz* imposed on property owners an impossible burden of proof with regard to showing the public's use of property was with permission or a license. By the simple expedient of recording a notice, a relatively easy and inexpensive measure, a property owner can protect title to his property from inadvertently being dedicated to public use.[1] Use by the public may be conditioned on time, place and manner restrictions, and use in violation of those restrictions will not be considered public use for purposes of a finding of implied dedication.

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[1] Section 813 provides, however, that, once notice has been recorded granting permission to use the property, "the owner *shall not prevent* any public use appropriate thereto by physical obstruction, notice or otherwise." In addition, in the context of coastal property, subdivision (f) of Section 1009 imposes a similar requirement where notices pursuant to Section 1008 are posted. Defendants Erickson/Malick recorded a Section 813 notices in 2008. (Ex. 194, Documents, Tabs 23 and 24; 9 RT 1803:20-1808:23.) All Defendants posted "No Trespassing" and "Keep Out" signs and/or installed gates blocking the roads. Because of these contradictory actions, the trial court concluded notices recorded and posted by Defendants were ineffective to prevent Plaintiffs from establishing an implied dedication. (6 CT 1221-1223; 6 RT 958:28-965:17, 977:14-978:4; 7 RT 1293:1-1294:14; 9 RT 1858:2-1860:11, 1884:1-1885:18, 1887:7-1888:16, 1890:5-1904:10, 1915:9-1916:9.)

Through Section 813 this objective can be achieved without the expense of fencing or patrolling property or other potentially costly measures to secure the property.

III.

PLAINTIFFS' AND THE TRIAL COURT RELIED IN PART ON IMPLIED IN FACT DEDICATION

The application to file the Mikkelsen Brief states that Plaintiffs are relying solely on implied in law dedication. (Mikkelsen Brief, Application, p. 3.) This statement is incorrect. Plaintiffs did rely at trial on implied in fact dedication with respect to those portions of the roads at issue that are the subject of the 1970 Declarations and Grants of Easements. (Ex. 54, 55, 56; 5 RT 753:13-761:3; Ex. 194, Documents, Tabs 5, 14, 16 and 25; *see* Opening Brief on the Merits, pp. 11-12, 56.) The trial court's finding for Plaintiffs was based in part on the 1970 Declarations and Grants of Easements. (6 CT 1215-1216.)

Consequently, the distinction the Mikkelsen Brief draws between the effect of Section 1009 on implied in fact dedication as opposed to its effect on implied in law dedication – which becomes relevant only if this Court is inclined to affirm the court of appeal's interpretation of Section 1009 – is pertinent in this case as well as in the case to which Mikkelsen is a party. (*See,* Mikkelsen Brief, pp. 6-10.) Such a conclusion would preserve the trial court judgment at least to the extent of the portions of the roads in question that are the subject of recorded dedications.

IV.

THE MIKKELSEN BRIEF CORRECTLY IDENTIFIES THE COURT OF APPEAL'S FAILURE TO RECOGNIZE THE DIFFERENCES BETWEEN IMPLIED IN FACT DEDICATION AND IMPLIED AT LAW DEDICATION AS A SOURCE OF ERROR

The Mikkelsen Brief notes that the court of appeal recognized the distinction between implied in fact and implied in law dedications, but never returned to that distinction in its analysis. (Mikkelsen Brief, p. 5; Slip Op., p. 24.) The court of appeal's failure to do more than pay lip service to the distinction was central to its erroneous decision.

The significance of the court of appeal's failure to fully address both implied dedication theories is reflected in the court of appeal's discussion, in an unpublished portion of the opinion, of the effect of the documents on which the trial court relied in finding implied in fact dedication as to certain parts of the roads. (Slip Op., pp. 35-36; 6 CT 1215-1216.) The court of appeal launched a three-fold attack on Plaintiffs' implied in fact dedication argument.

First, the court of appeal stated the conditions for acceptance of the 1970 Declarations and Grants of Easements were not satisfied. (Slip Op., p. 36.) However, under an implied in fact theory, express acceptance of the dedication would not have been necessary.

Second, in reliance on a case in which the document argued to be a dedication never became effective (as opposed to requirements for acceptance of the dedication never having been met), the court of appeal rejects the concept of implied in fact dedication, irrespective of any effect Section 1009 might have had on it. (Slip Op., p. 36 n. 14.)

Third, the court of appeal states "no testimony was introduced about public use before 1972 such as would constitute implied acceptance" (Slip Op., p. 36), suggesting implied in fact dedication prior to the effective date of Section 1009 was at least theoretically possible, in contradiction to the court of appeal's attacks on the implied in fact doctrine inherent in its other statements that a dedication could only be accepted in the manner stated in the recorded documents. What the court of appeal never considered is that, based on the then-existing case law to the effect Section 1009 only prevented *recreational* use from ripening into a public easement, Plaintiffs could not have known evidence of use before 1972 was particularly significant for their implied in fact arguments (or, for that matter, their implied law arguments). However, the fact there was evidence in the record of use prior to 1972 calls attention to the court of appeal's inversion of appellate principles regarding making all necessary inferences from the evidence to support, rather than overturn a judgment. (*See* Opening Brief on the Merits, pp. 4-13; 6 CT 1208-1214, 1216-1220, 1224-1225.)

V.

CONCLUSION

Plaintiffs conclude the issues raised in the Amicus Briefs are pertinent to the case and worthy of consideration, provided due consideration is given to the effect of Civil Code Section 813.

Dated: August 18, 2016

Respectfully submitted,

ALESHIRE & WYNDER, LLP
JUNE S. AILIN

By: _____
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CERTIFICATE OF WORD COUNT

I certify pursuant to Rule 8.204(c) of the California Rules of Court, the attached Appellants' Answer to Amicus Curiae Briefs was produced on a computer and contains 1,620 words, excluding cover pages, tables of contents and authorities and signature lines, as counted by the Microsoft Word 2010 word-processing program used to generate this document.

June S. Ailin

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2361 Rosecrans Ave., Suite 475, El Segundo, CA 90245.

On August 18, 2016, I served true copies of the following document(s) described as **APPELLANTS' ANSWER TO AMICUS CURIAE BRIEFS** on the interested parties in this action as follows:

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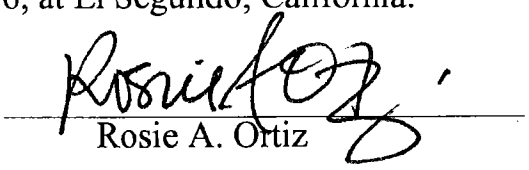

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