S230104

In The
Supreme Court of California

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

v.

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

AFTER A DECISION BY THE COURT OF APPEAL
Second Appellate District, Division 3
Case No. B235892

ANSWER BRIEF ON THE MERITS OF GEMMA MARSHALL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

California Cases

Statutes

Other Authorities

ANSWER BRIEF ON THE MERITS

What began as a simple easement dispute now poses a direct affront to private property rights in California. Plaintiffs Jaime Scher and Jane McAllister sued for the right to use Henry Ridge Motorway, a dilapidated road running across private property owned by defendant Gemma Marshall (on whose behalf this Answer Brief is filed) and other nearby landowners.[1] The trial court ruled (and the court of appeal affirmed) that the plaintiffs have no private right to use the road. The only remaining issue for this Court to decide is whether the roads have been impliedly dedicated to the public at large by acquiescence in public use.

California encourages private landowners to make their land available for recreational use by the public without risking the permanent loss of property rights by permitting such use. Civil Code section 1009 was specifically enacted to advance this policy. It provides that "no use" of noncoastal private property by the public after 1972 shall ever ripen to confer a vested right to continue such use permanently. By its plain terms, this statute abrogates the historically-problematic doctrine of implied dedication to the public, except in the coastal zone.

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[1] John F. Burke; Germaine Burke; Richard Erickson; Wendie Malick; Richard B. Schroder; Andrea D. Schroder; and Bennett Kerns, Trustee of the A.S.A. Trust Dated June 28, 2005

Plaintiffs' position is that section 1009 protects landowners only against "recreational" use of private property, but not against "non-recreational" or "roadway" use. This interpretation is contrary to the express language of the statute, the legislative history, and common sense. "Recreational" is a state of mind, having to do with personal refreshment or enjoyment experienced by the user, while people engage in "non-recreational" use of property to complete some external objective. There is no purpose to, say, riding dirt bikes through mountain trails, other than to experience personal enjoyment from the activity itself. It does not fulfill any underlying obligation.

The problem with codifying such a subjective distinction is obvious. Landowners like Marshall would be charged with determining, on a person-by-person basis, whether an individual member of the public who passes over her land is doing so for a "recreational" purpose or a "non-recreational" one. If she manages to accurately discern the individual's motives, she would then need to refuse access to the non-recreational user, while permitting access to the recreational user. The Legislature has recognized that no rational landowner would stand for this. Because the failure to make the correct determination about each user's motivations (or to abate the "non-recreational" use once it is discovered) could result in the permanent loss of property rights, landowners would have no practical option but to close their property to the public entirely.

This is exactly what the Legislature wanted to avoid with section 1009. The statutory ban on implied dedication in subdivision (b) is **not inconsistent** with the express legislative intent to promote public recreational use of private property set forth in subdivision (a). It is a natural, and necessary, means to accomplish the purpose for which the statute was enacted.

ISSUE PRESENTED

This Court granted review to address the following issue: Does Civil Code section 1009 preclude non-recreational use of non-coastal private property from ripening into an implied dedication of a public road? The answer is yes.

STATEMENT OF FACTS

A. The Parties Live on a Rural Road in Topanga Canyon

This action involves a mountain called Henry Ridge, nestled in the rural Topanga Canyon area of unincorporated Los Angeles County. Henry Ridge Motorway runs roughly north-south along Henry Ridge. (See Ex. 194, Map 17.) Marshall owns and lives at 1035 Henry Ridge Motorway. (11RT 2487.) Plaintiffs live at 1550 Henry Ridge Motorway, north of Marshall. (3RT 44.) The other defendants live south, on Henry Ridge Motorway and/or Gold Stone Road.

There is no evidence of who built the road along Henry Ridge. (7RT 1225.) A handful of early maps depict the ridge, including a land survey plat prepared in 1895 designating a "ROAD" along the ridge (Ex. 194, Map 1-2) and a 1908 map identifying "The Ridge Trail" in roughly the same location (Ex. 194, Map 5). Neither map shows any building, development, or destination point along or near the road.

County survey maps prepared in the 1930s identified the road as "Henry Ridge Motorway" for the first time.[2] (Ex. 194, Map 6, 7.) Quad maps prepared in 1952 and 1967 by the U.S. Geological Survey describe the path running along Henry Ridge as "unimproved dirt." (Ex. 194, Map 8, 9.) Thomas Guides from the 1960s also identify the road as Henry Ridge Motorway. (Slip Op. p. 8; Ex. 204.)

B. Marshall's Predecessor Offers a Private Easement Appurtenant to Owners in Section 1

On July 16, 1970, a developer recorded a document entitled "Declaration and Grant of Easements" to facilitate a proposed subdivision of a larger parcel into four smaller lots. (Slip Op. p. 10; 6RT 913-14.) For streamlined approval, the developer had to demonstrate that all sub-parcels would have access to a public

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[2] The court of appeal took judicial notice of the Street Name Policy of the County of Los Angeles Department of Public Works, defining the term "motorway" as a "truck trail or trail through mountainous terrain, usually for fire equipment usage or service access; e.g. power lines, Nike sites, etc. **Not for public use**." (Slip Op. p. 7 (original emphasis).)

street. (13RT 3140.) Accordingly, the 1970 Declaration offers an easement "for road purposes and to be **appurtenant to all owners, their heirs, successors, and assigns in said Sec. 1**..., the vesting of title to said easements to take effect upon recording...by any fee owner of a portion of said Sec. 1 of an acceptance of said easements." (Ex. 55, emphasis added.) The 1970 Declaration goes on to state that in the event a final tract map or parcel map is filed to dedicate or deed the streets to public use, which are accepted by the County, then the 1970 Declaration shall no longer be of any force or effect. (Ex. 55.) Attached to the 1970 Declaration was a map which states on the legend "Dedicated roads, per attached declaration." (Ex. 55-2.)

It is undisputed that no acceptance of the 1970 Declaration was ever recorded. (6RT975; 8RT1646; 13RT3052.)

C. Marshall Offers to Dedicate a Trail Easement

Marshall acquired her property in 1987. (Ex. 67; 6RT915.) At the time it was still vacant land. To build a house, the California Coastal Commission required her to record a document titled "Irrevocable Offer to Dedicate." (11RT2490-94.) This document offered "to dedicate to the People of the State of California an easement in perpetuity **for the purposes of hiking and equestrian trail** located on the subject property which extends to the Henry Ridge Trail which traverses the **private road** which bisects the subject property." (Ex. 63, p. 3 (emphasis added).)

The Offer to Dedicate refers to Henry Ridge Motorway as a "private access road" and an "existing trail [used by] riders, hikers, and joggers." (Ex. 63, see bates GM 0117, 0122-0123, 0125.) Marshall understood that by signing this document, she was offering a **trail easement** to the public. (11RT2494.) The offer expired after 21 years. (Ex. 63, p. 3; 6RT1042.)

Construction of Marshall's residence began in 1990. (11RT2490.) In 1991, Marshall erected a gate across Henry Ridge Motorway at the northern boundary of her property. (S11RT2503.) She gave a key to her neighbors, including Pauline Stewart,[3] for emergencies. (11RT2504, 2507; 12RT2751.) The fire department also has a key. (12RT2750-2751.) When closed, Marshall's gate prevents vehicular access; however, there is a passage allowing pedestrians and horseback riders to go around the gate. (12RT2706, 2710.)

Also in 1991, Marshall posted signs on the northern and southern boundaries of her property. (12RT2753, 2755; 12RT2809.) Both signs state: "PRIVATE ROAD[;] PERMISSION TO PASS SUBJECT TO CONTROL OF OWNER[;] PENAL CODE 602 AND SECTION 1008 CIVIL CODE[.]" (Ex. 207, 208.) Marshall's intent in putting up the signs was "to make sure that we protected our rights and that people understood that they

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[3] Stewart gave her key to Scher when he purchased his property. (4RT310-311.)

couldn't gain any prescriptive rights on our property." (12RT2757.)

D. Use by Anyone is Extremely Limited and "Public" Use is Virtually Nonexistent

The first use of Henry Ridge Motorway (of which there is any evidence) occurred in 1976. John Mac Neil, who was surveying in the area,[4] testified that he had driven on different parts of the road 50 to 60 times from 1976 to 2006. (13RT3107.)

Pauline Stewart, the so-called "Matriarch of Henry Ridge," did not move to the area until 1978.[5] (5RT656; 11RT2507.) Stewart testified that at the time, Henry Ridge Motorway and the other roads in the area were "just fire roads." (5RT656, 658-59.) When she started building her home, she received notice that the fire department would no longer maintain the road, and that "the County had designated it as a private road." (Slip Op. p. 13; 5RT656, 658-659, 667.) Stewart organized "community meetings" to determine "the legal requirements for...designating the road a PRIVATE ROAD." (Ex. 102, original emphasis.)

While Stewart testified that the public has been using the property "for fifty years," she conceded that she did not

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[4] Even this was not "public" use, as a land surveyor has a statutory right to enter private property for survey purposes. (Bus. & Prof. Code § 8774(a); Civ. Code § 846.5(a).)

[5] Stewart was unavailable to appear at trial, so portions of her deposition transcript were read pursuant to Evidence Code section 240.

personally know of anyone traveling from Gold Stone Road to Henry Ridge Motorway. Stewart herself almost exclusively used Henry Ridge Motorway northbound. (8RT1535-1536.) Her mail and deliveries arrived from the north 100 percent of the time. (8RT1527, 1532-1533.)

Plaintiff Scher testified that he first drove on Henry Ridge Motorway and Gold Stone Road in 1988, and thereafter did so two to three times per year until he purchased his property in 1998. (3RT55.) He testified to using the roads 200 times per year from 1998 to 2005, and 15 times total from 2005 to 2009. (4RT302-03, 406.) Plaintiff McAllister testified that she used the roads 14 to 20 times total prior to 1998, and six to 14 times per week from 1998 to 2005. (7RT1250-51.)

Plaintiffs' claim of extensive personal use was undermined at trial by the testimony of nearly a dozen witnesses, all residents of the area, who discounted plaintiffs' claims of heavy use.

John Burke "never" saw either Scher or McAllister drive up Gold Stone Road between 1998 and 2005. (9RT1822.) Richard Erickson testified that he has only seen Scher use the road "twice in the 20 years that I've been there." (10RT2225.) Marshall testified that she saw plaintiffs driving on her property "once or twice." (12RT2760). Lisa Salloux, who lived on Marshall's property for 11 years and knows plaintiffs personally, never once saw them drive across. (12RT2784.)

Christina Erteszek, who lived and worked on the Schroeders' property for 12 years, saw cars going up the road "a

handful" of times. (10RT2154-2156.) Nobuko Clemens (Marshall's neighbor to the north) drove on Henry Ridge Motorway to Gold Stone Road once or twice per month before construction of her house was completed in 2006. (10RT2207.) Ralph Weiss, who has lived at 2600 Henry Ridge Motorway (north of Clemens) since 1994, testified that he has driven on the road fewer than 10 times. (8RT1590-91, 1602.)

Malick testified that she has witnessed someone she did not recognize using Gold Stone or Henry Ridge to the north "maybe thirty times" in the 20 years she has lived in the area. (12RT2708.) Her habit was to stop cars she did not recognize. Her husband, Erickson, also testified that when he saw someone he did not know driving on Henry Ridge or Gold Stone, he would "religiously" attempt to find out who it was. (10RT2237.) No person ever told either of them that they thought they had the right to use the roads. (10RT2238; 12RT2708.)

Richard Schroeder described himself as "vigilant" of people driving on Gold Stone Road. (11RT2455.) He testified that he saw a total of four people on the road in 2005, and a total of five people on the road in 2006. (11RT2467.) He "always" approached these people, whom he described as "random trespassers," and if they were not guests of his neighbors, then he "always redirected them." (11RT2467.) None of the people ever told him they believed they had a right to use the road. (11RT2468.)

Mr. Burke stopped and approached people he did not recognize driving on the roads near his property. (8RT1582.) His

practice was to wave them down and ask where they were headed. (9RT1825.) If they were a guest of a northerly neighbor, he would "say okay" and offer directions; if not, he would redirect them. (8RT1586.) Oftentimes, they were simply lost. (9RT1826-27.)

But the most compelling account of use of the roads was provided by Scher himself. Of all Scher's thousands of alleged trips up and down the roads over the course of two decades, he saw other persons on the roads only a handful of times.

Q. Can you tell me approximately how many different times you saw automobiles using the roads while you were accessing the Scher property?

A. **In the entire time I have used those roads, I think I have seen other people on those roads less than a dozen times.**

Q. When you say other people, are you talking about –

A. Hikers, bikers, cars, residents, anybody.

* * *

Q. But does that include the two times with Ms. Malick?

A. Yes.

Q. And the one time with Mr. Erickson?

A. Yes.

Q. So then it would be no more than nine times, additional times?

A. That would be a good estimate, yes.

(4RT428-429 (emphasis added).)

E. Plaintiffs Have Numerous Other Access Routes

Plaintiffs' brief implies that their property is landlocked. (Brief p. 22 ["Realistically, it[Henry Ridge Motorway south] is the **only** route" (emphasis added)]; p. 57 ["Let Jaime and Jane go home."].) They never raised such an argument before now; an easement by necessity was never requested or considered at trial or in the court of appeal. (Slip Op. p. 45 ["there are several other routes plaintiffs can use to travel from their Section 1 property to Topanga...plaintiffs argue Henry Ridge Motorway to Gold Stone Road 'is the **quickest and most convenient route.**'" (original emphasis)].) Contrary to the "futuristic post-apocalyptic nightmare" they now present, (Brief p. 1), plaintiffs are not landlocked. There are several unimpeded public routes that they can, and do, use to access their home on a daily basis.

Taking Henry Ridge Motorway to the north leads to Adamsville Avenue, Alta Drive, and Mulholland Boulevard, all public streets. (Ex. 194, Map 17.) This is how Scher traveled to court during trial. (5RT614.) Heading south, plaintiffs can take Oldfield Ranch Road – which lies north of Marshall's property and runs east-west – to Greenleaf Canyon Road which, in turn, connects to Topanga Canyon Boulevard. (Ex. 194, Map 17.) The evidence was disputed about whether Oldfield Ranch Road is a

reliable alternative. Scher testified that it is viable in a motorcycle or a four-wheel-drive vehicle (3RT105), while several other witnesses testified to their ability to drive all the way up and down in sedans that do not have four-wheel-drive (11RT2553-54; 12RT2784-85; 12RT2730).

PROCEDURAL HISTORY

On June 11, 2009, plaintiffs filed a verified complaint for quiet title and declaratory and injunctive relief, asserting causes of action for express easement, non-exclusive prescriptive easement, dedication by acquiescence in public use, and equitable easement. (1CT13.) Plaintiffs later amended the complaint to name Marshall as Doe 2. (1CT116.)

A twelve-day bench trial began on May 16, 2011. On the last day of trial, the court granted plaintiffs leave to amend their complaint to conform to proof on the issue of implied easement. (14RT3373-76.) At the conclusion of trial, the trial court found for defendants on plaintiffs' claims for equitable easement, express easement, and prescriptive easement, but granted plaintiffs' causes of action for implied easement and implied dedication by acquiescence in public use. (14RT3458-63.)

Judgment was entered on September 6, 2011. (6CT1229.) Notice of entry of judgment was given September 12, 2011. (6CT1321.) Marshall timely appealed (6CT1358), and the court of appeal issued its opinion on September 15, 2015.

DISCUSSION

I.
Standard of Review

"When interpreting any statute, courts begin with its words 'because they generally provide the most reliable indicator of legislative intent.'" (*Smith v. Workers' Comp. Appeals Board* (2009) 46 Cal.4th 272, 277, citation omitted.) If the language of the statute is clear and unambiguous, there is ordinarily no need for judicial construction. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.)

If there is no ambiguity in the language of a statute, courts must "presume the Legislature meant what it said" and the plain meaning of the language governs. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.) "If, however, the statutory terms are ambiguous, then the court may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

In such circumstances, the court selects "the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Coronado* (1995) 12 Cal.4th 145, 151 (citations omitted).)

II.
Civil Code Section 1009 Abrogated The Doctrine of Implied Dedication of Non-Coastal Private Property

A. The Problematic Doctrine of Implied Dedication

A dedication is the application of private real property to a public use by the acts of its owner that clearly manifest the intent that it be used for a public purpose. (*Cal. Water & Tel. Co. v. Pub. Utilities Comm'n* (1959) 51 Cal.2d 478, 494.) A completed dedication creates a public easement. There are two methods of dedication: statutory and common law. A statutory dedication is accomplished through compliance with the specific requirements of a statute, such as the Subdivision Map Act (Gov't Code §66410, et seq.). This case involves a claim of common law dedication of Henry Ridge Motorway and Gold Stone Road to the public.

Common law dedication is a form of estoppel against the property owner in the public's favor, arising from the owner's failure to object to occurrences or circumstances that indicate an implied intent to dedicate the property. (*Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1973) 30 Cal.App.3d 579, 585.) A common law dedication may be express or implied. "Express dedication arises where the owner's intent to dedicate is manifested in the overt acts of the owner, e.g., by execution of a deed. An implied dedication arises when the evidence supports an attribution of intent to dedicate without the presence of such acts." (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 820-21 (citation omitted).)

An implied dedication may be in fact or in law. "A dedication is implied in fact when the period of public use is less than the period for prescription, and the acts or omissions of the owner afford an implication of actual consent or acquiescence to dedication. [Citation.] A dedication is implied by law when the public use is adverse and exceeds the period for prescription." (*Blasius, supra*, 78 Cal.App.4th at p. 821, citations omitted.) Put another way, an implied in fact dedication requires evidence of affirmative acts or acquiescence of the property owner, while implied in law dedication is established by the continuous adverse public use of the property for the prescriptive period without substantial interference by the owner. (*Union Transp. Co. v. Sacramento County* (1973) 42 Cal.2d 235, 240-41.)

For any dedication, the fundamental requirement is the **clear and unequivocal intent** by the property owner to dedicate his or her property to a public use. (*Cal. Water & Tel. Co., supra*, 51 Cal.2d at p. 494.) It must be shown that "various groups of persons have used the land," rather than "a limited and definable number of persons." (*Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 39.) "The use must be substantial, diverse, and sufficient, concerning all of the circumstances, to convey to the owner notice that the public is using the passage as if it had a right to do so." (*Blasius, supra*, 78 Cal.App.4th at p. 825 fn. 7.)

Even an unequivocal intent to *offer* to dedicate private property to the public use does not, by itself, consummate an easement by dedication. "[A] dedication, like a contract, consists

of an offer and acceptance, and it is settled law that a dedication is not binding until acceptance, proof of which must be unequivocal." (*County of Inyo v. Given* (1920) 183 Cal. 415, 418.) Acceptance of an offer of dedication may be actual or implied. Acceptance is implied when there is no formal acceptance by the proper public authority, but that "use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication." (*Ibid.*)

Put simply, the law of implied dedication requires proof of the owner's clear and unequivocal intent to dedicate, as well as proof of acceptance by the public, before property rights can be permanently taken away. While the doctrine has existed for over a century, this Court's 1970 opinion in the case *Gion-Dietz* brought the doctrine into public awareness.

B. *Gion-Dietz* Brought the Problem of Implied Dedication Into the Limelight

As plaintiffs recognize (Brief p. 34), *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29[6] was not revolutionary. It restated and clarified the law of implied dedication, and applied that law to a "unique pattern of factual circumstances." (*County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 213.) The case involved a stretch of land which the public historically used to access the sea.

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[6] *Gion* was consolidated with *Dietz v. King* (hereafter, *Gion-Dietz*).

> Since at least 1900 various members of the public have parked vehicles on the level area, and proceeded toward the sea to fish, swim, picnic, and view the ocean. Such activities have proceeded without any significant objection by the fee owners of the property.
>
> ...[the fee owner concedes] that he never told anyone to leave the property, and that he always granted permission on the few occasions when visitors requested permission to go on it.
>
> ...Every witness who testified about the use of the land before 1941 stated that the public went upon the land freely without any thought as to whether it was public or privately owned In fact, counsel for Gion offered to stipulate at trial that since 1900 the public has fished on the property and that no one ever asked or told anyone to leave it.

(2 Cal.3d at p. 35.)

Though historical use of the land in question was essentially undisputed, the case crystallized some of the problems of interpretation that had concerned lower courts. (*Gion-Dietz*, *supra*, 2 Cal.3d at p. 39.) One of the critical issues this Court sought to address was: "Is there any difference between dedication of shoreline property and other property?" (*Id.*) A substantial portion of the opinion is devoted to discussing "the strong policy expressed in the constitution and statutes of this state of encouraging public use of shoreline recreational areas." (2 Cal.3d at pp. 42-43.)

The court also delineated the evidence required for a finding that the road was impliedly dedicated to the public. "What must be shown is that persons used the property believing the public had a right to such use." (*Gion-Dietz, supra*, 2 Cal.3d at p. 39.) Proponents of implied dedication must show that "various groups" of people have used the land, not merely "a limited and definable number of persons." (*Id.*) " '[T]he thing of significance is that whoever wanted to use [the land] did so...when they wished to do so without asking permission and without protest from the land owners.' [Citation.]" (*Id.* at p. 40.)

The Court ultimately held that, based upon the specific facts presented in the case, a dedication of the shoreline property in question had occurred. The takeaway for present purposes is that as of 1970, depending on the facts and circumstances of a particular case, a dedication could arise with respect to coastal property *or* non-coastal property.

C. In Response to *Gion-Dietz*, the Legislature Prohibited Public Use of Private Property from Ripening to a Permanent Right to Continue Such Use

The Legislature "quickly and decisively repudiated" the factual assumptions underlying *Gion-Dietz*. (*Berk, supra*, (1980) 26 Cal.3d at 229 (concluding that "California landowners are far more charitable and neighborly").) Specifically, the Legislature determined that "the policy of public access to recreational areas

is best served by encouraging landowners to allow the public to use their land." (*Id.*, 26 Cal.3d at p. 230.) The Legislature passed a bill (SB 504) which enacted Civil Code section 1009, a statute specifically designed to abrogate the doctrine of implied dedication except in the coastal zone.

The full text of section 1009 is set forth in plaintiffs' brief at pages 36-39, and summarized below.

- Subdivision (a) sets forth three Legislative findings: (1) The state should encourage private landowners to continue to make their lands available for public recreational use; (2) landowners are "confronted with the threat of loss of rights in their property" if they allow the public to use their property for recreational purposes; and (3) record titles can be clouded by such public use, compelling the owner to exclude the public from his property.
- Subdivision (b) is a ban on implied dedication. It states that "no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently," in the absence of an express written irrevocable offer to dedicate the property to a government entity such as a city or county.
- Subdivisions (c) and (d) address procedures for dedication of private property to a government entity such as a county, city, or other public body – not applicable here.

- Subdivision (e) states that the ban on implied dedication set forth in in subdivision (b) "shall not apply to any coastal property which lies within 1,000 yards" of the sea.[7]
- Subdivision (f) states that even on coastal property, no use by the public shall constitute evidence of implied dedication if the owner posts signs, records notice, or enters a written agreement with the government. Subdivision (g) states that in such a case, the permission granted may be subject to reasonable restrictions on the time, place, and manner of the public use.

This statute is not the labyrinth of complexity that plaintiffs represent it to be. The operative portion of the statute, subdivision (b), provides that "no use" of private property by the public shall ripen to a permanent use. Certain exceptions exist (subdivisions (c) through (f)), which impose additional requirements for perfecting an express dedication to government entities and/or dedication of coastal property within 1,000 yards of the high tide line. There is no exception for "non-recreational" use of property, or for roadways.

The court of appeal correctly held that the language of Civil Code section 1009 is not ambiguous. (Slip Op. p. 29.) If the Legislature had wanted section 1009 to protect landowners only

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[7] In this case the trial court held the opposite, finding that Civil Code section 1009 "exclusively applies" to Coastal Property. (6CT1220.)

against recreational use but not against non-recreational use, the Legislature would have said so. Indeed, the Legislature explicitly referred to "recreational use" in subsection (a), but omitted it from subsection (b). As the court of appeal acknowledged, the "absence of the word 'recreational' from the phrase 'no use' in subdivision (b) indicates that the Legislature's aim was to comprehensively preclude implied dedications from **any kind of** public use of private real property." (Slip Op. p. 29 (original emphasis).)

"[W]hen one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning." (*Klein v. United States* (2010) 50 Cal.4th 68, 80, citations omitted.) There is no ambiguity in the language of section 1009 subdivision (b): "no use" of private non-coastal property shall ripen to confer a permanent right.

Plaintiffs bemoan the court of appeal for its "major departure from long-standing law without a clear expression of legislative intent to do so." (Brief p. 45.) But the court of appeal took judicial notice of all of the legislative history relating to Civil Code section 1009, and quoted it extensively in the published portion of the opinion. (Slip Op. p. 31-32.) Plaintiffs nevertheless ignore the legislative history in their brief.

D. The Legislative History Confirms the Legislature's Unequivocal Intent to "Delete Prospectively" the Doctrine of Implied Dedication Except in the Coastal Zone

In interpreting legislative intent the court looks first to the plain meaning of the statute itself. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) When the language of a statute is susceptible to more than one reasonable construction, it is appropriate for the court to turn to extrinsic aids, including the legislative history, to ascertain its meaning. (*Diamond Multimedia Systems, Inc.* (1999) 19 Cal.4th 1036, 1055; *People v. Fare!!* (2002) 28 Cal.4th 381, 390.) Here, the legislative history of section 1009 confirms what its plain text conveys: the Legislature intended to abrogate the doctrine of implied dedication, except in the coastal zone.

The Senate committee report from July 20, 1971 states:

> Proposed amendments to SB 504 would treat the effect of implied dedication differently in the coastal zone than in the remainder of the state. [¶] **The doctrine of implied dedication would be deleted prospectively** except for the 'coastal zone'...

(Assem. Com. On Planning and Land Use, Analysis of Proposed Amendments to Sen. Bill. No. 504 (1971 Reg. Sess.) July 20, 1971, p.1 (emphasis added).)

The Enrolled Bill Memorandum to Governor states:

> The bill makes specified notice of consent to public use of private lands conclusive evidence that subsequent use **for any**

> **purpose**, except as specified, is permissive and with consent in any judicial proceeding.
>
> ...
>
> The bill also **prohibits any use of private land**, except specified ocean frontage land, after the effective date of the bill from conferring a vested right in the public, with specified exceptions.

(Enrolled Bill Mem. to Gov. for Sen. Bill No. 504 (1971 Reg. Sess.) Oct. 7, 1971, p.1 (emphasis added).)

The Legislative Counsel's Digest for 1971 states:

> "**Prohibits any use of private land**, except specified ocean frontage land, after effective date of act from conferring a vested right in public. . .in absence of express written irrevocable offer by owner property accepted by specified public agency."

(Legis. Counsel's Dig., Sen. Bill No. 504 (1971 Reg. Sess. & 1971 1st Ex. Sess.) Summary Dig., p. 36 (emphasis added).)

When considered as a whole, the legislative history of section 1009 does not reveal an intent to create an artificial distinction between "recreational use" and "non-recreational use" as Plaintiffs urge. The clear intent is to distinguish **coastal** property from **non-coastal** property. The Legislature stated expressly that it intended to treat the effect of implied dedication differently in the coastal zone than in the remainder of the state. It sought to create a new law that would prohibit **any** use of private land from conferring a vested right to the public, except for coastal land.

In sum, the court of appeal correctly assessed the legislative history supporting section 1009:

> As shown, the express legislative purpose of Civil Code section 1009 is to encourage recreational use of private property be preventing implied dedication of coastal property based on public use if the landowner takes one of the specified steps in subdivision (f), while eliminating all implied dedication of non-coastal property to public use after March 1972 ... **To read subdivision (B) to apply only to recreational use would discourage non-coastal landowners, unable to distinguish between recreational and nonrecreational users, from allowing any entry on their inland property for fear that "non-recreational" use would become permanent.** Such a result would improperly thwart the statute's declared purpose and return the law to the state it was under *Gion*, thus defeating the Legislature's motive for enacting the statute.

(Slip Op. p. 32 (emphasis added).)

Plaintiffs' argument that there is "no clear expression of legislative intent" to repeal the doctrine of implied dedication is unpersuasive. (Brief p. 45.) In enacting section 1009, the Legislature unequivocally stated its intention to do just that.

III. This Court Should Not Interpret Section 1009 to Contain Ambiguous and Unworkable Exceptions

Section 1009 is capable of being implemented and enforced because the distinction it draws- coastal property versus non-coastal property- is defined by objective criteria. A property

owner can determine from a common survey (or even a decent map) whether permitting public use of his or her property may ripen to an implied dedication. If the property lies within 1,000 yards of the coast, it can. If not, it cannot.

Plaintiffs urge this Court to blur the lines by interpreting the phrase "no use" in subdivision (b) to mean no recreational use. Unlike the bright line distinction between coastal and non-coastal property, which is based on **objective** criteria, the distinction between "recreational" and "non-recreational" use of property is based on inherently **subjective** criteria. As explained above in section II, such a rule would undermine the very principles section 1009 was enacted to promote.

A. No Exception Exists for "Non-Recreational Use"

The term "recreational" commonly refers to "recreation," which means "something people do to relax or have fun : activities done for enjoyment : refreshment of strength and spirits after work : a means of refreshment or diversion." (Merriam Webster Dictionary, online edition (2016) www.m-w.com.) Civil Code section 846 contains a non-exhaustive list of activities that could be considered a "recreational purpose," such as "fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, private noncommercial

aviation activities, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites."

Plaintiffs are essentially urging this court to create an implied exception to section 1009 based on individualized feelings of relaxation, refreshment, and fun. Landowners are not going to jeopardize their property rights by permitting public use without objective criteria by which they can be certain their rights will be protected. If all they have to rely on is an ambiguous distinction of whether a person is feeling "relaxed" or "refreshed" at the time of use, they will have no practical choice but to block the public from using their land for any purpose.

Consider this example of two persons, Rider A and Rider B, who live nearby each other in a rural mountain area. Rider A owns a red motorcycle that she uses as her "daily driver" to run errands and commute to work. Rider B owns a red motorcycle that she uses exclusively for fun, traveling through country mountain roads. One day, they happen to depart at the same time. Together, they approach a gravel road running across a nearby property.

The property owner sees the riders approach. How is she supposed to discern which of these riders is traveling for a "recreational" purpose? There is no objective way to tell. They look the same and are riding similar vehicles. The only conceivable way is to stop them both and ask. It could be that the landowner is capable of running outside, waving her arms, chasing them down, and stopping the riders so she can physically

confront and interrogate them about the purpose of their travel. Even if she could, she may not want to do so.

Fortunately for the landowner, California law provides objective criteria allowing property owners to permit the public to use their land without fear of losing those rights. Section 1009 states that "no use" of non-coastal private property shall ripen to a vested right to continue such use permanently. Reversing the court of appeal's opinion would deprive landowners of the certainty they currently enjoy, causing the exact chilling effect on public access to private property that section 1009 was enacted to avoid.

B. No Exception Exists for "Roadways"

A substantial portion of Plaintiffs' brief is devoted to an argument that was never raised in either the trial court or the court of appeal. (Brief p. 29-45.) In essence, they argue that Civil Code section 1009 does not prevent implied dedication of **roadways**, on the theory that unlike "open land used for recreational purposes," the dedication of a roadway does not "substantially interfere" with private property rights, and could "even facilitate a productive use." (Brief p. 35.) This is erroneous. The implications arising from dedication of a public road running through otherwise-private property are even more problematic than dedication of the property as a whole.

To protect against unwanted intrusions into the private portions of her land, the property owner would have to install

security measures on the boundaries of the public road. She would become personally liable for any injuries that may occur if a person wanders off the public road and into the private sections. She also would presumably have to coordinate with the city or county responsible for the road, to allow periodic access for maintenance, street cleaning, and the like (unless plaintiffs suggest the owner should be personally responsible for maintaining the public road as well?).

These burdens would indeed "substantially interfere" with the landowner's private property rights by forcing her to undertake risky, expensive, and uncertain measures that would not otherwise be required. Again, the most likely result would be that the landowner will not risk losing her property rights to such uncertainty. She would be forced to close her property off to the public for **any** use- road or not road, recreational or not recreational.

This is precisely what the Legislature sought to avoid in enacting section 1009. (See, subd. (a)(2) [threat of dedication includes allowing the public to "use, enjoy *or* **pass over** their property for recreational purposes" (emphasis added)].) Section 1009 expressly states that "no use" of private property by the public shall ripen to a continued right to continue such use. (Subd. (b).) There is no statutory exception for "roadways." This Court should not entertain plaintiffs' invitation to create one.

C. The Absence of Subsequent Legislative Action Does Not Indicate Approval of Erroneous Case Law

Plaintiffs further contend that because the California Legislature has **not** acted to "correct" the misinterpretation of section 1009 set forth in recent cases, the "only plausible conclusion" is that the Legislature is presumed to approve their interpretation of the statute. (Brief p. 49.) If the absence of action by the Legislature could be interpreted as an implied acceptance of the thing it fails to act about, the Legislature could be said to approve things it has never even considered.

Bustillos v. Murphy (2006) 96 Cal.App.4th 1277, does not aid plaintiffs. The issue in that case was whether public use of a network of recreational trails could give rise to a public easement for "recreational purposes." (96 Cal.App.4th at p. 1279, 1281.) The court of appeal for the Fourth District properly held that section 1009 bars such a claim. (*Id.* at p. 1282.) Here, nobody disputes that under section 1009 recreational use of private land cannot ripen to an implied dedication. By its plain terms, no use of **any** kind may lead to a vested right to continue the use.

The case Plaintiffs rely most heavily on is *Hanshaw v. Long Valley Road Ass'n* (2004) 116 Cal.App.4th 471. (Brief p. 46.) This opinion was the basis for the trial court's determination that section 1009 has no application to "non-recreational" use of property. (6CT1221.) In *Hanshaw*, an express written offer to dedicate a portion of a road "for public access" had been formally accepted and recorded by the county. (116 Cal.App.4th at p. 475.)

Dissatisfied, neighboring landowners argued that the dedication was nevertheless barred by section 1009. (*Id.*, at p. 479-480.) The court of appeal for the Third District rejected this argument, concluding "Civil Code Section 1009...has no application to nonrecreational use of land." (*Id.*, at p. 474.) As the court of appeal in the instant case explained, this conclusion is incorrect as a matter of law. (Slip Op. p. 32-33.)

Similar to this case, *Hays v. Vanek* (1989) 217 Cal.App.3d 271 presented the question whether evidence that a road existed on an old map could be sufficient to support a finding of implied dedication. A "first class or primary road" had been designated on a survey in 1891, before the relevant land patents were issued. (217 Cal.App.3d at 280.) The defendants argued that this required the finding that an offer of dedication had been accepted by public use. (*Id.*) The Court of Appeal for the Fourth District rejected that argument.

> We are unable to conclude that "public" use must be inferred from the designation of this dirt road as "first class" during a period of time when the county's population was sparse with the roads probably being primarily used by homesteaders and mining claim owners. Such use is just as consistent with private easements by prescription or necessity or with implied private licenses as with public dedication. Lacking facts, the bare legal history of the subject property is insufficient to establish a dedication to the general public before the patents were issued.

(*Hays, supra*, 217 Cal.App.3d at p. 280; see also, *Whelan v. Boyd* (1892) 93 Cal. 500, 501 ["Whether it also became a public street did not depend upon the fact alone that the land appears on these

maps as a public street, but whether the proof showed that it had been offered for dedication, and accepted as such by user or otherwise."].)

Put simply, the mere designation of a road on a map – even a "first class" road – can, at most, evince the road's **existence** as of the time the map was created. It does not evince the extent to which the road was used, or by whom.

In *Biagini v. Beckham* (2008) 163 Cal.App.4th 1000, landowners contended that a road running through their neighbors' property had been impliedly dedicated to the general public. They argued that they and their clients frequently used the roads for ingress and egress pursuant to an express private easement, and that this heavy use "sufficed to show public acceptance of the offer of dedication." (163 Cal.App.4th at p. 1010.) The Court of Appeal for the Third District rejected the claims, because their use of the road did not exceed the scope of use permissible under the express private easements. (*Id.* at pp. 1013-14 ["Where, as here, the use of property is consistent with a private easement, there is no basis for finding an implied acceptance of an offer of dedication by public use"].)

Most recently, in *Pulido v. Pereira* (2015) 234 Cal.App.4th 1246, the Court of Appeal for the Third District concluded that the phrase "use of such property" in section 1009 subdivision (b) "refers back to subdivision (a)(1), which explains that the subject of the statute is the public recreational use of private real property." The court of appeal in the instant case was correct in

rejecting this flawed analysis. It is unnecessary to rely on a cross-reference to a qualified, limited subset of "use" set forth in subdivision (a) because the operative portion of the statute (subdivision (b)) contains its own definition, namely, "any particular" property. (Slip Op. p. 29.) Indeed, while the legislative findings in subdivision (a) may be illuminating insight into an otherwise ambiguous clause, "a preamble is not binding in the interpretation of the statute." (Slip Op. p. 29-30, citing *Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 109, 1103.)

None of the foregoing opinions focused on the reasoning that plaintiffs now request this court to endorse. None of the cases considered the legislative history of Civil Code section 1009, or held that section 1009 is inapplicable to "roadways." The absence of legislative response to these cases is meaningless, and the court of appeal correctly rejected their flawed logic in the instant case. This Court's determination of the intent and purpose of the statute should begin and end with the unambiguous language of the rule itself. Any opinion which suggests a contrary interpretation should be disapproved.

IV. The Sufficiency of the Evidence Set Forth in the Judgment is Outside the Scope of Review

Plaintiffs also raise two matters that this court should not consider, because they go beyond the scope of review the court

granted and because plaintiffs did not properly preserve the issues.

A. There Is No Material Omission or Misstatement of Fact in the Court of Appeal's Opinion, But Even If There Was, Plaintiffs Failed to Bring it to That Court's Attention

In section VI, B, Plaintiffs argue that the trial court's judgment should be reinstated because the court of appeal improperly reweighed the evidence, making erroneous decisions about what evidence was credible and not credible. (Brief p. 50-52.) An appeal to this court is not simply a "do over" of what was presented to the court of appeal. Alleged omissions or misstatements of fact will ordinarily not be considered unless the error was called to the court of appeal's attention. (Cal. Rules of Court 8.500(c)(2); *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 952 ["Because neither party petitioned the Court of Appeal for a rehearing, we take the facts largely from that court's opinion"].) Plaintiffs never petitioned for rehearing after the court of appeal opinion was issued, nor were any of the evidentiary issues identified in section VI, B of their brief presented in the petition for review. With respect to sufficiency of the evidence to support the judgment, the court of appeal opinion should stand.

More importantly, even if this court were to entertain plaintiffs' request to further reweigh the evidence, the result would not change. The evidence at trial was clear. While there

was some evidence of persons using the roads, those persons were all local residents. Evidence of use by the general public at large was virtually nonexistent. Scher himself only saw persons he did not know a handful of times in his 20 years of using the roads. The occasional passerby or "lookie-loo" is not sufficient to support implied dedication. The court of appeal correctly applied long-established legal standards to the facts presented, and concluded no dedication occurred here.

B. Plaintiffs' Private Rights of Action Are Also Outside the Scope of Review

Plaintiffs also say that "the trial court judgment must be reinstated" (Brief p. 57), without limiting the request to the issue of implied public dedication under section 1009. The trial court judgment sustained their causes of action for implied public dedication and implied easement, but denied their claim for an express, prescriptive, or equitable private easement. Their brief does not mention their private theories. Accordingly, whatever the outcome on the question of public dedication, the court of appeal's determination on the issues of a private express, implied, prescriptive, and equitable easement is final.

CONCLUSION

The Legislature enacted Civil Code section 1009 to abrogate the doctrine of implied dedication of non-coastal private property by acquiescence in public use. This court should hold that the statute means exactly what it says: **no use** of non-coastal private property by the public shall ever ripen to a vested right to continue such use permanently, in the absence of an express written offer to dedicate. Plaintiffs' invitation to imply uncertain and subjective exceptions into this clear rule for "roadways" and "non-recreational use" would cause the exact chilling effect the Legislature intended to avoid.

The court should affirm the decision of the court of appeal, and award Marshall her costs.

Dated: May 9, 2016 Respectfully submitted,

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By _____

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CERTIFICATE OF WORD COUNT

(Rule 8.204©, California Rules of Court)

The text of this brief consists of 7987 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: May 9, 2016

Joshua S. Hopstone

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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 Ventura, State of California. My business address is 2801 Townsgate Road, Suite 215, Westlake Village, CA 91361.

On May 10, 2016, I served true copies of the following document(s) described as ANSWER BRIEF ON THE MERITS OF GEMMA MARSHALL on the interested parties in this action as follows:

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Executed on May 10, 2016, at Westlake Village, California.

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