S230104

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

SUPREME COURT
FILED

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JAIME A. SCHER and JANE McALLISTER

Petitioners,

v.

JOHN F. BURKE; GERMAINE BURKE; RICHARD ERICKSON; CHRISTINA ERTESZAK; BENNETT KERNS, TRUSTEE OF THE A.S.A. TRUST, DATED JUNE 28, 2005; WENDIE MALICK; GEMMA MARSHALL; NORTHERN TRUST BANK N.A.; ANDREA D. SCHRODER; and RICHARD B. SCHRODER

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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I.

Introduction

Not surprisingly, defendants are unable to see that there is a real issue created by the Opinion, in terms of a conflict in published authority and in terms of the impact on persons living in rural and semi-rural areas like Topanga, where residential development has occurred without the niceties of the Subdivision Map Act. Contrary to defendants' intent, the Answer only serves to highlight the reasons this Court should grant review.

II.

Defendants Admit There Is A Conflict of Authorities

Defendants do not dispute that there is now a conflict of authorities between *Hanshaw v. Long Valley Road Ass'n* (2004) 116 Cal.App.4th 471 and the Court of Appeal's opinion in this case. (Answer, p. 4 fn. 1.) That conflict alone, in the context of interpretation of a statute that was the outgrowth of an opinion of this Court that generated the degree of controversy engendered by *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 84 Cal.Rptr. 162, justifies granting review.

III.

The Fact The Issue Is Framed Differently In The Petition For Review Does Not Preclude Review

Defendants assert plaintiffs have abandoned the arguments made in the courts below. While the issue has been framed somewhat differently in the Petition, the question whether Civil Code section 1009 prohibits non-recreational use of non-coastal land from ripening into an implied dedication to public use was always at issue in this case. *Bustillos v. Murphy* (2006) 96 Cal.App.4th 1277, which rejected a claim for a private easement, stated public recreational use of a trail could not ripen into a dedication to public use due to section 1009. While *Bustillos* dealt with something similar to a road, the use of the property was clearly recreational and clearly directed at the trail. In this case, the use of the property at issue is clearly *not* recreational and is clearly limited to the road. The manner in which the Court of Appeal applied section 1009 specifically to roads calls for a determination, in light of subdivision (a) of section 1009 and the *Gion-Dietz* opinion, of whether section 1009 was intended to apply in this situation.

While the issue as stated in the Petition is inherently raised by the Court of Appeal's Opinion, even if it were a new issue, as defendants seem to suggest, this Court is not precluded from granting review. This Court's power of decision extends to any issue presented by the case.

(California Rules of Court, rule 8.516(b)(2).) Further, this Court has granted review of seemingly "new" issues in the past.

For example, in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662, this Court considered whether Civil Code section 3291 prejudgment interest is awardable on punitive damages because the issue was "integrally related to the principal issues on review and [its resolution] will provide guidance on remand." Similarly, in a wrongful termination case, this Court addressed the respondent employer's arguments for dismissing the employee's breach of implied covenant cause of action, although those arguments were not fully before the Court of Appeal. Among other things, the same arguments had been made in the trial court and the matter had been fully briefed before this Court. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 348.)

The fact the property in question in this case was being used as a road was front and center in the trial court. The fact the Court of Appeal saw no significance in the nature of the use is not determinative of whether the issues identified by plaintiffs are appropriate for review. The question whether, in light of the Legislature's express statement of intent, implied dedication of a road for non-recreational use was made impossible by section 1009, remains an open issue.

IV.

***Klein v. U.S.* and Cases Cited Therein Are Distinguishable Because The Statutes Involved In Those Cases Do Not Contain Express Statements of Legislative Findings or Legislative Intent as Civil Code Section 1009 Does**

Defendants contend, based on *Klein v. United States* (2010) 50 Cal.4th 68, that the use of the word "recreational" in subdivision (a) of Civil Code section 1009 "cannot be read into the operative language of subdivision (b)." (Answer, p. 5.) *Klein* states that when the Legislature uses a term in one part of a statute, but not in another, it shows an intention to convey a different meaning. (*Klein, supra,* 50 Cal.4th at 80.) *Klein*, however, and the cases it cites for this proposition, do not involve the interpretation of statutes that, like section 1009, contain an express statement of the Legislature's intent in enacting the statute. To say that a statute should not be interpreted in light of the Legislature's express statement of legislative intent runs contrary to the fundamental tenet of statutory interpretation, which is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 828 P.2d 672.) An express statement of legislative intent in the statute itself cannot simply be ignored.

V.

Legal and Safe Access to One's Home is Not Merely a Matter of Convenience

Citing an unpublished portion of the Court of Appeal's opinion, defendants assert "Petitioners have not even claimed that they cannot access their home, only that they are being denied access by the 'quickest and most convenient route.' (Opn. p. 45)." (Answer, p. 10.) The Answer thus highlights problems with the Court of Appeal's understanding of the evidence in this case and the consequences the Opinion will have for persons whose situation is similar to plaintiffs.'

In one of several instances of poor understanding of the evidence (along with, arguably, overstepping the bounds of the Court of Appeal's review of the evidence), the Opinion indicates there is alternate legal access available to the north of plaintiffs' property. The defendants' properties in this case are all located to the south of plaintiffs' property, leading to an unsupported conclusion or assumption that access from the north is safe and legal, an issue that was not before the courts below.

Moreover, as demonstrated by evidence introduced at trial and cited in plaintiffs briefs to the Court of Appeal, plaintiffs do not have legal and safe access over the roads to the north of their property any more than they have legal access to the roads to the south. In fact, other roads by which plaintiffs could access their property, like the roads at issue in this case, have also been gated and blocked. (Respondents'

Brief and Cross-Appellants' Opening Brief, pp. 21-22; Cross-Appellants' Reply Brief, pp. 12-14.)

Moreover, the Opinion itself renders it impossible for plaintiffs to secure legal, safe and practical alternative northerly access by implied dedication. Surrounding landowners, in addition to defendants, will take the Court of Appeal's Opinion as authorization to continue to block the roads should this Opinion be allowed to stand. The Opinion effectively permits any and all of the surrounding landowners to block access to or from plaintiffs' property at will and provides similar encouragement to others who live in rural areas not conventionally subdivided with express dedication of roads. The Opinion thus encourages landowners to gate their sections of the road, thus creating more and more significant access problems and probable litigation for many more people on Henry Ridge Motorway and Gold Stone Road and on similar roads in other similarly rural and semi-rural areas.

The Opinion encourages persons residing along private roads formerly considered "common" to a neighborhood, despite the lack of formal dedication or written easements, to gate off each of their sections of roadway, worsening the access problem for all neighbors and endangering community safety. This is precisely the type of situation that begs the Court to take action to assure this does not become commonplace.

It cannot have been the Legislature's intent to cause the unresolvable loss of access rights over commonly used roads for all homes in similar rural and semi-rural areas where dedications or easement rights were not properly perfected. The Court must speak to prevent this type of untenable situation now and in the future as the State's population continues to grow and more of the population seeks refuge in less crowded rural areas.

VI.

Plaintiffs Have Stated Reasons For Limiting Section 1009 to Recreational Use

Defendants made the rather perplexing statement that plaintiffs "fail to make any argument for limiting section 1009's application to recreational use." (Answer, p. 2.) Not to belabor the point, the reasons are here summarized:

- The Legislature's intent stated in subdivision (a) of section 1009.
- The nature of the perceived controversy generated by the *Gion-Dietz* case that section 1009 was intended to resolve.
- The future issues with residents in rural and semi-rural areas who require access to their property for non-recreational use.

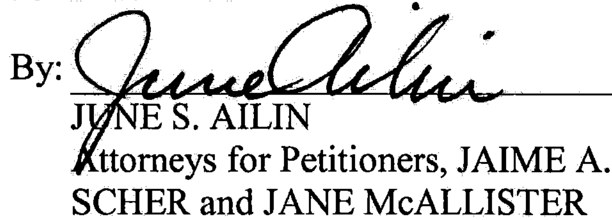
VII.

Conclusion

For the reasons set forth in the Petition for Review and this Reply, petitioners respectfully request that this Court grant review.

Dated: November 23 2015 Respectfully submitted,

ALESHIRE & WYNDER, LLP
JUNE S. AILIN

By: 

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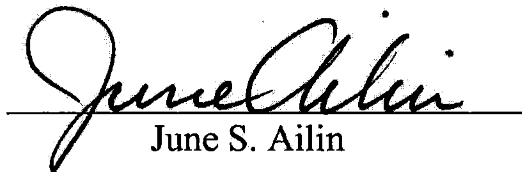
CERTIFICATE OF WORD COUNT

I certify that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached Reply to Answer to Petition for Review was produced on a computer and contains 1,476 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 the Petition for Review.



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 November 23, 2015, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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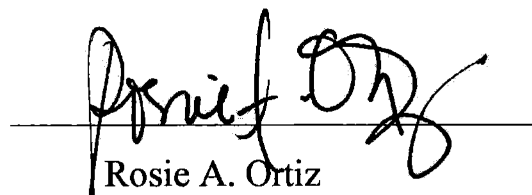

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