S230104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAIME A. SCHER and JANE McALLISTER,
Plaintiff, Appellants and Respondents,

vs.

RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER and ANDREA D. SCHRODER, et al.,
Defendants, Appellants and Respondents.

On Review from the Court of Appeal for the Second Appellate District, Division Three, 2nd Civil Case No.: B235892
After an Appeal From the Superior Court for the State of California, County of Los Angeles, Case No.: BC415646
Hon. Malcolm Mackey

ANSWER BRIEF ON THE MERITS

Robert S. Gerstein, Esq., SB# 35941 Law Offices of Robert S. Gerstein 12400 Wilshire Blvd., Ste. 1300 Los Angeles, CA 90025 Tel: (310) 820-1939; Fax: (310) 820-1917 robert.gerstein1@verizon.net	Wendy C. Lascher, Esq., SB# 58648 Joshua S. Hopstone, Esq.,, SB# 273719 FERGUSON, CASE, ORR, PATERSON, LLP 1050 Kimball Road, Ventura, CA 93004 Tel: (805) 659-6800; Fax: (805) 659-6818 wlascher@fcoplaw.com

Ryan C. Squire, Esq., SB# 199473
Zi C. Lin, SB# 236989
GARRETT & TULLY
225 S. Lake Avenue, Suite 1400, Pasadena, CA 91101
Tel: (626) 577-9500; Fax: (626) 577-0813
rsquire@garrett-tully.com

Attorneys for Defendants and Appellants, JOHN AND GERMAINE BURKE, RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER and ANDREA D. SCHRODER, et al.

S230104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAIME A. SCHER and JANE McALLISTER,
Plaintiff, Appellants and Respondents,

vs.

RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER and ANDREA D. SCHRODER, et al.,
Defendants, Appellants and Respondents.

On Review from the Court of Appeal for the Second Appellate District, Division Three, 2nd Civil Case No.: B235892
After an Appeal From the Superior Court for the State of California, County of Los Angeles, Case No.: BC415646
Hon. Malcolm Mackey

ANSWER BRIEF ON THE MERITS

Robert S. Gerstein, Esq., SB# 35941 Law Offices of Robert S. Gerstein 12400 Wilshire Blvd., Ste. 1300 Los Angeles, CA 90025 Tel: (310) 820-1939; Fax: (310) 820-1917 robert.gerstein1@verizon.net	Wendy C. Lascher, Esq., SB# 58648 Joshua S. Hopstone, Esq.,, SB# 273719 FERGUSON, CASE, ORR, PATERSON, LLP 1050 Kimball Road, Ventura, CA 93004 Tel: (805) 659-6800; Fax: (805) 659-6818 wlascher@fcoplaw.com

Ryan C. Squire, Esq., SB# 199473
Zi C. Lin, SB# 236989
GARRETT & TULLY
225 S. Lake Avenue, Suite 1400, Pasadena, CA 91101
Tel: (626) 577-9500; Fax: (626) 577-0813
rsquire@garrett-tully.com

Attorneys for Defendants and Appellants, JOHN AND GERMAINE BURKE, RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER and ANDREA D. SCHRODER, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

LAW REVIEW ARTICLES

S230104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAIME A. SCHER and JANE McALLISTER,
Plaintiff, Appellants and Respondents,

vs.

RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER and ANDREA D. SCHRODER, et al.,
Defendants, Appellants and Respondents.

On Review from the Court of Appeal for the Second Appellate District, Division Three, 2nd Civil Case No.: B235892
After an Appeal From the Superior Court for the State of California, County of Los Angeles, Case No.: BC415646
Hon. Malcolm Mackey

◊

ANSWER BRIEF ON THE MERITS

◊

INTRODUCTION

Petitioners Jaime Scher and Jane McAllister's (hereinafter Petitioners) Opening Brief starts with an emotionally charged picture of the Court of Appeal decision's impact on their lives. According to Petitioners, since reversal of the trial court judgment giving them access to their home across Respondents' property, they live with constant uncertainty about being able to get to and leave their home

each day, and whether emergency services will reach them in time of need. (OB 1-2). The Brief ends with a plea to "Let Jaime and Jane go home."[1] (OB 57).

But, assuming its veracity, this "post-apocalyptic nightmare" is not the issue Petitioners have put before this Court.[2] They have petitioned this Court for review, not as individuals asserting private easement rights based on hardship, but as members of the public who benefitted from the trial court's finding of implied dedication of these roadways to the public.

Specifically, they ask whether Civil Code section 1009 bars non-recreational public use of private property to ripen into implied dedication of roadways, or whether that section is applicable to roadways at all. (Ptn., p. 1; OB 3).

Petitioners do so because the trial court found implied

---

1 In their Opening Brief in the Court of Appeal, Petitioners complained only that it took them some minutes longer to get to the Topanga town center through alternative routes, and that there was "a very real threat" that the alternative routes could be closed (RB 21)

2 It would be relevant to their claim for an equitable easement over Respondents' property, which depends largely on a balance of hardships, see *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1009. But the trial court rejected that claim for insufficient evidence (CT 1226), the Court of Appeal affirmed its denial (Opn., 45-46). Petitioners did not raise it in their Petition for Review, and now ask this Court to reinstate the trial court judgment in full.

dedication based in part on evidence of use after 1972 (CT 1217-21), and, the Court of Appeal reversed, in part, based in part on its holding that section 1009 bars evidence of *any* public use after 1972 for that purpose (Opn., pp. 26-35).

As shown below and in other Respondents' briefs, the Court of Appeal construed section 1009 correctly. Nothing in that section's language or legislative history justifies limiting its ban of implied dedication based on public use after 1972 to recreational use (pp.11, 24, infra), or reading into it any special status for roadways. (pp. 24-28, infra).

Beyond that, Petitioners ask that this Court not only to reverse the Court of Appeal's decision as to the meaning of section 1009, but also to reinstate the judgment of the trial court, which would provide them with relief beyond that warranted by reversal of the Court of Appeal's construction of section 1009. (OB 50-56). As will be shown below (pp. 28-32, infra), even if this Court reverses, there is no good reason to grant that request.

STATEMENT OF THE FACTS AND OF THE CASE

The roadway at issue is in a secluded area of Topanga Canyon.

It is made up of a southerly portion of Henry Ridge Motorway (which connects with Mulholland Boulevard to the north, 8 RT 1675), and Gold Stone Road, which connects with Greenleaf Canyon on the south, and thence through Greenleaf Canyon to Topanga Canyon Boulevard. Henry Ridge and Gold Stone meet in a hairpin turn where the roadway is only 12 feet wide. (RT 2433, 2469).

Petitioners live at 1550 Henry Ridge Motorway (CT 15-16). They seek access to Topanga Canyon through Respondents' properties, which lie to their south along Henry Ridge and Gold Stone (Ex. 204).

The Burkes decided to make the property at the southern end of Gold Stone their home in 1993, because they value their solitude (RT 1267, 1278, 1808). They bought with the understanding that Gold Stone was a private road on their property, as reflected in the street signs (RT 1277, 1563; Ex. 194, Maps 15-21). In 2005, the Burkes bought an adjacent 5½ acres of undeveloped property to ensure that there would be no development nearby to disturb their seclusion (RT 1275, 1817).

///

A. THE HISTORY OF HENRY RIDGE MOTORWAY

A plat from 1895 (when the relevant property still belonged to the federal government) shows a road in the general area of what is now Henry Ridge (Ex. 194, Map #1).

The government conveyed the land at issue to homesteaders in the period 1902 to 1911 (Ex. 194, Docs. 1-4, RT 726). A map prepared to show the area as it was in that time has the predecessor to Henry Ridge Roadway – the "Ridge Trail" – connecting with Greenleaf, not through what has become Gold Stone Road, but through what is now the Burkes' driveway. It also shows houses, taverns and a post office in the area, but none which would be accessed through the Ridge Trail. (RT 723-24, 728, 741; Ex. 194, Maps # 4; Ex. 205)

There is no indication of a Ridge Trail on a map intended to show the area as it was during the 1930's. (Ex. 194, Map #5). The designation Henry Ridge Motorway does appears for the first time, however, on CSB maps (a map prepared to show existing *and* projected roads, RT 3137) from the 1930's. (Ex. 194, Maps #6,7).

Two government maps from 1967 describe Henry Ridge as an

"unimproved dirt" road. (Ex. 194, Maps #8, 9). Thomas Brothers maps from the 1960's also show the roadway, identified as Henry Ridge Road or Henry Ridge Motorway (Ex. 14, Maps #13-17).

B. THE HISTORY OF GOLD STONE

The first evidence of what later became Gold Stone Road is from 1949, when Grace Joel Lea, then owner of what are now the Burke Properties, granted to Elva Sigrist, then-owner of the Erickson/Malick and Schroder properties, an easement over it to get to and from her property. (RT 935-36; Ex. 194, Document 15, p. 2). According to Petitioners' expert, Anya Stanley, it was then "still just a drive, private driveway (RT 944)."

Gold Stone Road is identified for the first time by name on a CSB map (RT 3137; Ex. 194, Map 7), originally prepared in 1952, and revised in 1967 (RT 907). It appears on Thomas Guide maps beginning in 1983 (RT 1016; Ex. 194, Maps 15-17).

Gold Stone was not paved until 1987 (RT 2151). In a 1989 Coastal Commission permit for construction on the land now owned by the Schroders, it is described as "a paved private road (Ex. 194, Document 17 p. 10, Document 18, p. 10)."

C. WRITTEN EASEMENTS AND OFFERS OF EASEMENTS RELATING TO BOTH ROADS.

In 1968 and 1970, the then-owners of the Schroder, Erickson/Malick and Marshall properties recorded offers of easements for road purposes to benefit those in Section 12 (which included those properties). (Exs. 53, 54, 56). No acceptance was recorded for either (RT 3052).

In 1989 and 1992, Marshall, and the predecessors of Schroder and Erickson/Malick, offered to dedicate Henry Ridge through their land for hiking and equestrian use only. (Ex. 194, Docs. 7, 18).

D. EVIDENCE OF PUBLIC USE OF HENRY RIDGE AND GOLD STONE BEFORE 1972.

There was no direct evidence of public use of these roadways before 1972. The prior owner of Petitioners' property, Pauline Stewart (known as the "Matriarch of the Ridge"), did testify generally that the roads in the area had been used by the public for 50 years (RT 1313), but she admitted she had no personal knowledge of anyone going down the Henry Ridge-Gold Stone route to Greenleaf and Topanga (RT 1314). On the contrary she declared that "I don't know anyone in their right mind that would even try to go that way (RT

1544)."

E. EVIDENCE OF USE AFTER 1972.

1. PETITIONERS' TESTIMONY

Scher testified that since he and McAllister moved in 1550 Henry Ridge Motorway in 1998 he had used the Henry Ridge-Gold Stone route to their home about 200 times a year (RT 136).

Scher estimated that from 1998 to 2006 he had seen a total of 30-40 other cars on Henry Ridge Motorway, included workers coming to the Erickson/Malick property, and deliveries to Malick and Erickson (RT 430). He had only seen two cars traveling Gold Stone Road through the Burke Properties during that time, and one belonged to a cleaning crew for Malick and Erickson (RT 623).

2. OTHER WITNESSES

Other witnesses (including Respondents) who had lived on Henry Ridge or Gold Stone, or had visited there, testified that they had seen hardly any other cars going along Henry Ridge through Gold Stone to Greenleaf (RT 1274, 1600, 2216, 2450, 2768), or very few (RT1824-25, 1888, 2154, RT 2199, 2713, 2739, 2782, 2834-35). One commented of Gold Stone that "There's no place to go." (RT

2803-04).

F. ALTERNATIVES ROUTES.

The route from the south through Gold Stone is not the only way to access Petitioners' home. There is also access through various routes to the north, including Mulholland Boulevard (RT 1675), Adamsville Avenue (RT 1532: Ex. 39-1; Ex. 194, Map 17), Alta Drive (RT 364, 1532, 1603), Oldfield Ranch Road (RT 1256, 2488; Ex 204), and Summit to Summit (RT 1603; Ex. 194, Map 17).

Petitioners testified they had tried all of the alternative routes, but found the one through Gold Stone most convenient (RT 87), taking 4 to 6 minutes to get to Topanga town center, rather than 20 to 25 minutes (RT 1255). They also testified that other routes could be difficult, especially in bad weather (RT 102, (RT 113-14, 1256, 1296) and that one of them was blocked off at least once (RT 103, 106).

There was testimony, however, that the fire department accessed the area from the north, because the grade and hairpin turn on the southern route through Henry Ridge and Gold Stone to Greenleaf made it unusable for fire engines (RT 1881-1883).

///

G. THE LITIGATION

On June 11, 2009, Petitioners filed their verified complaint to quiet title and for express easement, non-exclusive prescriptive easement, dedication by acquiescence in public use, equitable easement, and injunctive relief against the Burkes, Richard B. and Andrea D. Schroder, and Wendie Malick and Richard Erickson (CT13), later adding Gemma Marshall as a defendant (CT116). Also, on the final day of trial the court gave Petitioners leave to add a cause of action for implied easement (CT 747, RT 3373-76).

After a 13 day bench trial, the trial court filed its Statement of Decision, holding that, while the federal government still owned the properties, Henry Ridge Motorway had been dedicated to public use, and an implied easement to the benefit what became Petitioners' property had arisen (CT 1208-14). It also found that later public use resulted in an implied-in-fact dedication of Henry Ridge Motorway (CT 1214-16), and an implied-in-law dedication of both Henry Ridge Motorway and Gold Stone Road (CT 1216-20). It held against Petitioners, however, on their causes of action for express, prescriptive and equitable easement (CT 1226).

On September 8, 2011, the trial court entered judgment accordingly, specifically enjoining Respondents from obstructing or interfering with Petitioners, their families, guests and tenants, in their use of Henry Ridge and Gold Stone (CT 1251-53).

In the appeal that followed, the Court of Appeal reversed, concluding that the trial court had erroneously implied public use sufficient to support dedication and implied easement from evidence of the roadways' mere existence before 1972, and that the evidence of public use after 1972 was inadmissible under Civil Code section 1009. (Opn., pp.18-41)

ARGUMENT

I. THE UNAMBIGUOUS LANGUAGE OF CIVIL CODE SECTION 1009, AND ITS LEGISLATIVE HISTORY, DEMONSTRATE THE LEGISLATURE'S INTENT TO BAR IMPLIED DEDICATION ENTIRELY FROM NON-COASTAL LAND.

Civil Code section 1009 provides that (with the exception of coastal lands) "*no* use of [private real] property by the public after the effective date of this section [in 1972] shall *ever* ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently," unless the owner has made "an

express written irrevocable offer of dedication...." (emphasis added).

Because dedication following such an express written offer is defined as *express* rather than implied, even where acceptance is implied from use, *Hanshaw v. Long Valley Road Association* (2004) 116 Cal.App.4th 471, 481-82, *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, that language unequivocally abrogates the law of implied dedication for non-coastal property in California.

That the Legislature intended that abrogation is confirmed by legislative history. While section 1009 was under consideration the Assembly Committee on Planning and Land Use declared that, as a result of its enactment, "[t]he doctrine of implied dedication would be *deleted prospectively* except for the special treatment given to coastal property...." (emphasis added) (Malick/Erickson-Schroeder Req. Jud. Notice, Ex. F).

The Opinion, taking the statute at its word, holds that "no use" means "no use," whether recreational or non-recreational (Opn., p. 29). It therefore understands section 1009 as "*eliminating* all *implied* dedication of noncoastal property to public use" after the statute's effective date. (Opn., p. 32, emphasis in original).

Nevertheless, Petitioners, citing earlier decisions which read section 1009 to apply only to recreational uses, *e.g., Hanshaw v. Long Valley Road Association, supra,* 116 Cal.App.4th 471, *Bustillos v. Murphy* (2006) 96 Cal.App.4th 1277, 1280-81, and *Pulido v. Pereira* (2015) 234 Cal.App.4th 1246, 1250, continue to insist that the Legislature, in adopting section 1009, "did *not* intend to completely put an end to implied dedication...." (OB 3; emphasis added).

Specifically, however, departing from the position taken in the earlier decisions (and which they themselves took below), Petitioners now limit their argument to a claim that implied dedication still operates on *roadways* in non-coastal areas. (OB 3).

Petitioners provide two alternative formulations for this roads exception, with no clear statement as to which they ask this Court to adopt. Initially, Petitioners assert that "the law of implied dedication lives on" under section 1009, but only "as to roads used for non-recreational purposes." (OB 3). Later, however, they argue that 1009 did not curtail the implied dedication of roads at all, asserting that "the Legislature did not state any intent to change the law of implied dedication as it relates to roads." (OB 40).

In what follows, the Burkes will show that (1) the Opinion here correctly rejected the earlier decisions' limitation of section 1009 to recreational uses, and that (2) there is no basis for either of Petitioners' two approaches to distinguishing roads from open land under section 1009.

A. CONTRARY TO PETITIONERS' ASSERTIONS, SECTION 1009 WAS INTENDED TO ABROGATE THE DOCTRINE OF IMPLIED DEDICATION FOR NON-COASTAL LAND, WHETHER BASED ON RECREATIONAL OR NON-RECREATIONAL USE.

The Court of Appeal's conclusion that section 1009 is directed at all uses of private property by the public, recreational and non-recreational, is founded on the unambiguous language of the statute.

The court cited *Klein v. United States of America* (2010) 50 Cal.4th 68 at 80, for the proposition that where the Legislature uses a term in one part of a statute and omits it from another, it shows an intention "to convey a different meaning." Here, the limiting term "recreational use" appears only in subdivision (a), the "preamble" of the statute setting out its purpose. It appears nowhere in the statute's operative provisions. (Opn., p. 29).

On the contrary, section 1009 provides that "*no* use... by the

public" shall ever ripen into a vested public right in the absence of the owner's written irrevocable offer of dedication. In that language the Legislature made clear its intent not to limit subdivision (b)'s operative force to the banning of "recreational use" as a basis for dedication. (Opn., pp. 28-29).

Further, as already seen, dedication based on such an explicit offer is express dedication, *not* "implied dedication," even when the acceptance of the offer is not explicit, but implied from use. *Hanshaw v. Long Valley Road Association, supra*, 116 Cal.App.4th 471 at 481-82.

It follows, then, that the statute is on its face a total abrogation of the law of implied dedication (except for instances falling within the exceptions stated in subdivisions (d) and (e)).

1. THERE IS NO BASIS FOR PETITIONERS CLAIM THAT LIMITING SUBDIVISION 1009(B) TO RECREATIONAL USE IS "NECESSARY" TO EFFECT THE LEGISLATURE'S INTENT.

Petitioners respond to that reasoning with the assertion that express statements of legislative intent are different. Here, according to Petitioners, the courts must depart from the literal language of (b)

because it is "*necessary* to effectuate the Legislature's intent." (OB 41). For that proposition, Petitioners cite *Demchuk v. State Dept. Of Health Services* (1991) 4 Cal.App.4th Supp. 1, 5.

To say that it is necessary to limit application of subdivision (b) to recreational uses in order to achieve the intent stated in subdivision (a), is to posit that literal application of subdivision (b) to bar "any use" of land from ripening into dedication to the public would make achievement of the Legislature's goal of encouraging landowners to open their property to public recreational use impossible. But Petitioners provide no reasoning to support that conclusion, and it is not obvious what that reasoning would be.

On the contrary, as shown in the Burkes' Opening Brief (AOB 40-41), and in the Opinion (at p. 32), to limit section 1009's application to recreational uses would be to render it unworkable as a means of achieving the goal. Owners disposed to open up their land to public recreation – provided their rights to the land remain intact – would have the burden of distinguishing those who come onto their land for recreational purposes and others, and keeping the others out.

That burden would be daunting, because the distinction

between recreational and non-recreational use can be difficult to discern. Are people walking across your property hiking for the pleasure of it, or simply trying to get somewhere. And, if they are just trying to get somewhere, will they be doing business or playing sports when they get there?

Because *Gion v. City of Santa Cruz* (1970) 2 Cal.3d. 29, (hereinafter *Gion-Dietz*) would continue to apply to turn non-recreational public use into dedication, owners would make such distinctions at their peril. To keep their property free of vested public rights while letting recreational users in, they would have to make sufficiently "significant efforts" to identify and "exclude" members of the public with non-recreational intent to convince trier of fact they mean business. See Berger, "Nice Guys Finish Last–At Least They Lose Their Property: *Gion v. City Santa Cruz,"*(1971) 8 *Cal.Western L.Rev.* 75, 83-84.

Rather than encouraging owners to open their land to recreational use, then, Petitioners' reading of section 1009 will motivate them to do what commentators predicted they would do in response to *Gion-Dietz* in the first place: put up "fences and

barricades," and perhaps "barbed wire" to keep out those whose use would ripen into implied dedication. *Berger, supra*, 8 *Cal.Western L.Rev.* 75, 100.

2. PETITIONERS' TEXTUAL ARGUMENTS IS BASED ON MISREADING THE TEXT.

Petitioners also make a textual argument for limiting the effect of section 1009 to recreational use. Following *Hanshaw*, Petitioners argue that the phrase "such property," in subdivision the subdivision (b) language providing that "no use of *such property* by the public" will ripen into dedication, refers back to the phrase: "property for recreational purposes" in subdivision (a)(2). *Id.* (OB 42).

But that understanding, taking "property for recreational purposes" in (a)(2) to refer to a *kind* of property set aside for recreational use, is based on a misreading. The whole of section 1009(a)(2) reads as follows:

> Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their *property for recreational purposes*. (emphasis added)

In context, then, "for recreational purposes" is not an adjectival phrase modifying "property, but an adverbial phrase modifying "to

use enjoy or pass over." Section (a)(2) does not reference any "property for recreational purposes." The "such property" in (b) refers back, not to subdivision (a)(2), but to the phrase "real property" earlier in that same subdivision.

Beyond that, Petitioners suggest that there is some room for continuing to allow implied dedication beyond the limits of subdivision (b) in the language of section 1009(c).

Subdivision (b) provides that public use cannot ripen into public rights, unless in response to "an express written irrevocable offer of dedication..." in accordance with subdivision (c). Subdivision (c) adds that dedication can be accomplished by the owner's making such an express written irrevocable offer, and its acceptance, either through the procedure set out in Government Code section 7050, or through "any procedure authorized by law and not prohibited in this section...."

Petitioners conclude that section (c)'s acceptance of methods of dedication beyond Government Code section 7050 "must mean other methods of dedication are *not completely eliminated* by section 1009." (OB 42-43).

But the question is not whether any "other methods of dedication" remain effective after section 1009's enactment. Of course they do. Rather, it is whether section 1009 any means of *implied* dedication remains.

The answer to that question is that section 1009(b) forbids public use from ripening into vested public rights except in response to "an express written irrevocable offer of dedication..." and a dedication in response to such an offer is *express,* not implied. It follows that implied dedication is "a procedure prohibited in this section" excluded by definition from the procedures section 1009(c) makes available.

Petitioners have provided this Court with no good reason to read section 1009 as anything other than a total ban on implied dedication, whether resulting from recreational or non-recreational public use.

3. PETITIONERS REFERENCE TO LEGISLATIVE HISTORY PROVIDES NO SUPPORT FOR THEIR POSITION.

As already made clear (p. 12, supra; AOB 42-44), the legislative history of section 1009 unequivocally supports the

conclusion that it was intended broadly to eliminate implied dedication from California law except for coastal land.

Petitioners attempt to temper that unequivocal record with their own reference to legislative history. They point out that the bill that became section 1009 was originally introduced with a statement of urgent concern that, "in the forthcoming recreational season," owners should be assured that they "will not lose their property rights through future public use." (OB 41).

According to Petitioners, "ensuring recreational property would not be closed to the public..." in the coming season could not possibly have justified the legislators' sense of " urgency". There must have been a "broader concern": "the potential, at any moment, for public use of some property to ripen into a vested right." (OB 41).

But some of the very secondary literature Petitioners themselves cite confirms that *Gion-Dietz* itself gave rise to just such a sense of urgency about property previously used for public recreation being "closed in the forthcoming recreational season." It show that, while this Court concluded there was nothing revolutionary about *Gion-Dietz*, see *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201,

216 (rejecting a challenge to *Gion-Dietz'* retroactive application to the dedication of coastal land) many in the legal community thought otherwise.

"What happened to all of the recreational land that *Gion-Dietz* was going to open to the public?", asked one author. The answer was that it was disappearing "at such an alarming rate that emergency legislation to counteract the effects of *Gion-Dietz* is now pending before the legislature...." Berger, *supra*, 8 *Cal.Western L.Rev.* 75, 100. The problem, according to the author, was that the *Gion-Dietz* court had required of landowners a "bona fide attempt to prevent public use" to avoid implied dedication, but provided "no clue" as to what would satisfy that standard. "Is the court requiring fences and barbed wire?" Given the uncertainty, those, "the nice guys of the world..." who had opened their land for recreational use must now "scurry around erecting fence and barricades...." *Id.*

In another law review, a city attorney is quoted as saying, in October, 1970, that "'this year and the coming months is a time which is very crucial if we are to prevent the *Gion* case from becoming a disaster.'" Llewellyn, "The Common Law Doctrine of Implied

Dedication and its Effect on the California Coastline Property Owner: *Gion v. City of Santa Cruz,*" (1971) 4 *Loyola L.Rev.* 438 at 447.

4. THE LEGISLATURE'S INACTION IN THE FACE OF THE EARLIER DECISIONS LIMITING SECTION 1009 TO RECREATIONAL USE DOES NOT JUSTIFY REWRITING THE STATUTE.

Finally, Petitioners argue that the Legislature's failure to respond to decisions such as *Hanshaw*, which for more than a decade interpreted section 1009 to apply only to recreational use, should be taken as legislative acceptance of that view. (OB 46-49).

Petitioners provide no authority for that contention, and there is none. On the contrary. The Supreme Court explicitly rejected Petitioners' reasoning in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142. The *Olson* plaintiffs argued for reading an authorization of expert witness fees into Code of Civil Procedure section 1021.5, because the Legislature had for years acquiesced in the decision in *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, which found such an authorization in the statute. 42 Cal.4th 1142, 1155.

Despite the fact that the Legislature had amended another part

of the section 1021.5 in the interim without changing the portion relating to fees, this Court rejected the plaintiffs' argument. The Court agreed that

> it may sometimes be true that legislative inaction signals acquiescence when there exists both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering the interpreted provision....
>
> *Id.*, at 1156.

In *Olson,* however, there was only a single decision, followed by a single amendment to an unrelated aspect of the statute. The argument was, therefore, "unpersuasive."

So here, the few cases interpreting section 1009 as limited to recreational use hardly amount to "a well-developed body of law, and, crucially, section 1009 has not been amended at all in the interim. The absence of legislative action cannot be read as acceptance of an interpretation contrary to the unambiguous language of the statute.

B. THERE IS NO BASIS FOR CONCLUDING THAT SECTION 1009 DOES NOT APPLY TO ROADS.

As with Petitioners' other arguments, the principal barrier to Petitioners' efforts to treat dedication of roads differently from dedication of open land under section 1009 is the straightforward

language of the statute.

Where statutory language is plain and unambiguous on its face, that language is the beginning and the end of its construction. *People v. Licas* (2007) 41 Cal. 4th 362, 367; *Mejia v. Reed* (2003) 31 Cal. 4th 657, 663. Such is the case here.

Further, under the rule *expressio unius est exclusio alterius*, "where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." *Wildlife Alive, et al. v. Sherman Chickering* (1976) 18 Cal.3d 190 at 195. Here, there are clearly delineated exceptions in section 1009, and there is no suggestion that dedication of roadways is among them.

Petitioners argument that the text of section 1009 supports their exception for roadways is that "there is nothing in the statute... expressly or necessarily eliminating implied dedication of roads." (OB 45). It is true that section 1009 says nothing whatever about roadways. But, under *Wildlife Alive*, and given the presence of express exceptions on other grounds in section 1009, that is a decisive reason for *not* finding an exception for roadways.

Beyond that, given the unambiguously general language of

section 1009's negation of implied dedication not covered by the express exceptions, it must be read as "necessarily eliminating implied dedication of roads" as well as open land.

Without any textual basis for their claim of some kind of exception for roads, Petitioners seek support from case law and review articles from before the adoption of section 1009. (OB 31-35). But, as already seen (p. 25, supra), such indications cannot justify departure from the plain, unambiguous language of the statute. *People v. Licas*, *supra*, 41 Cal. 4th 362, 367; *Mejia v. Reed*, *supra*, 31 Cal. 4th 657, 663.

In any case, the indications amount to little. It is true that this Court said in *Gion-Dietz* that most of the law of dedication in California had been made in cases relating to roads, that questions had been raised about whether the rules governing roads also applies to shoreline property, and that this Court had in the past been less receptive to implied dedication for open beachfront than for roadways. 2 Cal.3d 29, 41-42. (OB 31-32). But that hardly justifies the conclusion that the Legislature meant section 1009 not to apply to roadways.

Nor did this Court affirm in *Berk* that *Gion-Dietz* was a departure from prior law, if it all, in that it "applied implied dedication doctrine to something other than a roadway," as Petitioners claim. (OB 34). On the contrary, this Court's *Berk* opinion rejected the suggestion that implied dedication had been limited to roadways before *Gion-Dietz*, citing *Morse v. Miller* (1954) 128 Cal.App.2d 237, as a decision upholding implied dedication of beachfront and athletic field property. 26 Cal.3d 201, 214-15.

The same is true of Petitioners' related claim that the concern over *Gion-Dietz* leading to the passage of section 1009 was generated by the application of implied dedication to open land as opposed to roads (OB 31) is unsupported by any reference to case authority or law review articles.

Rather, as already pointed out, that the concern appears to have been generated by what some commentators understood to be *Gion-Dietz*' imposition on landowners who seek to avoid implied dedication of an affirmative duty either to prove they have granted a license to the public, or made a "bona fide attempt" to exclude them. Llewellyn, *supra*, 4 *Loyola L.Rev.* 438 at 447; Berger, *supra*, 8

Cal.Western L.Rev. 75, 83-84, 100.

II. PETITIONERS REQUEST TO REINSTATE THE TRIAL COURT JUDGMENT RAISES ISSUES BEYOND THE SCOPE OF THIS COURT'S REVIEW, AND SHOULD THEREFORE BE REJECTED.

There are cases in which the disposition Petitioners ask from this Court – reversal of the Court of Appeal decision and reinstatement the trial court judgment (OB 50-57) – is the appropriate. Even if this Court decides that the Court of Appeal erred in its interpretation of section 1009, however, this case is not among them.

Where, for example, the Court of Appeal originally reversed a trial court judgment based on a single point of law, this Court has granted review to consider that point of law, and has found the Court of Appeal's decision of it erroneous, this Court ordered reinstatement of the judgment on reversal of the Court of Appeal decision. See, *e.g., Greene v. Marin County Flood Control and Water Conservation District* (2010) 49 Cal.4th 277, 299.

Here, however, Petitioners ask this Court to reinstate the judgment, not as the logical consequence of reversal on the section

1009, but based on this Court's consideration and decision in their favor of a set of separate issues, not presented in the Petition for Review: their detailed claim that the Court of Appeal misused the standard of review in a variety of ways in rejecting the trial court's findings of implied dedication (OB 50-57).

Except where this Court has given the parties reasonable notice and an opportunity to brief and argue additional issues, this Court limits itself on review to deciding the issues that have been "fairly raised or fairly included in the petition or answer." 8.516(b).

Here, Petitioners ask this Court to decide issues in no way suggested by the petition or answer, but have failed to request that this Court give the required notice. Nor would this Court have any reason to provide such notice to decide the issues Petitioners raise.

Petitioners do not, and cannot seriously, contend that their claims that the Court of Appeal wrongfully reweighed the evidence raise issues appropriate for this Court's review under Rule of Court 8.500 (b)(1) – that their decision would be necessary to secure uniformity of decision or settle an important question of law.

On the contrary, Petitioners ask this Court to join the lower

courts in struggling through a "thicket of conflicting evidence" in order to assess the decision on those issues in the unpublished portions (pp. 18-23, 35-41) of the Opinion. (OB 52). That is not an appropriate role for this Court.

And, beyond that, to reinstate the trial court judgment would be to affirm other trial court determinations which the Court of Appeal found erroneous as a matter of law, such as the trial court's decisions that Petitioners' had an implied easement based on federal patents. (Opn., pp. 18-23), and that the express dedications of portions of the roadways as daytime hiking and equestrian trails ripened into implied in fact dedication for unlimited vehicular use[3]. (Opn., pp. 34-35). Petitioners fail to mention that reinstatement of the trial court judgment would reverse those aspects of the Court of Appeal decision as well, without any consideration of the soundness of the reasoning on which they are based.

Finally, in order to reinstate the trial court judgment, this Court would have to decide issues which the Court of Appeal has not yet

---

[3] Neither the implied easement (AOB 29) nor these trail dedications (AOB 31) would have affected the Burkes' property.

considered.

Because the Court of Appeal's reading of section 1009 rendered evidence of public use after 1972 inadmissible to support implied dedication, reversal of that reading would require it to face for the first time the issue of whether there was sufficient evidence of public use since that date to support a finding of implied dedication.

Petitioners imply that the Court of Appeal did consider and decide that question, despite its decision that the evidence was inadmissible. (OB 52). Not so. The Court of Appeal considered the period since 1972 only in its legal ruling on implied dedication based the express offers of dedication for hiking and equestrian use. (Opn., p. 34-35). Otherwise, it assessed evidence of public use only for the period *before* 1972 (Opn. 33-37).

In the recent case of *Cordova v. City of Los Angeles* (2015) 51 Cal.4th 1099 at 1111-12, this Court demonstrated the approach to be taken where it has found error in the Court of Appeal's decision of the legal issue on which review was granted, but that finding does not "bring [the] particular case to an end." Rather than deciding *ad hoc* to resolve the remaining issues, it "expressed no view" on them, and

remanded the case "for further proceedings consistent with this opinion." If this Court reverses the Court of Appeal's decision on the meaning of section 1009, it should take the same approach here.

CONCLUSION

For the reasons stated, the Burke Respondents respectfully request that this Court affirm the Court of Appeal in full. In the alternative, if this Court reverses the Court of Appeal's decision regarding the construction of Civil Code section 1009, it should (1) remand the case to the Court of Appeal to allow it to decide whether public use since 1972 justifies a finding of implied dedication, (2) leave the rest of the Court of Appeal judgment standing.

DATED: May 13, 2016

Respectfully submitted,
ROBERT S. GERSTEIN
LAW OFFICES OF ROBERT S. GERSTEIN

By: 
ROBERT S. GERSTEIN
Attorney for Appellants
Appellants John and Germaine Burke herein
and Bennett Kerns, Trustee of the ASA Trust

CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the ANSWER BRIEF ON MERITS is proportionately spaced, has typeface of 14 points or more, and contains 5975 words.

Dated: May 13, 2016

LAW OFFICES OF ROBERT S. GERSTEIN

By: _____

ROBERT S. GERSTEIN
Attorney for Appellants
Appellants John and Germaine Burke herein and Bennett Kerns, Trustee of the ASA Trust

PROOF OF SERVICE

Re: *Scher, et al. vs. Erickson, et al.*
Docket No.: B235892;
LASC Case No.: BC 415 646.

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 12400 Wilshire Boulevard, Suite 1300, Los Angeles, CA 90025.

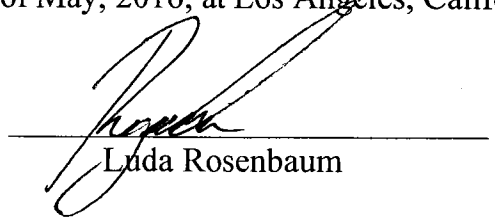
On May 16, 2016, I served true and correct copies of the foregoing document described as **ANSWER BRIEF ON MERITS** on the interested parties in this action addressed as follows:

Please See Attached Service List

[X BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing I know that the correspondence is deposited with the U.S. Postal Service on the same day this declaration was executed and in the ordinary course of business. I know that the envelope was sealed, and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practice, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 16th Day of May, 2016, at Los Angeles, California.



Linda Rosenbaum

SCHER, et al. v. ERICKSON, et al.
Docket No.: B235892 - LASC Case No.: BC 415 646
PROOF OF SERVICE MAILING LIST

June S. Ailin
ALESHIRE & WYNDER, LLP
2361 Rosecrans Ave., Suite 475
El Segundo, CA 90245
Attorneys for Plaintiffs and Respondents, Jaime A. Scher and Jane McAllister

James E. Treadwell, Esq.
CUNNINGHAM & TREADWELL
21800 Oxnard Street, Suite 840
Woodland Hills, CA 91367-3640
Attorneys for Plaintiffs and Respondents, Jaime A. Scher and Jane McAllister

Jason J. Jarvis, Esq.
Richard I. Arshonsky, Esq.
LEVINSON, ARSHONSKY & KURTZ, LLP
15303 Ventura Boulevard, Suite 1650
Sherman Oaks, CA 91403
Attorneys for Defendants, Richard B. Schroder, Andrea D. Schroder

Ryan C. Squire, Esq.
GARRETT & TULLY
225 S. Lake Avenue, Suite 1400
Pasadena, CA 91101
Attorneys for Defendants, Richard B. Schroder, Andrea D. Schroder

Wendy C. Lascher, Esq.
FERGUSON, CASE, ORR, PATERSON, LLP
1050 Kimball Road
Ventura, CA 93004
Attorneys for Defendant and Respondent, Gemma Marshall

Honorable Malcolm Mackey
Los Angeles Superior Court
111 North Hill Street, Dept. 55
Los Angeles, CA 90012

Court of Appeal
Second Appellate District, Division 3
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013