S275023

IN THE SUPREME COURT OF CALIFORNIA

CESAR ROMERO and TATANA SPICAKOVA ROMERO,

Plaintiffs and Appellants

v.

LI-CHUAN SHIH and TUN-JEN KO,

Defendants and Respondents

US BANK NATIONAL ASSOCIATION,

Cross-defendant and Respondent.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT CASE NO. B310069

AFTER AN APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT CASE NO. EC064933

OPENING BRIEF ON THE MERITS

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INTRODUCTION

The limited certified question for review in this case is: "Did the trial court correctly find the existence of an implied easement under the facts?" The clear answer to this question is: "Yes". There was substantial evidence before the trial court of the existence of an implied easement benefiting the property[1] owned by Defendants and Respondents Li-Chuan Shih and Tun-Jen Ko's (collectively the "Shih-Kos") to maintain a driveway, planter, and block wall ("Improvements") over an approximate eight (8) foot strip ("Disputed Area") of the property[2] owned by Plaintiffs and Appellants Cesar Romero and Tatana Spicakova Romero (collectively the "Romeros").

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[1] The property is commonly known as 643 West Alegria Avenue, Sierra Madre, California 91024 (the "643 Property").

[2] The property is commonly known as 651 West Alegria Avenue, Sierra Madre, California 91024 (the "651 Property").

The evidence before the trial court presented a classic example of an implied easement. The Improvements were first installed in the 1960s when the 643 and 651 properties were both owned by Edwin L. Cutler and Ann L. Cutler (the "Cutlers"). [Reporter's Transcript ("RT") 158:8-159:19; Appellants' Appendix ("AA") Vol. I p. 509 (Trial Exhibit 92 p. 3); Respondents' Transcript ("RA") Vol. 1 p. 190 (Trial Exhibit 718 p. 52).] In 1986, the Cutlers sold the 651 Property to their son Bevon Cutler, his wife Judy Cutler together with David and Sally Shewmake. [AA Vol. II pp. 365-366 (Trial Exhibit 26).] At that time, the use of the Improvements in the Disputed Area by the Cutlers was obvious and permanent. Based on these undisputed facts, the trial court correctly found that an implied easment was created in favor of the 643 Property for use of the Disputed Area. (*Cal. Civ. Code* § 1104 [implied easement is created "in the same manner and to the same extent as such property was **obviously and permanently** used…"].)

Moreover, the trial court relied on the testimony of Mr. Shewmake, the only witness with first-hand knowledge of the intent of the parties and the use of the properties prior to the division of title in 1986. Mr. Shewmake clearly testified that the intent of the parties was for the Improvements to remain for the benefit of the 643 Property. [RT 159:20-160:14.]

These facts alone established the clear intent required to prove the existence of an implied easement.

In addition, there was substantial evidence before the trial court that the implied easement is "reasonably necessary" to the beneficial enjoyment of the 643 Property, which means no more than "for the benefit thereof". (*Thorstrom v. Thorstrom*, (2011) 196 Cal.App.4th 1406, 1420-1421.) Expert testimony firmly established that without the use of the Disputed Area the 643 Property would be severely impacted. The loss of use of the

Disputed Area would result in an unreasonably narrow driveway, an inadequate turnaround area in front of the garage, and the elimination of the garage setback, parking area and the garden planter, all of which would result in a significant diminution in value of the 643 Property.

Importantly, this same evidence was relied on by the trial court to establish the "greatly disproportionate hardship" standard for an equitable easement, "which is more than sufficient to satisfy the reasonably necessary factor here." [AA Vol. II p. 307 at ¶2 (SOD).] Given that both the trial court and the Court of Appeal determined that this higher standard for an equitable easement was met, there can be no dispute that this same evidence satisfies the lower standard of reasonable necessity for an implied easement.

This Court should affirm the trial court decision which correctly found the existence of an implied easement over the Disputed Area to maintain the Improvements for the benefit of the 643 Property, and reverse the Court of Appeal decision finding that an implied easement could not exist under the facts of this case.

STATEMENT OF FACTS

A. The Properties At Issue

The Shih-Kos are the owners of the 643 Property. The Shih-Kos obtained title to their property on or about July 1, 2014. [AA Vol. III p. 484-485 (Trial Exhibit 55).] The 643 Property is improved with a single-family residence as well as the Improvements at issue in this case.

The Romeros are the owners of the adjacent real property known as the "651 Property". The Romeros obtained title to the 651

Property on or about April 9, 2014. [AA Vol. III pp. 403-441 (Trial Exhibit 43).] The 651 Property is improved with a single-family residence that was originally constructed in or about 1985. A block wall divides the Romero and Shih-Ko properties. [RA Vol. 1 p. 185 (Trial Exhibit 692 p. 1).] The 651 Property is on the left side of the photo and the 643 Property is on the right. A diagram of the 643 Property and the 651 Property, the Disputed Area and the Improvements is included in the Appendix. [AA Vol. III p. 493 (Trial Exhibit 89).]

B. Prior Ownership Of The 643 and 651 Properties

The 643 and 651 Properties were previously owned by the Cutlers who acquired title as joint tenants on or about October 8, 1941. [RA Vol. 1 pp. 53, 55 (Trial Exhibits 4 and 5).] The Cutlers lived in the home on the 643 Property. For many years the 651 Property was a vacant lot. [RT 146:25-147:15.] During the time that the Cutlers owned the 643 and 651 Properties, the properties were separated by a chain link fence. [RT 156:19-158:7; AA Vol. IV p. 509 (Trial Exhibit 92 p. 3).]

C. The Lot Line Adjustment Application

On about February 4, 1985, the Cutlers filed an application seeking a variance to obtain a lot line adjustment with the City to widen the 643 Property to include the Disputed Area ("Application"). [AA Vol. II pp. 346-347 (Trial Exhibit 7).] Mr. Cutler submitted a covenant and drawings indicating his intent to transfer eight (8) feet of the 651 Property to the 643 Property. [AA Vol. II, pp. 351-354 (Trial Exhibit 10 p. 2-4).]

On February 21, 1985, the City approved the Application. The Planning Commission minutes state that Mr. Cutler told the Commission that he was seeking the variance because without the additional square footage, the driveway would be "extremely narrow". The Minutes reflect that the Commission approved the Application and state that "[i]n order to adjust the boundary line, Mr. Cutler will need an engineer-surveyed parcel map." [AA Vol. II pp. 351-354, 356 (Trial Exhibits 10 p. 1 and 11).]

Thereafter, Mr. Cutler submitted all necessary documents to the City to complete the lot line adjustment including a survey and site plan prepared May 8, 1985, by John B. Abell, Inc., with a legal description for the properties after the lot line adjustment. [AA Vol. II pp. 358-359 (Trial Exhibit 14); RT 160:15-27.]

Vincent Gonzalez ("Mr. Gonzalez"), Director of Planning and Community Preservation for the City, testified at trial that all necessary documents required to complete the lot line adjustment were submitted to the City. However, Mr. Gonzalez testified that the City never issued a certificate of compliance and therefore the lot line adjustment was not finalized. [RT 190:8-191:6.]

Mr. Gonzalez also testified that there was no evidence in the City's files to indicate that Mr. Cutler affirmatively abandoned his request or withdrew the Application. [RT 191:7-22.] Mr. Gonzalez further testified that in 1985, when the home on the 651 Property was constructed, the Notice of Completion would not have been issued by the City if the lot line adjustment had not been completed. [RT 196:2-11; 198:28-199:6; RA Vol. 1 pp. 57-70 (Trial Exhibits 18, 19, 20, 22, 23, 24, 25); AA Vol. II p. 363 (Trial Exhibit 21); AA Vol. II pp. 371-72 (Trial Exhibit 28).]

D. Improvements On The 651 Property Intended To Be Permanent And Benefit The 643 Property After Severance Of Title

After Mr. Cutler embarked upon the lot line adjustment process, his son Bevon Cutler and Bevon's wife Judy Cutler, partnered with David G. Shewmake ("Mr. Shewmake") and his wife, Sally Ann Shewmake, to build the house on the 651 Property with the intention of selling it and earning a profit. [RT 146:28-147:6; 147:25-148:15; 167:18-168:28.]

Mr. Shewmake was the only witness at trial who had direct knowledge of the physical configuration of the properties and the intent of the parties at the time of separation of title. Mr. Shewmake testified that he knew the Cutlers because his father was an electrician who did repair work for the Cutlers at the 643 Property where they lived with their son, Bevon Cutler. He also testified that he first visited the Shih-Ko and Romero properties in the early 1960s, and the last time on March 8, 2020, the day before he testified at trial. [RT 146:15-27; 148:25-149:5.]

Mr. Shewmake testified that the driveway and the garden planter at the 643 Property were in existence since the 1960s and remained unchanged to the present. [RT 158:8-159:6; AA Vol. I p. 509 (Trial Exhibit 92 p.3); RA Vol. 1 p. 190 (Trial Exhibit 718 p. 52).] He testified that both the brick planter and the driveway were in the same configuration and location before the construction of the house began on the 651 Property in 1985. [RT 156:19-24; 157: 15-19; 158:8-159:6; RA Vol. 1 p. 198 (Trial Exhibit 721 p. 4).] He made it clear that the driveway and brick planter belonged to the 643 Property. [RT 160:22-161:8.]

Mr. Shewmake further testified that before construction began, there was an existing chain link fence between the Romero and Shih-Ko properties that was ultimately replaced by the block wall. [RT 156:19-24; 157:24-158:7.]

He testified that the intent of the parties was that the driveway and the garden planter would remain. There was no intent to tear them out. [RT 159:20-160:14.] He further testified that he thought the lot line adjustment pursued by the Cutlers had been completed. [RT 160:15-21.]

Thus, there was no doubt that the parties intended that the Improvements remain for the continued use by the 643 Property after the separation of title.

E. Development Of The 651 Property And The Transfer Of Title

Beginning in May of 1985, Bevon Cutler applied for several building permits to construct the block wall as well as the single-family residence on the 651 Property. [RA Vol. 1 pp. 57-70 (Trial Exhibits 18, 19, 20, 22, 23, 24, 25.); AA Vol. II p. 363 (Trial Exhibit 21); AA Vol. II pp. 371-72 (Trial Exhibit 28).] The building permits reflect that the last building inspections were completed on or about January 1986. The Notice of Completion states that construction was completed on January 1, 1986. [AA Vol. II pp. 371-372 (Trial Exhibit 28).]

Thereafter, on March 12, 1986, the Cutlers executed a grant deed transferring title to the 651 Property to Bevon and Judy Cutler, and David and Sally Ann Shewmake as joint tenants ("Bevon/Shewmake Grant Deed"). [AA Vol. II pp. 365-366 (Trial Exhibit 26).] The

Bevon/Shewmake Grant Deed was not recorded until May 9, 1996, the same date they transferred title to the 651 Property to Manfred and Elizabeth Leong ("Leongs"). [AA Vol. II pp. 368-369 (Trial Exhibit 27).]

The 651 Property was subsequently conveyed from the Leongs to Dawn Hicks prior to the Romeros acquiring title to the Property in 2014. [AA Vol. II pp. 383-384 (Trial Exhibit 37).] There was no evidence that the Leongs, Ms. Hicks or any of the subsequent owners of the 651 Property ever questioned or complained about the Improvements.

F. The Cutlers Included The Disputed Area In Several Wild Deeds

For many years following the submission of the Application for a lot line adjustment and the transfer of title of the 651 Property, the Cutlers prepared and recorded several grant deeds for the 643 Property that included a legal description of the Disputed Area. [AA Vol. II pp. 374, 376, 381 (Trial Exhibits 29, 30, 35).] Because the lot line adjustment had not been recorded, the Cutlers did not own the Disputed Area at the time they executed the deeds. Therefore, the deeds are "wild deeds" because they are not within the chain of title and did not convey title to the Disputed Area. However, the fact that the Cutlers included a legal description for the Disputed Area in the wild deeds is further evidence of their intent to maintain an interest in the Disputed Area for the benefit of the 643 Property and further evidences their belief that the lot line adjustment process had been completed.

First, on November 16, 1989, a grant deed was recorded transferring the 643 Property from Edwin L. Cutler and Ann L. Cutler to

Edwin L. Cutler, Sr. and Ann L. Cutler, Trustees under Declaration of Trust dated May 9, 1989 ("1989 Cutler Grant Deed"). The 1989 Cutler Grant Deed included the following legal description of the Disputed Area: "Together with the easterly 8.00 feet of Lot "B" of Gurhardy Heights, as per map recorded in Book 13, Page 188 of Maps, in the office of the County Recorder of said County, lying south of the easterly prolongation of the North line of Lot 12 of said Tract." [AA Vol. II p. 374 (Trial Exhibit 29).]

Thereafter, on April 1, 1992, another grant deed was recorded transferring the 643 Property from Edwin L. Cutler, Sr. and Ann L. Cutler, Trustees Under Declaration of Trust dated May 9, 1989, to Edwin L. Cutler, Sr. and Ann L. Cutler, husband and wife as community property ("1992 Cutler Grant Deed"). The 1992 Cutler Grant Deed also included the same legal description of the Disputed Area. [AA Vol. II p. 376 (Trial Exhibit 30).]

Again, on December 21, 1998, a quitclaim deed was recorded transferring title of the 643 Property from Ann L. Cutler to Ann L. Cutler, Trustee of the Revocable Trust of Ann L. Cutler dated December 7, 1998, and included the legal description of the Disputed Area ("1998 Cutler Grant Deed"). [AA Vol. II p. 381 (Trial Exhibit 35 p. 2).]

Thus, the evidence shows that the Cutlers intended to complete and in fact believed that the lot line adjustment process was completed.

G. The Romeros Discover That The Improvements Encroach On The 651 Property

At the time that the Romeros purchased the 651 Property, they were unaware that the Improvements encroached onto the 651 Property.

[RT 662:6-10] In 2015, approximately a year after purchase, Mr. Romero testified he planned to make improvements to the retaining wall in his front yard and took measurements needed to order the building materials for the project. Based on the measurements, he suspected that the width of the front yard was inaccurate. [RT 663:15-664:10] Thereafter, he hired a land surveyor, James Kevorkian who prepared a survey dated July 30, 2015, which confirmed the existence of the encroachments. [RT 680:20-681:13; AA Vol. IV p. 512 (Trial Exhibit 100).]

H. Reasonable Necessity For The Implied Easement

The evidence at trial showed that the Improvements are reasonably necessary for the use of the 643 Property.

1. Unreasonably Narrow Driveway to Access Rear Garage

David Knell ("Mr. Knell"), a land surveyor, testified as to several dimensions of the 643 Property. Based on his survey, he testified that the Shih-Ko driveway was 7.2 feet at its narrowest point between the true property line and the length of the Shih-Ko residence. [RT 272:13-28; RA Vol. 1 p. 176 (Trial Exhibit 608).]

Mr. Gonzalez testified regarding a City ordinance requiring a ten (10) foot minimum driveway width for properties with a detached garage in the rear. [RT 203:25-204:27; 205:23-206:4; RA Vol. 1 pp. 142-174 (Trial Exhibit 595).]

Steve McCormick ("Mr. McCormick") a licensed general contractor, testified that he conducted a study of multiple car widths to determine whether cars could use the driveway and access the rear garage without the use of the Disputed Area. He concluded that the Shih-Ko driveway would be largely unusable to access the garage because it was too narrow for most vehicles. Specifically, he said that access to the rear garage would be virtually eliminated for all but subcompact cars. [RT 310:9-311:25; 312:6-315:16; 341:11-344:5; RA Vol. 1 pp. 203-212 (Trial Exhibit 739).]

The Romeros offered the opinion testimony of Steven Helfrich ("Mr. Helfrich"), a civil engineer and general contractor. Mr. Helfrich simply opined that a 2018 Prius could access the garage using a 7.2 feet wide driveway. [RT 423:6-12; AA Vol. IV p. 539 (Trial Exhibit 87).] In rendering his opinion, Mr. Helfrich did not consider the width of any other vehicle. [RT 428:22-27; 429:23-27.]

2. Inadequate Turnaround Area to Exit Driveway

At the end of the driveway is a two-car garage. [RA Vol. 1 pp. 192 (Trial Exhibit 718, p. 55).] There is also a turnaround area in front of the garage. Mr. McCormick testified that without the use of the Disputed Area, a driver exiting the Shih-Ko garage could not exit the driveway head on. Rather, a driver would be required to back up the entire length of the eighty-five (85) driveway. [RT 315:24-316:13; 322:19-26.]

Mr. Helfrich admitted that there was an insufficient turnaround area without the use of the Disputed Area for even a small 2018 Prius to exit the driveway head on. [RT 430:19-431:1; RA Vol 1 p. 78 (Trial

Exhibit 86).] Therefore, Mr. Helfrich suggested creating a twenty (20) foot by twenty (20) foot turnaround area which is less than the City's minimum requirement. Mr. Gonzalez testified that the City's minimum turnaround or back up area needed to enable a driver to turn around the vehicle and exit the driveway head on, is twenty-six (26) feet, eight (8) inches. [RT 204:9-206:14; 207:9-208:20; RA Vol. 1 pp. 142-174 (Trial Exhibit 595).]

In addition, to create this inadequate turnaround area, Mr. Helfrich stated that the wood fence between the garage and the house would need to be torn down so that the land located behind the fence could be used for the turnaround area. [RT 420:19-27; 421:11-422:8; 424:24-425:1; RA Vol. 1 p. 78 (Trial Exhibit 86); AA Vol. III p. 491 (Trial Exhibit 85).] This was unworkable given the existence of a planter bed and a patio that is nine (9) to fourteen (14) inches lower than the driveway, rendering it completely unsuitable as a turnaround area. [RT 431:14-432:2; 432:23-433:27; RA Vol. 1 p. 189 (Trial Exhibit 718 p. 35).]

Mr. Helfrich stated that a 2018 Prius using the proposed turnaround area would still need to back up five (5) or six (6) times to angle the vehicle so that it could exit the driveway head on. [RT 431:2-13] Mr. Helfrich did not consider any other options to create a new turnaround area other than removing the fence and using the patio and garden area. He admitted that without the patio and garden area, a car would have to back up the entire length of the eighty-five (85) foot driveway. [RT 434:4-13; 435:14-23.] Therefore, Mr. Helfrich effectively admitted that there is no reasonable substitute available on the 643 Property and thus substantiated the reasonable necessity for an implied easement.

3. Inadequate Space between Garage and Block Wall/Removal of the Air Conditioning Unit

Mr. McCormick testified that if the block wall was moved to the property line, there would be only a few inches between the block wall and the exterior of the garage on the 643 Property. [RT 323:20-27.] As a result, there would be no access to maintain the exterior of the garage. [RT 324:7-9.] In addition, the distance between the wall and the garage would be less than the five (5) foot setback ordinance requirement of the City. [RT 324:10-18; RA Vol. 1 pp. 181-183 (Trial Exhibit 620).] Finally, the air conditioning unit mounted to the exterior wall of the garage would have to be relocated. [RT 324:4-7; 338:19-27.]

The Romeros offered no viable alternative for the inadequate space between the garage and the block wall if the block wall was moved to the property line.

4. Inadequate On-Site Parking

With respect to on-site parking, Mr. McCormick testified that if the block wall was moved to the property line, the on-site parking space beside the garage would be eliminated. [RT 323:20-324:3.] In addition, parking would be eliminated on the driveway between the house and the block wall. He explained that even a subcompact car could not park on the driveway adjacent to the house because there would be insufficient room to open the car doors and exit the vehicle. [RT 314:4-28; 319:3-15; RA Vol. 1 pp. 203-212 (Trial Exhibit 739 pp. 4-6).] Mr. Helfrich confirmed that without the use of the Disputed Area, it would be impossible to open the

doors and exit a Prius parked in the driveway adjacent to the Shih-Ko house. [RT 426:14-427:5; AA Vol. IV p. 539 (Trial Exhibit 87).]

5. Loss of Garden Planter

The garden planter is part of the curb appeal and aesthetics of the 643 Property. The garden planter at issue flanks one side of the Shih-Ko driveway and matches the garden planter on the other side of the Shih-Ko driveway, thus marking the gateway to the 643 Property. [RT 231:3-20; RA Vol. 1 p. 193 (Trial Exhibit 718 p. 61).]

The Romeros' own expert, Mr. David Harding, a real estate appraiser, took the existence of garden planter into consideration in his analysis, agreeing that curb appeal is an important consideration. [RT 655:4-20.] Mr. Daniel Poyourow ("Mr. Poyourow"), Shih-Ko's real estate appraiser testified that the loss of the garden planter on the 643 Property is an aesthetic issue. [RT 579:1-6.]

6. No Alternative Options

Mr. McCormick is the only expert who testified regarding whether an alternative option exists to use the 643 Property to maintain an adequate driveway and create space between the garage and the block wall without the use of the Disputed Area.

Mr. McCormick prepared a bid to increase the width of the driveway and increase the area beside the garage by demolishing and rebuilding both the garage and the house. He considered moving the east wall of the garage over five (5) to six (6) feet to increase the space between

the garage and the block wall. He also considered tearing down and moving the east wall of the house over four (4) feet [RA Vol. 1 pp. 214-221 (Trial Exhibit 742).] Mr. McCormick concluded these options were not reasonable because they were cost prohibitive and impractical. [RT 324:20-325:19; 335:10-336:10; 383:24-384:15.]

Specifically, Mr. McCormick explained that tearing down a portion of the house would result in a bedroom of less than one hundred (100) square feet. This would result in a violation of the Los Angeles County habitability requirements and would reduce the house from a two-bedroom to a one-bedroom house. [RT 324:20-325:19.]

Importantly, tearing down the garage would create another problem in that it would reduce the capacity of the garage from a two (2) car to a one (1) car garage. [RT 335:24-336:10.] However, Mr. Gonzalez testified that the City has a two (2) car covered parking requirement. [RT 208:24-209:16.] If a portion of the garage was torn down to create space between the block wall and the garage, and to comply with the City setback requirement of five (5) feet, there would be inadequate onsite covered parking. [RA Vol 1 pp. 178-179 (Trial Exhibit 619).]

To address this problem, Mr. McCormick considered building a carport on the 643 Property, behind the house and in front of the garage. He testified that this was not a reasonable alternative because vehicles would have to park tandem and back out of the driveway to provide access. [RT 385:5-386:1.] Mr. McCormick also considered constructing a covered parking area in the front yard of the 643 Property. Mr. McCormick testified that this was not a viable option because, not only was it unattractive, but it would also violate the City's twenty-five (25) foot front yard setback requirement. [RT 337:14-26; RA Vol. 1 pp. 181-183 (Trial

Exhibit 620).]

7. Diminution in Value

Mr. Poyourow has over thirty-five (35) years of experience and has completed hundreds of diminutions in value ("DIV") appraisals and specializes in DIV appraisals involving encroachments and easements. [RT 489:7-24; 492:28-493:3.] Mr. Poyourow testified that without an easement, the value of the 643 Property would be diminished. He testified that the DIV to the 643 Property without the use of the Disputed Area is $133,000. [RT 525:9-26.]

PROCEDURAL HISTORY

A. The Operative Complaint And Cross-Complaint

On February 10, 2016, the Romeros filed their verified Complaint asserting various causes of action against the Shih-Kos stemming from the encroachment of the Improvements. After a series of amendments, the operative Third Amended Complaint ("TAC") alleges six (6) causes of action for: 1) Wrongful Occupation of Real Property; 2) Quiet Title; 3) Trespass; 4) Private Nuisance; 5) Wrongful Disparagement of Title; and 6) Permanent Injunction. [AA Vol. I pp. 37-120 (TAC.)]

On May 5, 2016, the Shih-Kos filed their Cross-Complaint against the Romeros for: 1) Equitable Easement; 2) Implied Easement;(3) Quiet Title; and 4) Declaratory Relief seeking an implied or equitable easement to allow the Improvements to remain. [AA Vol. I pp. 12-25

(Cross-Complaint).] A Notice of Pendency of Action was recorded on January 24, 2017. [RA Vol. 1 pp. 124-133 (Trial Exhibit 525).] To ensure any judgment awarding an easement was not wiped out by foreclosure, the Shih-Kos also named as a defendant the Romeros' lender, U.S. Bank National Association, which holds two deeds of trust on the 651 Property. [RA Vol. 1 pp. 90-122 (Trial Exhibits 514, 516).]

B. The Trial Court's Decision

The court trial proceeded on March 9, 10, 11 and 12, 2020. [RT 106-747.] The parties filed their respective closing briefs on March 20, 2020. [RA Vol. 1 pp. 17-41 (Shih-Ko Closing Brief).] Closing arguments were held on June 30, 2020. [RT 748-820.]

On August 24, 2020, the trial court submitted a proposed statement of decision. [AA Vol. I pp. 138-149 (Proposed SOD).] On September 8, 2020, the Romeros filed Objections to the Proposed Statement of Decision and Request for Additional and Alternative Findings raising 53 objections/requests (some consisting upwards of 54, 67 and 97 subparts) ("Objections") [AA Vol. I pp. 151-291 (Romeros' Objections).] On September 22, 2020, the Shih-Kos filed a response to the Objections. [RA Vol. 1 p. 43-51 (Shih-Kos' Response).]

On September 28, 2020, the trial court overuled the Romeros' Objections and issued its final Statement of Decision [AA Vol. II pp. 303-315 (SOD).] finding the Shih-Kos possess an implied easement over the Disputed Area. The trial court further found that, if there was no implied easement, an equitable easement would arise entitling the Romeros to compensation of $69,000. [AA Vol. II p. 308 at ¶¶ 1, 2 (SOD).] The trial

court also found that the elements for an equitable easement were established. [AA Vol. II p. 304 at ¶ 4 (SOD).]

With respect to the first element for an implied easement, the trial court found that it was undisputed that "Edwin and Ann Cutler previously owned both the 643 and 651 properties." [AA Vol. II p. 305 at ¶ 3 (SOD).]

The trial court then correctly concluded that the parties to the transaction intended the 643 Property's encroachment on the 651 Property would continue after the division of such properties in 1986, relying on the following evidence:

- The testimony of Mr. Shewmake as "the only witness with first-hand knowledge of the state of the 643 and 651 properties at the time of transfer in 1986 or the intended use of the properties at the time." [AA Vol. II p. 305 at ¶ 4 (SOD).]
- The actions of Edwin Cutler in applying for the lot line adjustment which made it "clear under the circumstances" that Edwin Cutler intended the 643 Property to continue its use of the existing driveway and planter and for the fence (later block wall) to separate the two properties." [AA Vol. II p. 307 at ¶ 1 (SOD).]
- The fact that the parties acted consistently with the intent, referring to the fact that Bevon Cutler applied for permits and built the block wall which remains standing, and that Edwin Cutler recorded wild deeds as if the lot line adjustment had been finalized. [AA Vol. II p. 307 at ¶ 1 (SOD).]; and

- "Lastly and most importantly, all the Cutlers, the Shewmakes, and every successive owner of either property (until now) has allowed for and behaved as if the 643 Property has the right to encroach…all of which has remained unchanged in their use and function since at least the initial property separation in 1986." [AA Vol. II p. 307 at ¶ 1 (SOD).]

The trial court found the element of "reasonable necessity" was established based on all the same facts that proved the higher standard of "disproportionate hardship" for the equitable easement claim. [AA Vol. II p. 307 at ¶ 2 (SOD).] This evidence included:

- The testimony of Mr. McCormick that the driveway would be 7.2 feet at the narrowest point which is far short of the City's ten (10) foot minimum driveway width. The width of the driveway would severely which limit the type of cars that could use the driveway, preclude the opening of car doors, and create an insufficient turnaround such that cars could not exit the driveway head on. In addition, there would be insufficient room beside the garage to allow for maintenance and the air-condition unit would have to be moved. [AA Vol. II p. 311 at ¶ 1 (SOD).]
- The testimony of Mr. McCormick as to the impracticability and great expense of alternatives to the easement. [AA Vol. II p. 311 at ¶ 2 (SOD).]
- The testimony of Mr. Poyourow regarding the diminution in value of $133,000 to the 643 Property if the Disputed

Area could not be used for the Improvements. [AA Vol. II p. 312 at ¶ 1 (SOD).]

The trial court final judgment was filed on or about October 26, 2020. [AA Vol. II pp. 317-340 (Judgment).]

C. The Court Of Appeal's Decision

On December 23, 2020, Romeros filed their Notice of Appeal. [AA Vol. II pp. 342-344 .]

On May 5, 2022, the Court of Appeal filed its Opinion, which reversed the judgment on the cause of action for implied easement and affirmed the judgment on the cause of action for equitable easement. The Court of Appeal applied the laws of prescriptive easements holding that an implied easement is not available for exclusive uses, with the exception of: 1) de minimis encroachments; or 2) if needed to protect general public health or safety. (*Romero v. Shih,* (2022) 78 Cal.App.5th 326, 352.)

As a result, because the Court of Appeal found that an implied easement was unavailable for exclusive uses, it never addressed the issue raised on appeal regarding whether the existence of an implied easement was supported by substantial evidence.

LEGAL ARGUMENT

A. The Substantial Evidence Standard of Review for Implied Easements

The standard of review for an implied easement case is substantial evidence. (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1417.) Review under substantial evidence standard involves an undertaking to "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660 [citations omitted].) This standard of review is deferential to the factual findings of the trial court. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

"The standard is simply one according deference to the findings of the trial court, which are to be upheld if supported by substantial evidence." (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 370.) If the evidence presented on the issue of an implied easement "'is conflicting, the determination of the trial court will not be disturbed on appeal.' [citation.]" (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 148.)

It does not matter that the reviewing court would have reached a different decision based on the evidence presented at trial. "Proof of the essential elements for an implied easement, while not compelling, is found in the record. Even if we would not have made the same decision had we been presented with the matter in the first instance, we cannot reverse the trial court's determination, supported as it is by the minimal standard of

substantial evidence." (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1421.)

The reviewing court does not reweigh the evidence. "We do not review the evidence to see if there is substantial evidence to support the losing party's version of the events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party". (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245.) "In asserting that the record does not contain substantial evidence, the Tushers [in arguing the elements of an implied easement] do nothing more than reargue their case by citing to evidence in support of their position. It is elementary that we will not engage in a reweighing of the evidence." (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 143.)

B. The Trial Court Correctly Found the Existence of an Implied Easement

The trial court correctly found the existence of an implied easement based on substantial evidence. The standard of proof to establish an implied easement is preponderance of the evidence. (*Tusher v. Gabrielsen* 68 Cal.App.4th at 145.)

As stated by this Court in *Fristoe* v. *Drapeau* (1950) 35 Cal.2d 5, "The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances."(*Id.* at 8) "The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it

and the property which the vendor retains." (*Rosebrook v. Utz* (1941) 45 Cal.App.2d 726, 729; *Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th at 1421-1422) ["A purchaser of real property is bound to take notice of all easements or servitudes which are 'apparent' upon inspection of the property"].) Use sufficient to charge a purchaser of the servient tenement with notice of the easement is sufficient to establish the implication in favor of the grantee of the dominant tenement (*Rubio Canon Land & Water Ass'n v. Everett* (1908) 154 Cal. 29, 35.)

This rule has been approved by this Court for over one hundred and thirty (130) years. (See eg. *Quinlan v. Noble* (1888) 75 Cal. 250*; Jersey Farm Co. v. Atlanta Realty Co.* (1912) 164 Cal. 412; *Cheda v. Bodkin* (1916) 173 Cal. 7) In addition, this rule is codified in California Civil Code section 1104 ("Section 1104") which states:

> A transfer of real property passes all easements attached thereto and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

(*Cal. Civ. Code* § 1104.)

Although Section 1104 speaks only in terms of implying an easement in favor of a grantee, "California also recognizes easements by implied reservation. The result is that a purchaser may take not only the obvious *benefits* but the obvious *burdens* as well." (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 133.) Applying Section 1104, California courts

have set forth three (3) elements necessary to create an easement by implied grant:

1) The owner of property conveys or transfers a portion of that property to another;
2) The owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and
3) The easement is reasonably necessary to the use and benefit of the quasi-dominant tenement.

(See *Tusher v. Gabrielsen* 68 Cal.App.4th at 141.)

The trial court decision finding that each of these three (3) elements has been met establishing the existence of an implied easement is supported by substantial evidence.

1. The Cutlers' Joint Ownership of the Properties Was Undisputed

The trial court correctly found that the evidence established the joint ownership of the Shih-Ko and Romero properties by the Cutlers. There must be common ownership of a parcel and a transfer or conveyance of one parcel, or a portion of a parcel, to another. (*Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 266; see also *Orr v. Kirk* (1950) 100 Cal.App.2d 678, 681 (1950).)

It was undisputed at trial that the two properties were previously owned by the Cutlers. [RA Vol. 1 pp. 53-55 (Trial Exhibits 4 and 5).] Ownership of the two properties was split when the 651 Property was transferred to Bevon and Judy Cutler and David and Sally Shewmake. [AA Vol. II pp. 365-366 (Trial Exhibit 26).]

Therefore, the first element required to establish an implied easement is easily met.

2. The Intent for the 643 Property to use the Disputed Area After the Severance of Title was Supported by Substantial Evidence

The trial court finding the existence of the implied easement was based on substantial evidence of intent. The evidence before the trial court showed that the Cutlers' prior use was of a nature that both the grantors and grantees intended or believed that the existing use would continue after the division of title.

"Whether an easement arises by implication on a conveyance of real estate depends on the intent of the parties, which must clearly appear in order to sustain an easement by implication. In order to determine the intent, the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted." (*Orr v. Kirk* (1950) 100 Cal.App.2d 678, 681.)

The element of intent was established by the obvious and permanent long-time use of the Improvements, the testimony of Mr. Shewmake, the evidence regarding the lot line adjustment process and the existence of the wild deeds.

a. The obvious permanent and long term use of the Improvements is substantial evidence of intent

The permanent and obvious nature of the improvements together with the continuous use is evidence of intent. (*Cal. Civ. Code* § 1104 [implied easement is created " in the same manner and to the same extent as such property was **obviously and permanently** used…"].)

An implied reservation of an easement may be inferred "where there is an obvious ongoing use that is reasonably necessary to the enjoyment of the land granted." (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 635.) "If the owner's use of the 'quasi servient tenement' has continued for a period of time in an obvious and permanent manner, a division of his title implies that the parties intended to transfer the obvious burdens and benefits with the property conveyed." (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 131.) "Such long continued use plus the fact that the grading and the opening in the curb were obvious and visible at all times indicates unquestionably appellant's intention that it should be permanent. (*Fischer v. Hendler* (1942) 49 Cal.App.2d 319, 323.)

Here, the Cutlers used the Disputed Area to maintain the Improvements since the 1960's long before they sold the 651 Property in 1986. The Improvements and ongoing use are clearly visible thereby establishing the intent of the parties.

b. Mr. Shewmake's testimony is substantial evidence of intent

The trial court correctly relied on the credible testimony of Mr. Shewmake, the only witness with first-hand knowledge of the intent of the parties and the state of the properties prior to and at the time of the division of title in 1986. Mr. Shewmake testified that the intent of the parties was for the Improvements to remain. Conversely, there was no intent to tear out the driveway and the garden planter on the 643 Property. [RT 159:20-160:14.] He also confirmed the existence of the driveway and the garden planter at the 643 Property since the 1960's through the division of title. [RT 146:15-27; 148:25-149:5; 157:24-159:19; AA Vol. IV p. 509-510 (Trial Exhibits 92 pp. 3, 4).]

Thus, Mr. Shewmake's testimony alone is substantial evidence of the intent of the parties for the use of the Disputed Area to maintain the Improvements to continue after the division of title. [AA Vol. II p. 306 at ¶ 1.]

c. The lot line documentation is substantial evidence of intent

The trial court further found that the lot line adjustment documentation established the parties' intent for the 643 Property to continue to use the Disputed Area after the division of title. The lot line documentation, together with the testimony of Mr. Gonzalez is substantial evidence of the intent of the parties.

Specifically, Mr. Cutler submitted an application for a lot line adjustment so that "8 feet be transferred" from the 651 Property to the 643 Property. [AA Vol. II pp. 346-347 (Trial Exhibit 7); AA Vol. II pp. 351-354 (Trial Exhibit 10)]; AA Vol. II p. 356 (Trial Exhibit 11).] The Planning Commission Minutes stated that Mr. Cutler told the Commission that he was seeking the variance because without the additional square footage, the driveway would be "extremely narrow". In addition, Mr. Gonzalez testified that all necessary documents were submitted to the City to complete the lot line adjustment and there was no indication the Application was withdrawn or abandoned, or that the City closed out the Application. [RT 190:8-191:22.]

Therefore, Mr. Cutler's pursuit of a lot line adjustment is substantial evidence of his intent to continue to use the Disputed Area and maintain the Improvements after the division of title.

d. The wild deeds are substantial evidence of intent

The trial court relied on the existence of wild deeds as further evidence of the Cutler's intent. The wild deeds recorded by the Cutlers in 1989, 1992 and 1998 included a description of the Disputed Area as if the lot line adjustment had been completed. [AA Vol. II pp. 374, 376, 381 (Trial Exhibits 29, 30, 35).] This is substantial evidence of intent for the Improvements to remain for the continued use by the 643 Property.

3. There is Substantial Evidence that the Implied Easement is Reasonably Necessary

The trial court relied on substantial evidence that the implied easement is reasonably necessary for the beneficial enjoyment of the 643 Property.

There is little, if any, difference between the expression "reasonably necessary to the beneficial enjoyment of the land granted" and the expression found in the Section 1104 "for the benefit thereof." (*Fischer v. Hendler* (1942) 49 Cal.App.2d 319) By establishing that the easement claimed was "reasonably necessary to the beneficial enjoyment of the land granted" a party seeking an easement has thus met the code requirement that it was "for the benefit thereof." (*Id.* at 322.)

The degree of necessity is merely as much that renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. (*Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 830.) A party claiming an implied easement is "not required to prove that the easement as it existed was a strict necessity or 'the only possible way' of obtaining water for their parcel". (*Thorstrom v. Thorstrom,* (2011) 196 Cal.App.4th at 1421; see also *Rees v. Drinning* (1944) 64 Cal.App.2d 273, 278 [The requirement that the easement must be "reasonably necessary to the beneficial enjoyment" of the property conveyed means no more than "for the benefit thereof," and defendants were not required to prove strict necessity or "the only possible way"].)

The evidence before the trial court of reasonable necessity included expert testimony concerning the physical impact on the 643 Property, the lack of a reasonable substitute, and the diminution in value of the 643 Property.

a. The physical impact on the 643 Property is substantial evidence of reasonable necessity

Mr. McCormick testified that if the Shih-Kos could not continue to use the Disputed Area, the driveway would be too narrow severely limiting vehicle use to all but subcompact cars [RT 310:9-311:25; 312:6-315:16; 341:17-344:5; RA Vol. 1 pp. 203-212 (Trial Exhibit 739).] He also testified that there would be insufficient turnaround room [RT 315:24-316:13; 322:19-26.] and no onsite parking [RT 323:20-324:3.]. He further testified that there would be no access to maintain the exterior of the garage [RT 324:7-9.], the air conditioning unit would have to be relocated, [RT 324:4-7; 338:19-339:2.] and the distance between the wall and the garage would be less than the five (5) foot setback ordinance requirement of the City. [RT 324:10-18; RA Vol. 1 pp. 181-183 (Trial Exhibit 620).]

McCormick's testimony alone is substantial evidence satisfying the element of reasonable necessity.

b. The lack of alternatives to maintain the Improvements on the 643 Property is substantial evidence of reasonable necessity

There was no evidence before the trial court of the existence of a reasonable substitute to maintain the Improvements. *Leonard v. Haydon* (1980) 110 Cal.App.3d 263 was an action by plaintiffs against adjoining landowners seeking quiet title to a driveway entirely on plaintiffs'

property in which defendants contended they enjoyed an implied easement for access to a public road. The court of appeal held that the trial court properly instructed the jury that in determining whether the easement was reasonably necessary to the use and benefit of defendants, it could consider whether defendants could at a reasonable cost create a substitute on their own property. (*Id.* at 269.)

Here, the Shih-Kos do not have a reasonable substitute to maintain the Improvements on their own property. Mr. McCormick considered several alternatives, all of which were untenable in that they were prohibited by the City's code requirements, cost prohibitive, created safety concerns or were visually unattractive. [RT 324:20-325:19; 335:10-336:10; 337:6-26; 383:24-384:15; RA Vol. 1 p. 181-183 (Trial Exhibit 620).]

Therefore, the lack of a reasonable substitute is further evidence establishing the element of reasonable necessity.

c. <u>The diminution in value of the 643 Property is substantial evidence of reasonable necessity</u>

Diminution in value of the dominant tenement is a factor in determining reasonable necessity. In *Owsley v. Hamner* (1951) 36 Cal.2d 710, 719 the Court found that the evidence before the trial court was sufficient to support the finding that an easement for the uninterrupted use of a passageway and patio providing access to prospective purchasers to a men's clothing store was reasonably necessary. In analyzing the evidence of reasonable necessity, the Court referred to, in part, the financial impact on the value of the dominant tenant without the benefit of the easement.

"Certainly a substantial reduction in the value of the leased property by the elimination of the ways and patio is a factor bearing upon reasonable necessity because the use of property and its value are directly related." (*Id.* at 720.)

The expert testimony of Mr. Poyourow established a significant diminution in value of the 643 Property if the Shih-Kos lost the right to use the Disputed Area to maintain the Improvements.

d. Apparent use over a long period of time is substantial evidence of reasonable necessity

Evidence of long-term use of the improvements establishes that an easement was reasonably necessary for the beneficial use of the 643 Property. In *Rees v. Drinning* (1944) 64 Cal.App.2d 273 the court of appeal found that long-term use is evidence of reasonable necessity. "Here the driveway was laid out when the Rees house was built and was used until the property was sold. It was therefore used for the maximum period possible under the circumstances; and the trial court was justified in finding from the evidence before it that the use was sufficiently long continued and the driveway sufficiently obvious and necessary for the enjoyment of plaintiffs' property to create the easement." (*Id.* at 381.)

Similarity, in *Fischer v. Hendler* (1942) 49 Cal.App.2d 319, the court held that respondents successfully established that the easement claimed was reasonably necessary and thus met the code requirement that it was "for the benefit thereof", noting that respondents "were not required to show that the drain was the only method possible to carry excess water from their land" *(Id.* at 322.*)* Rather, the apparent and

obvious use for a long period of time preceding the severance, was evidence that the easement was reasonably necessary for the beneficial use of the land granted. *(Id.)*

Like *Rees and Fischer,* the evidence of apparent and obvious use for a long period of time preceding severance, is evidence that the easement is reasonably necessary. Mr. Shewmake testified that the Improvements had been in existence and used since the 1960's when he first visited the properties, long before the separation of title in 1986. [RT 158:8-159:19; AA Vol. I p. 509 (Trial Exhibit 92 p.3); RA Vol. 1 p. 190 (Trial Exhibit 718 p. 52).] That long-term use continued at the time the Romeros purchased their property in 2014 and therefore, "they bought what they saw".

e. <u>The physical arrangement of the 643 Property is substantial evidence of reasonable necessity</u>

A simple review of the photos of the Shih-Kos Property and the 651 Property demonstrates the reasonable necessity for the easement. In *Owsley v. Hamner* (1951) 36 Cal.2d 710, 719-720, the court, in analyzing the evidence of reasonable necessity, referred to an inspection of the property by the trial judge and the reasonable inferences made by the trial judge. "The trial judge viewed the premises, thus observing the physical arrangement" and reasonably concluded that the easement would benefit the dominant tenement by providing more access to prospective pedestrian purchasers. (*Id.*)

Therefore, the photographs of the properties are substantial evidence in the record supporting the conclusion that the easement is reasonably necessary for the enjoyment of the 643 Property.

CONCLUSION

The Shih-Kos respectfully request that this Court affirm the trial court decision which correctly found the existence of an implied easement over the Disputed Area to maintain the Improvements for the benefit of the 643 Property and reverse the Court of Appeal decision finding that an implied easement could not exist under the facts of this case. The Shih-Kos also respectfully request that they be awarded their costs on appeal.

Dated: September 8, 2022

Respectfully submitted,

By: _____

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1).)

I hereby certify that the text of this Opening' Brief on the Merits ("OBM") consists of 9,662 words as counted by the Microsoft Word 2019 word-processing program used to generate the entire OBM.

Dated: September 8, 2022

SONGSTAD RANDALL
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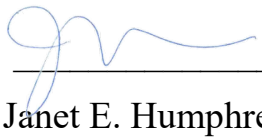

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PROOF OF SERVICE
Cesar Romero, et al. v. Li-Chuan Shih, et al.
California Supreme Court Case No. S275023

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Julie Nelson

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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