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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Rules

Other

S275023

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REPLY BRIEF ON THE MERITS

INTRODUCTION

The Court granted review to decide whether the trial court correctly found the existence of an implied easement under the facts and required briefing on this issue. In their Answer Brief on the Merits ("Answer Brief"), Cesar Romero and Tatana Spicakova Romero ("Romeros") predominantly focus on different issues for which the Court did not request briefing: 1) whether the Court of Appeal correctly concluded that the rationale for precluding exclusive prescriptive easements applies to implied easements; and 2) whether exclusive easements (implied or equitable) violate the Due Process Clause and/or Takings Clause of the United

States Constitution, an issue the Romeros failed to raise to the Court of Appeal below. The Court should decline to consider these uninvited arguments.

In addressing the single issue to be briefed, whether the trial court correctly found the existence of an implied easement under the facts, the Romeros effectively ask the Court to reweigh the evidence and do little more than improperly reargue the evidence supporting their position, which they cannot do. (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245-1246); *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 143.) The trial court correctly determined the existence of an implied easement based on substantial evidence of Edwin Cutler's intent to retain the brick planter, driveway and block wall (hereinafter "Improvements") on Li-Chuan Shih and Tun-Jen Ko's ("Shih-Ko") 643 Property[1] after the division of title and transfer of the Romeros' 651 Property[2]. In addition, there was substantial evidence before the trial court that the Improvements were reasonably necessary for the of benefit the 643 Property.

Should the Court consider the Romeros' uninvited briefing, the law does not support their arguments. First, California law does permit exclusive use implied easements, and the Romeros have failed to effectively distinguish any of these cases. The rationale for prescriptive easements is markedly different than

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[1] The "643 Property" refers to 643 West Alegria Avenue, Sierra Madre, California 91024.

[2] The "651 Property" refers to 651 West Alegria Avenue, Sierra Madre, California 91024.

the rational for implied easements and therefore prescriptive easement cases do apply. Second, the Romeros' new Due Process/Takings Clause argument should not be reviewed where it was not raised on appeal to the Court of Appeal below. In any event, the Romeros' Due Process/Takings Clause argument has no merit. No case has found that an implied easement constitutes a taking under the United States Constitution. Further, no case has found that a judicial decision amounts to a taking.

Therefore, the Court should affirm the trial court decision which correctly found the existence of an implied easement over an approximate eight (8) foot strip of the Romeros' side yard ("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.

LEGAL ARGUMENT

A. Substantial Evidence Supports The Trial Court's Finding Of An Implied Easement

1. There Is No Heightened Standard Of Review For Implied Easement Cases

Relying on *Conservatorship of O.B.* (2020) 9 Cal.5th 989, the Romeros argue that there is a heightened standard of review for the intent element such that "this Court must determine whether substantial evidence supports a finding that there is clear evidence" that Edwin Cutler intended to reserve an easement. (Answer Brief pp.48-50.) The Romeros' entire argument fails because it is dependent on the incorrect conclusion that the burden of proof for implied easement cases is clear and convincing evidence. The correct burden of proof is preponderance of evidence, and therefore, there is no heightened standard of review.

A "'[b]urden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (*Cal. Evid. Code* § 115.) The default burden of proof is preponderance of evidence. (*Cal. Evid. Code* § 115.) In rejecting the clear and convincing standard for implied easements, the

Court of Appeal in *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131 stated: "We agree with the Tushers that the proper standard of proof to establish an implied easement is by a preponderance of the evidence." (*Id.* at 145.) The Court specifically stated that "the need for 'clear' evidence of intent does not create a 'clear and convincing' standard of proof" for implied easements. (*Id.* at 141-142, fn. 13.)

The *Tusher* court addressed the difference between the language requiring clear evidence of the intent and the standard of proof. "[I]f the Tushers were going to tip the scales in their favor, they were going to have to present evidence that clearly showed a contrary intent; nothing wishy washy or uncertain would do." (*Id.* at p. 146.) The court then correctly equated this with the quality of the evidence rather than the quantity or weight of the evidence: "We see nothing in the record to suggest that the trial court applied the 'clear and convincing' burden of proof standard. She sought clear evidence of the intent of the parties, which she found in considering the facts and circumstances existing at the time the property was conveyed to the Goslines." (*Id.*)

In *Conservatorship of O.B.* this Court reversed the judgment of the Court of Appeal and remanded to that court for further proceedings, concluding that the Court of Appeal erred in treating the clear and convincing standard of proof as disappearing on appeal. The Court held that appellate courts must account for the clear and convincing standard and determine "whether the record as a whole contains substantial evidence from

which a reasonable fact finder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence." (*Conservatorship of O.B.,* 9 Cal. 5th at 1011-12.) *Conservatorship of O.B.* is not applicable here where the correct burden of proof for implied easement cases is preponderance of evidence, not clear and convincing evidence.

Therefore, there is no heightened standard of review for the intent element for implied easement cases. Even if there is a heightened standard of review for the intent element, the evidence before the trial court easily meets any such standard.

2. The Trial Court's Finding That Edwin Cutler Intended For The Use Of The Disputed Area To Continue Is Supported By Substantial Evidence

The Romeros' argument that there is no substantial evidence to support the trial court's finding that Edwin Cutler intended to "reserve an easement for the 643 Property"[3] is without merit. (Answer Brief p. 50.) The Romeros

[3] The intent required, is not an intent to create an easement, but rather an intent that the use would continue. *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 141 ("the owner's prior

do nothing more than improperly reargue their case by citing to evidence in support of their position. "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* 68 Cal.App.4th at 143.) This alone is fatal to their argument regarding intent. In addition, the totality of the evidence presented at trial is substantial evidence of the parties' intent that the use would continue after the division of title.

First, the Romeros disingenuously argue that there is no "documentary" evidence that Edwin Cutler intended to convey or create an easement over the Disputed Area because he did not use the new legal description in the deeds. (Answer Brief p. 51.) This is precisely the reason why an implied easement is needed. If Edwin Cutler had inserted a description of the Disputed Area into the Bevan/Shewmake Grant Deed on March 12, 1986, there would be no need for an implied easement. Moreover, it ignores documentary evidence that Edwin Cutler did intend for the 643 Property to continue to use the Disputed Area after the division of title, including the lot line documentary

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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".)

evidence [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 wild deeds [AA Vol. II pp. 374, 376, 381 (Trial Exhibits 29, 30, 35).]; the testimony of David Shewmake ("Shewmake"); and the testimony of Vincent Gonzalez ("Mr. Gonzalez") Director of Community Preservation for the City of Sierra Madre (the "City").

Second, the Romeros' argument that Mr. Shewmake's testimony is not evidence of Edwin Cutler's intent is meritless. (Answer Brief pp. 51-52.) Mr. Shewmake was the only witness who testified at trial with direct knowledge of the events surrounding the division of title and the intent for the Improvements remain. 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.] Moreover, Mr. Shewmake testified extensively that the Improvements were in the same configuration from the time of the division of title to the day before trial, which is further evidence of Edwin Cutler's intent that the Improvements remain. [RT 146:15-27; 148:25-149:5; 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); RT 156:19-24; 157:15-19; RA Vol. 1 p. 198 (Trial Exhibit 721 p. 4).] The testimony of a single credible witness may constitute substantial evidence. (*Marriage of Mix* (1975) 14 Cal.3d 604, 614.) None of this testimony was mentioned by the Romeros in their Answer Brief.

Third, the Romeros challenge the sufficiency of the lot line documentation by contending it is not indicative of Edwin Cutler's intent in 1986 and that the lot line adjustment was not completed or paid for by Edwin Cutler[4]. (Answer Brief p. 52.) The Romeros are simply rearguing the same failed arguments that were rejected by the trial court.[5] The evidence showed that Edwin Cutler submitted all the necessary documents to complete the lot line adjustment on May 8, 1985 with a legal description for the properties after the lot line adjustment, less than a year before the division of title on March 6, 1986. [AA Vol. II pp. 358-359 (Trial Exhibit 14); RT 160:15-27.] At the same time, in May 1985, Bevan Cutler applied for the building permits to build the 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).] Significantly, Mr. Gonzalez testified that 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

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[4] The only testimony regarding whether Edwin Cutler paid Mr. Abell came from Catherine Connen, Mr. Abell's daughter. In fact, she testified that she had no personal knowledge as to whether Edwin Cutler paid Mr. Abell. [RT 356:25-357:1; 358:18-23.]

[5] The trial court specifically addressed these contentions and determined that: "In view of all the surrounding circumstances, however, Edwin Cutler's failure to complete the lot line adjustment process is most reasonably viewed as an oversight or lack of follow through." [AA Vol. II p. 307, ¶ 1.]

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).][6]

Fourth, the Romeros' argument that the long-continued use of the Improvements is not indicative of Edwin Cutler's intent but vaguely suggest that this is evidence of "actions by others". (Answer Brief p. 53.) This is not true. It was undisputed at trial that the Improvements have been in existence and were used by the Cutlers until the 651 Property was conveyed on March 12, 1986.

Fifth, the Romeros contend that the wild deeds are "inconclusive" of Edwin Cutler's intent because they were ineffective to convey the Disputed Area and that it proved that Edwin Cutler knew that he needed to include the Disputed Area at the time he executed the grant deed transferring title on March 12, 1986. (Answer Brief pp. 53-54.) These arguments are nonsensical for many reasons. The fact that the wild deeds did not actually convey the Disputed Area is not the point. The point is that because the wild deeds included a description of the Disputed Area, this fact is indicative of Edwin Cutler's belief that

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[6] Moreover, the Romeros' argument ignores the evidence that none of the Improvements were ever torn out or altered in over thirty-five (35) years. [RT 156:19-24; 157:15-19; 158:8-159:6; RA Vol. 1 p. 198 (Trial Exhibit 721 p. 4).] In addition, the Cutlers included the description in the wild deeds even after the division of title. [AA Vol. II pp. 374, 376, 381 (Trial Exhibits 29, 30, 35).]

he had successfully completed the lot line process and intended for all the Improvements to remain after the division of title.

Therefore, the trial court correctly determined that Edwin Cutler intended for the use of the Disputed Area to continue and for the Improvements to remain after the division of title. To suggest otherwise would mean that Edwin Cutler purposely intended to abandon the lot line adjustment process so that he could intentionally trespass on the 651 Property for the next thirty (30) years and run the risk that the Improvements could be torn out at any time. Thus, Romeros' interpretation of the substantial evidence supporting the trial court's decision is meritless.

3. There Is Substantial Evidence That The Implied Easement Is Reasonably Necessary

In making the argument that the Improvements were not reasonably necessary for either the Cutlers or for the Shih-Kos, the Romeros once again improperly reargue their case and do not address the substantial evidence before the trial court that the implied easement is reasonably necessary.

The inquiry is whether the easement is reasonably necessary to the quasi-dominant tenement. *Tusher v. Gabrielsen* 68 Cal.App.4th at 141–142 ("the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement.") 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 that the easement as it existed was a strict necessity or "the only possible way". (*Thorstrom v. Thorstrom* (2011) 196 Cal. App. 4th 1406, 1420-21.)

First, the Romeros argue that there was no evidence that the Disputed Area was reasonably necessary for Edwin Cutler's use and benefit of the 643 Property in 1986. (Answer Brief p. 56) This is belied by the lot line variance application for the specific purpose of enlarging the 643 Property to establish the "driveway and fence line". [AA Vol. II pp. 346-347 (Trial Exhibit 7).] Mr. Cutler told the Planning Commission that the driveway was extremely narrow, and he intended to divide the property and adjust the width of the driveway. [AA Vol. II p. 356 (Trial Exhibit 11).]

In addition, there is substantial evidence of long-term use of the Improvements. It is undisputed that the Improvements existed since the 1960's and were unchanged through the division of title. [RT 146:15-27; 148:25-149:5; 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); RT 156:19-24; 157:15-19; 158:8-159:6; RA Vol. IV p. 198 (Trial Exhibit 721 p. 4).]

Moreover, the expert testimony regarding the unreasonably narrow driveway and the related impacts was relevant to the entire time that the Cutlers owned the 643 Property through the present because the location and configuration of the Improvements are exactly the same as they were at the time of the division of title. Thus, there was

substantial evidence that the Disputed Area used to maintain the Improvements was reasonably necessary for the 643 Property in 1986.[7]

Second, the Romeros argue that if reasonable necessity is determined based on the current necessity, the Shih-Ko's only "cost" is to relocate an air conditioner for $2,500.00. (Answer Brief p. 57.) This argument is disingenuous in that it ignores expert testimony establishing reasonable necessity. The Romeros fail to address substantial evidence of the Shih-Ko's necessity as established by the expert witnesses, including Mr. McCormick. He offered testimony that if the Shih-Kos could not continue to use the Disputed Area, the driveway would be too narrow severely limiting vehicle use and there would be insufficient turnaround room, onsite parking and room between the block wall and garage. [RT 310:9-311:25; 312:14-315:21; RA Vol. 1 pp. 203-212 (Trial Exhibit 739); 319:3-15; RA Vol. I pp. 206-208 (Trial Exhibit 739 pp. 4-6); 315:24-316:13; 323:22-324:18; RA Vol. I pp. 181-183 (Trial Exhibit 620); 430:19-431:1.] The Romeros do not mention Mr. McCormick's testimony that without the

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[7] The Romeros further argue that there was no evidence that Edwin Cutler used more than the first 30 feet of the driveway or parked his cars in the garage. To the contrary, Shewmake testified that the Cutlers used the entire driveway. [RT 154:10-22; AA Vol. IV p. 510 (Trial Exhibit 92 p. 4); RT 160:28-161:8; 175:7-17.] The Romeros' reference to an alleged citation issued by the City to the 643 Property for converting the garage into a living space has nothing to do with reasonable necessity and therefore is irrelevant.

easement there is no reasonable alternative way to widen the driveway that would not result in considerable expense. [RT 324:20-325:19; 337:6-26; RA Vol. I p. 181-183 (Trial Exhibit 620).] Further, Daniel Poyourow ("Mr. Poyourow") testified that without an easement, the value of the 643 Property would be diminished by $133,000. [RT 525:9-26.]

Third, the Romeros argue that there was no evidence that if the Shih-Kos did not have use of the Disputed Area, that they would have to tear down any structures. (Answer Brief pp. 57-58.) The Romeros misunderstand the relevance of the evidence presented at trial. The Shih-Kos were not suggesting that structures would have to be torn down if they did not have the use of the Disputed Area. Rather, the Shih-Kos relied on Mr. McCormick who testified that there were no reasonable alternative options to maintain an adequate driveway width 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.]

Fourth, the Romeros argue that reasonable necessity was not established because the Shih-Ko's did not testify. (Answer Brief pp. 58-59.) This argument is of no consequence. The facts to establish reasonable necessity were established by the experts who evaluated the width of the driveway, accessibility to allow cars to traverse the driveway and the ability to turn around. In addition, contrary to the Romeros' arguments, there is evidence that the Improvements continue to be used by the 643 Property. Indeed, the Romeros' Third Amended Verified Complaint contains photographs of the Shih-Ko's tenants use of the Disputed Area which they complain constitutes a trespass and a nuisance. [AA Vol. I pp. 95-102.] Indeed it is hard to imagine why the Shih-Kos have litigated this case for over six (6) years to establish the existence of an easement if they are not using the Improvements.

Fifth, the Romeros argue that the Shih-Kos have the ability to park on the street, some small vehicles can use the driveway and the lack of a turnaround space is of no consequence. (Answer Brief p. 59.) This is nothing more than an invitation for this court to re-weigh the evidence and a re-argument of the evidence that the Romeros believe support their position. The re-weighing of evidence and the rearguing the losing party's position is not permitted on appeal. (*Tusher v. Gabrielsen* 68 Cal.App.4th at 143. ("It is elementary that we will not engage in a reweighing of the evidence.")

Therefore, the trial court correctly determined from the evidence presented at trial that the Improvements are reasonably necessary for the benefit of the 643 Property.

B. Response To The Romeros' Arguments Regarding The Court Of Appeal's Opinion Concluding That An Exclusive Implied Easement Can Only Be Found Where The Easement Is Necessary For Public Health Or Safety Or Is *De Minimis*

The Court did not invite the parties to brief the Court of Appeal decision's finding that an exclusive implied easement can only be found where the easement is necessary for public health or safety or is *de minimis*. Instead, the Court specifically limited briefing to whether the trial court correctly found the existence of an implied easement under the facts. Nevertheless, the Romeros devote most of their argument in their Answer Brief to whether the Court of Appeal correctly concluded that the rationale precluding exclusive prescriptive easements also applies to implied easements. The Court should not consider the Romeros' arguments.

However, to the extent that the Court considers the Romeros' uninvited briefing, the Shih-Kos hereby address the arguments made by the Romeros.

1. Cases Support Implied Easements For Exclusive Uses

The Romeros fail to materially distinguish several cases that permit implied easements for an exclusive use or uses similar to the uses in this case. By definition, California Civil Code section 1104 recognizes that an implied easement may be found where the use is permanent:

> The 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.)

Miller and Starr state that "an easement may be implied where a building on the quasi-dominant tenement encroaches on the quasi-servient tenement as a result of the conveyance." (6 Miller & Starr Cal. Real Estate (4th ed. 2021) Easements, §15:20, p. 15-95.) Miller and Starr then cite to the following three (3) cases:

1. *Zeller v. Browne* (1956) 143 Cal.App.2d 191. The Court granted plaintiff an implied easement for a walkway,

stairway and retaining wall in favor of Lot 39. Lots 39 and 40 were hillside properties and each had their own entrances. Lot 39 (the dominant tenement) used a walkway, stairway and retaining wall which encroached onto Lot 40 (the servient tenement) to access the upper level of Lot 39. (*Id.* at 192.) Despite the fact the encroaching improvements were used exclusively by plaintiff, the court found an implied easement based on the fact the improvements existed at the time ownership of Lots 39 and 40 was severed, and the continued use of the improvements was reasonably necessary for Lot 39. (*Id.* at 194-95.)

The Romeros concede that in *Zeller v. Browne* the court of appeal did affirm a judgment finding an exclusive implied easement, but argue the case is distinguishable because it falls within the *de minimis* exception and because the easement in *Zeller* "was in fact necessary for ingress and egress to and from the upper levels of the house." (Answer Brief p. 41.) However, the court in *Zeller* makes no mention of relying on any *de minimis* exception to affirm the judgment for the exclusive implied easement. Further, the implied easement found by the trial court in favor of the Shih-Kos was also clearly reasonably necessary for the use and benefit of their property.

2. *Dixon v. Eastown Realty Co.* (1951) 105 Cal.App.2d 260. Defendant owned an apartment building on Lot 19 and a two-story garage on Lot 23 and six feet of Lot 21, which had been constructed when the properties were under common ownership. The buildings were separated by a 47-inch walk. Plaintiff acquired the apartment building and sued

Defendant's successor to the garage, claiming an encroachment of the garage wall (.35 feet at one corner (over 4 inches) and .015 feet at another). The garage included an elevated tower, the bottom of which was approximately 12.5 feet above ground level, that also encroached by 13.5 inches. (*Id* at 263.) The court found an implied easement for the encroaching garage. (*Id* at 264-265.) Obviously, an implied easement for an encroaching garage is an exclusive use of the surface, yet the court never mentioned that an exclusive use would bar an implied easement, nor did the court discuss the "*de minimis* rule".

The Romeros seek to distinguish *Dixon v. Eastown Realty Co.* by claiming it also falls within the *de minimis* exception. (Answer Brief p. 41.) However, like *Zeller*, there is no mention by the court of appeal in *Dixon* that it found an exclusive implied easement based upon the purported *de minimis* exception.

3. *Navarro v. Paulley* (1944) 66 Cal.App.2d 827.

This case involved an alleged implied easement for a five (5) foot garage and fence encroachment. Two adjoining lots were owned by one person who constructed a garage at the rear of the properties, principally on one of the lots but encroaching five (5) feet into the adjoining lot. The Court of Appeal affirmed the denial of an implied easement, stating: "So far as the garage is concerned, it may well be that the trial court drew the inference from the testimony that it could be moved from its location straddling the boundary line to a location entirely on defendant's property without any great hardship to the defendant. There is, therefore, substantial evidence to support the findings of fact, and

the judgment." (*Id*. at 830.) The importance of this case is that the Court of Appeal recognized that an implied easement could be available for exclusive use because in analyzing whether an implied easement could be found, the Court of Appeal did not say that an implied easement could not be found because the use at issue (an encroaching garage) was exclusive.

The Romeros attempt to distinguish *Navarro v. Paulley* pointing out that the court found no implied easement in that case. (Answer Brief pp. 41-42.) Of course, the importance of the *Navarro* case is that the court recognized an implied easement could be available for exclusive use because in analyzing whether there was an implied easement, the court did not reject that an implied easement could not be found because the encroaching garage made the easement exclusive.

In addition to these three (3) cases cited by Miller and Starr, there are additional cases where implied easements were found for exclusive use. Those cases include:

4. *Owsley v. Hammer* (1951) 36 Cal.2d 710. This case allowed an implied easement in favor of lessee for an apparent exclusive use by the lessee. The owner-lessor of a building under construction exhibited blueprints to defendant-lessee of a store in the building. These showed a patio, display windows and entrances from the street. The court of appeal held that the plaintiff, the owner's successor, had no right to close the passageways and patio. Access to the street and use of the patio for display of merchandise were contemplated by the parties when the lease was made and were reasonably necessary for the full

enjoyment of the leased premises. (*Id.* at 720.)

The Romeros seek to distinguish *Owsley v. Hammer* arguing that the court simply found that there was an "apparent" exclusive use. (Answer Brief p. 42) However, a fair reading indicates that the use was exclusive, given the extent of the improvements at issue in that case. Again, there was no discussion in *Owsley* about whether exclusive use would bar the implied easements.

5. *Horowitz v. Noble* (1978) 79 Cal.App.3d 120. This case involved a black topped driveway/access passageway providing access to a garage on the dominant tenement (Lot 2, an apartment building with a garage) which overlapped or encroached by twelve (12) feet onto the servient tenement (Lot 1, a vacant lot). The Court specifically found that the dominant tenement (Lot 2, apartment building/garage) holder did not have enough room on his own property but had to cross the property line to access the garage. (*Id.* at 717-718.) There is no indication that the owner of the servient tenement (Lot 1, the vacant lot) used the passageway at all, but the court granted an implied easement in favor of the dominant tenement without any discussion about whether exclusive use of the passage way would bar an implied easement.

The Romeros do little to try to distinguish *Horowitz v. Noble* other than to state that the road use easement was not exclusive to either property owner. (Answer Brief p. 42.) However, the 12-foot encroachment was an access easement to the dominant tenements holder's garage. Further, there was no

discussion about whether exclusive use would bar the implied easements.

Therefore, the foregoing implied easement cases are authority that implied easements for a limited exclusive use are permissible. There is no mention in these cases that exclusivity would bar an award of an implied easement. There is also no mention in these cases of the *de minimis* rule.

2. There Is No Authority That Supports The Romeros' Argument That An Exclusive Implied Easement Can Only Be Found Where The Easement Is Necessary For Public Health Or Safety, Or Is *De Minimis*

The Romeros cite to no authority (other than the Court of Appeal decision below) for their argument that "the rationale for precluding court ordered *exclusive* prescriptive easements which are not de minimis or necessary for public health and safety should apply to all court ordered easements, including the implied easement ordered by the trial court". (Answer Brief p. 12.) In its decision, the Court of Appeal asserted there were two exceptions where exclusive **prescriptive** easements have been allowed: (1) cases involving utility services or important essential public health and safety purposes (citing *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 104); and (2) cases involving the so-called *de minimis* rule. (Citing *McKean v. Alliance Land Co.* (1927) 200 Cal. 396.) These cases did not involve implied

easements, nor did they purport to articulate "exceptions" that must exist before an exclusive easement of any type could be found.

Otay's application was limited to cases involving prescriptive easements. Even with respect to prescriptive easements, it does not purport to limit an exclusive prescriptive easement solely to "health and safety purposes." Similarly, *McKean* did not involve a claim of implied easement. In fact, the defendant did not allege it was entitled to any type of easement, nor did the court refer to an easement in the decision. In affirming the judgment of the trial court which denied plaintiff a mandatory injunction and instead awarded nominal damages, the court simply held: "It is also true, as a general rule that the court should not interfere by way of mandatory injunction . . . where the injury is so slight as to bring it within the maxim *de minimis*, or full compensation can be made in damages." (*Id.* at 399.)

Therefore, the Romeros have failed to cite to any case holding that an exclusive implied easement can only be found for public health or safety purpose, or for a *de minimis* use. In fact, there simply is no such limitation in the law with respect to implied easements.

3. The Rationale Precluding Exclusive Prescriptive Easements Does Not Apply To Exclusive Implied Easements

The Romeros contend that the rational for precluding exclusive prescriptive easements applied equally to preclude exclusive implied easements, citing a litany of prescriptive easement cases. (Answer Brief pp. 32-39.) To the contrary, the rationales for prescriptive and implied easements are in fact quite different.

The rationale for prohibiting prescriptive easements for exclusive use is to avoid an end run around the requirement that taxes be paid to satisfy the elements of adverse possession. As the court in *Hirshfield v. Schwartz* (2002) 91 Cal.App.4th 749 explained, prescriptive easement cases concern themselves solely with defending the integrity of the adverse possession laws. (*Id.* at 767-768 [decisions restricting the scope of prescriptive easements are not applicable].) This rationale does not apply to easements by implication.

Implied easement cases are not concerned with defending the integrity of adverse possession laws, and in fact there is no implied easement case that makes any mention of adverse possession. Rather, the concern in implied easement cases is to imply the grant of an easement based on the party's intention to transfer the obvious burdens and benefits with the property conveyed. (*Horowitz v. Noble* 79 Cal.App.3d at 131-132.)

The element of intent for prescriptive easement is also very different from cases involving an easement by implication. The grant of adverse possession or a prescriptive easement requires an intent to dispossess the owner of the disputed property. (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321-322.) Thus, prescriptive easements arise from a hostile act or a trespass.

By contrast, the rationale for implying an easement is based on the preexisting use of the quasi-dominant tenement in such a manner that the parties must have intended the continued use after the transfer of title. (*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 8.) An implied easement exists to affirm a permanent use that existed at the time of separation of title which is consistent with the intent of the grantor. (*County of Los Angeles v. Bartlett* (1962) 203 Cal.App.2d 523, 529-530.)

Thus, because the rationales for and the elements of prescriptive and implied easements are not the same, prescriptive easement case law is not applicable to implied easements.

4. There Is A Dispute Whether The Easement Is Exclusive

The Romeros argue that there is no dispute that the easement is exclusive. (Answer Brief p. 42.) The Shih-Kos do not concede that the easement is for an exclusive use. The implied easement found by the trial court is a limited use and does not

amount to fee title. Mr. Poyourow, an appraiser, testified to air and subsurface uses, as well as the ability of the Romeros to include the surface square footage in calculations to increase the size of a permissible structure on their property, which was "really important and a big value to the 651 Property." [RT 581:19-582:18.]

5. The Granting Of An Exclusive Implied Easement Does Not Contravene The Maxim That Equity Must Follow The Law

The Romeros argue that if the easement is exclusive, then the trial court's decision contravenes the maxim that equity must follow the law and the only way to obtain title to property is by adverse possession and compliance with California Code of Civil Procedure section 325 which includes payment of taxes. The argument continues that because the Shih-Kos presented no evidence of the payment of taxes, they cannot meet the statutory requirements of adverse possession. (Answer Brief pp. 44-47.) This argument is meritless.

The Shih-Kos did not assert a claim for adverse possession, rather, the Shih-Kos pled causes of action for implied and equitable easements, both of which allow for exclusive use. Thus, the trial court did follow the law. In any event, courts sitting in equity have flexibility in affording relief. The court in *Hirschfield v. Schwartz* (2001) 91 Cal.App.4th 749 in granting an equitable easement recognized that "[t]he powers of a court of

equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity, a wide play is left to the conscience of the chancellor in formulating his decrees." (*Id.* at 770-771.)

Therefore, the trial court correctly followed the law in awarding an implied easement.

C. The Romeros' New Argument That Judicially Created Easements Violate The Due Process Clause And/Or Takings Clause Is Without Merit

1. The Romeros' Due Process/Takings Clause Argument Should Not Be Considered

In their Answer Brief, the Romeros argue that exclusive easements, whether implied or equitable[8] violate the Due Process Clause and/or Takings Clause of the United States Constitution. (Answer Brief pp. 60-65.) Because the Romeros did

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[8] Recognizing that the court denied review of exclusive equitable easements, the Romeros contend that this issue is "fairly included in the issue upon which this Court granted review" citing to California. Rules of Court, Rule 8.516(a)(1).) (Answer Brief p. 65, fn.1.) Not so. This new issue cannot be deemed to be fairly included in the Court's request that the parties brief the single issue of whether the trial court correctly granted an implied easement based on the facts at trial. The Court has denied the Romeros' Petition to Review the Court of Appeal's finding of the existence of an equitable easement. Under these circumstances, it can hardly be said that it is fairly included in the narrow issue to be briefed before the Court.

not raise this issue on appeal to the Court of Appeal, it should not be considered by this Court. "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." *California Rule of Court*, Rule 8.500(c)(1); *see also Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481 ("We do not consider this argument because defendants did not raise it in the trial court, in the Court of Appeal, or in their petitions for review by this court.") Accordingly, the Romeros' Due Process/Takings Clause argument should not be considered by this Court.

2. The Romeros' Due Process/Takings Clause Argument Is Not Supported By Law

In the event the Court considers the issue, there is no authority that a judicial determination of an implied easement violates the Due Process Clause and/or Takings Clause of the United States Constitution. The cases cited by the Romeros do not apply.

The Takings Clause states that "private property [shall not] be taken for public use, without just compensation." *United States Constitution, Amendment* 5. Here, the implied easement found by the trial court in favor of the Shih-Kos did not result in any property of the Romeros being taken for public use and therefore cannot constitute a taking as a matter of law.

Significantly, the Romeros cite no implied easement case in support of their Due Process/Takings Clause

argument. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 560 U.S. 702 cited by the Romeros did not involve an implied easement for private use. Rather, it involved the alleged taking of private beach property to become property of the state of Florida. [9]

Furthermore, *Stop the Beach* in no way found that a judicial decision could constitute a taking. As noted in the recent case of *Pavlock v. Holcomb* (7th Cir. 2022) 35 F.4th 581, 586, "The Supreme Court last considered the judicial-takings question in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, but in that case, no majority of the Court agreed on 'whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause[.]' [citations omitted]. **Since then, neither this court nor any of our fellow circuits have recognized a judicial-takings claim."** (*Id.* at 586 [emphasis added].)

Here, the trial court's decision finding an implied easement, and in the alternative, an equitable easement, in favor of the Shih-Kos clearly did not constitute a taking of real property by a governmental entity for public use and therefore was not a violation of the Takings Clause.

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[9] The Romeros citation to cases discussing the "bundle of rights" and the importance of the right to exclude similarly do not hold that implied easements for private use could ever amount to a taking. Nor do any of the cited cases hold that a judicial decision could ever amount to a taking.

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: October 17, 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 Reply' Brief on the Merits ("RBM") consists of 7,504 words as counted by the Microsoft Word 2019 word-processing program used to generate the entire RBM.

Dated: October 17, 2022

SONGSTAD RANDALL
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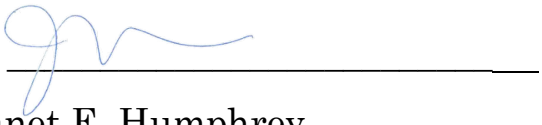

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Cesar Romero, et al. v. Li-Chuan Shih, et al.

California Supreme Court Case No. S275023

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STATE OF CALIFORNIA
Supreme Court of California

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