B259102

IN THE

COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
Division Six

JOANNE HABIBI and ALI HABIBI,
Plaintiffs & Appellants,

vs.

RAMIN SOOFER and DENISE SOOFER,
Defendants & Respondents.

Appeal from the Superior Court of California,
County of Santa Barbara
The Hon. James Herman (case no. 1383317)

APPELLANTS' OPENING BRIEF

John Derrick, SBN 223308
THE LAW OFFICE OF JOHN DERRICK,
a professional corporation
21 E. Pedregosa Street
Santa Barbara, CA 93101
805 284 1660
jd@californiaappeals.com

Attorney for Appellants
JOANNE HABIBI and ALI HABIBI

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INTRODUCTION

This is an appeal following the grant of summary judgment in a driveway easement case. Despite finding a triable issue of fact as to the settled elements of adverse possession, the Superior Court granted summary judgment after making a novel and unsupported ruling that the Subdivision Map Act and issues of public safety preempted an otherwise triable claim, thereby making adverse possession unachievable as a matter of law.

The Facts in a Nutshell

Appellants and respondents own adjacent properties. To reach respondents' property, one uses a driveway easement that crosses appellants' property. When the parcels were created through a lot split in 1972, the easement over appellants' property was recorded as 20 feet in width. But the paved area was never, in fact, more than 12 feet wide.

When appellants bought their property in 2000, they put landscaping and other obstructions in the non-paved area of the easement, essentially making it part of their yard. After respondents bought their property some 11 years later, they took it upon themselves to bulldoze this area, insisting they were entitled to a 20-foot driveway.

The Error in a Nutshell

Appellants filed a lawsuit claiming adverse possession over the area they had occupied. Respondents filed a motion for summary judgment. The Superior Court

appeared to agree that there was a triable issue of fact as to the long-settled elements of adverse possession — i.e., actual possession, open and notorious use, continuous and uninterrupted for five years, hostile and adverse, and so forth.

Nevertheless, the court granted summary judgment on two erroneous legal bases:

- The court ruled that because the two lots came about through a recorded lot split, which gave rise to the easement, any adverse possession claim was preempted by the Subdivision Map Act ("SMA"). Thus, according to the court, any change to the easement had to be made by application to the County. This ruling was flawed on multiple grounds. For a start, the 1972 lot split creating the two parcels did not fall within the purview of the SMA at the time, since, back then, only splits involving five or more parcels constituted a "subdivision." That aside, as a matter of law the SMA does *not* preempt adverse possession claims about the width of easements. Case law indicates exactly the opposite.
- The court also ruled that adverse possession could not take place, because a narrower driveway than that envisaged in the 1972 lot split supposedly created a fire hazard. The court stated that it was, *sua sponte*, taking judicial notice of the wild fire risk in Santa Barbara County. There was no legal basis for

such a ruling. There is no "public safety" exception to claims for adverse possession. And, even if there were, there would, at a minimum, have been a triable issue of fact as to whether such concerns were well-founded, since evidence before the court showed that both the County and the local Fire District were fully aware of the narrower driveway and satisfied that it met existing safety standards.

Similar issues concern a separate part of the driveway — originally designated as 30 feet in width — which crosses another property, which wasn't part of the 1972 lot split, and then continues into the 20-foot section just discussed.

The judgment should be reversed so that the claims can proceed to trial.

STATEMENT OF THE CASE

Plaintiffs and appellants Joanne and Ali Habibi filed a first amended complaint against Ramin and Denise Soofer asserting various causes of action to do with a driveway easement. (1 App. 18.) For the purposes of this appeal, three of those are at stake:

- First cause of action for declaratory and injunctive relief. (1 App. 27.)
- Second cause of action to quiet title to portions of a 30-foot easement by prescription. (1 App. 30.)

- Fourth cause of action to quiet title to a portion of a 20-foot easement by adverse possession.[1] (1 App. 30.)

Also named were various other defendants who are no longer part of the litigation. (1 App. 18.) The Soofers cross-complained. (1 App. 103.)

The Soofers brought a motion for summary adjudication of, among other things, each of the three causes of action listed above. (2 App. 136-137.) After a hearing, the court granted the motion as to each of those. (5 App. 883.) It denied all evidentiary objections filed by both sides. (5 App. 885.)

Separately, all the remaining causes of action — in both the first amended complaint and cross-complaint — were dismissed, either as a result of an earlier demurrer or subsequently by the parties themselves. (1 App. 893.) Thus, with no causes of action remaining, the court entered judgment on July 25, 2014.[2] (5 App. 892.) This appeal followed.

Before the dismissal of all the other causes of action between the parties, the Habibis filed a petition for a writ

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[1] This was mistakenly identified on the caption of the first amended complaint as the third cause of action.

[2] The motion began as one for summary adjudication, since it did not seek the dismissal of all the causes of action existing between the parties at that time. However, the dismissal of the others meant that it ended up, in effect, a motion for summary judgment. For the sake of simplicity, this brief will refer to this as a "summary judgment" case, not a "summary adjudication" one.

of mandate. This Court summarily denied that. (See case number B249955.) Joining in the denial, Justice Gilbert wrote: "I join in the denial, but wish to stress that the denial is without prejudice to any parties' right to seek relief on appeal, if at that time they deem such action appropriate."

STATEMENT OF APPEALABILITY

The judgment entered pursuant to the Superior Court's order granting the motion for summary judgment is an appealable final judgment pursuant to Code of Civil Procedure sections 904.1 and 906.

STATEMENT OF FACTS

All of the facts in this narrative are drawn from the parties' separate statements and evidence cited therein.

Undisputed Evidence re the Parties, their Properties, and the Easement

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Plaintiffs and appellants Joanne and Ali Habibi own their home at 228 Ortega Ridge Road in Santa Barbara. (2 App. 166 #2; 3 App. 359 #2.[3]) The neighboring property on one side — 226 Ortega Ridge Road — is owned by defendants and respondents Ramin and Denise Soofer.[4] (2 App. 166 #1; 3 App. 359 #1.) The neighboring property on the other side — 230 Ortega Ridge Road — is, for the purposes of this narrative, referred to as the Burney one.[5] (2 App. 167 #11; 3 App. 361 #11.)

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[3] With undisputed facts, this narrative cites only to the competing separate statements to establish the agreed fact. In addition, it cites only to the Soofers' separate statement for disputed facts, where the Habibis accept that the source evidence supports the summary in the separate statement itself. Where the Habibis seek to show a triable issue of fact with respect to material issues based on *their* evidence, the narrative cites both to their separate statement and to the source evidence cited therein.

[4] Or, more specifically, their trust. For the sake of simplicity, this narrative will dispense with the names of family trusts which formally hold title.

[5] Burney is also referred to in parts on the record as Schwabacher. Burney — although originally a defendant in the underlying action — is no longer involved.

The relative locations of the three properties is shown in a plan, which was included in the Soofers' moving papers for "illustrative purposes" and was also part of the Habibis' complaint. (2 App. 176, 177.) For the convenience of the Court, this is included in the addendum at the back of this brief. (Cal. Rules Ct., rule 8.204(d).) From left to right on that plan, the first lot is the Burney one. To its right is the Habibi one. And to *its* right is the Soofer lot.

The Soofer parcel has a recorded 20-foot easement for access purposes over the Habibi parcel. (2 App. 167 #6; 3 App. 360 #6.) And both the Soofer and Habibi parcels have a recorded 30-foot easement for ingress and access over the Burney parcel. (2 App. 167 #11; 3 App. 361 #11.) These easements are shown on the illustrative plan as a driveway, which crosses the Burney and Habibi properties and leads up to the gate of the Soofer property. (2 App. 177.) In other words, to get to the Habibi property, one has to use the easement over the Burney lot. And to get to the Soofer property, one first has to use that easement and then proceed along the easement over the Habibi property — which is a continuation of the same driveway.

The Soofer and Habibi parcels were created through a 1972 three-way division of a single larger parcel. (2 App. 166 #3; 3 App. 359 #3.) The three parcels created by the 1972 lot split included the Habibi and Soofer properties and a third parcel — not the Burney one — that isn't

involved in this litigation. (2 App. 166 #3, citing to 3 App. 316 [third property was at 2176 Lillie Avenue].)

During the approval process for the 1972 lot split, the Summerland-Carpinteria Fire Department submitted a letter to the County, which referenced a driveway with "a minimum graded width of 20 feet" over the Habibi property. (2 App. 166 #4; 3 App. 359 #4.) Thus, the officially recorded parcel map shows a 20-foot easement across the Habibi parcel for the benefit of the Soofer property. (2 App. 167 #6; 3 App. 360 #6.) That recorded parcel map has never been modified; it remains the same as it was at the outset in 1972. (2 App. 167 #10; 3 App. 361 #10.)

The Habibis purchased their parcel in 2000. (2 App. 168 #18; 3 App. 362 #18.) At the time, they were aware of the 20-foot access easement. (2 App. 167 #8; 3 App. 360 #8.) The Soofers bought their property next to the Habibis' in 2011. (2 App. 169 #25; 3 App. 365 #25.[6])

As noted above, the Soofers' easement over the Habibi property was recorded as 20-feet wide. (2 App. 167 #6; #App. 360 #6.) In reality, however, the paved driveway was approximately 12 feet wide. (2 App. 168 #15; 3 App. 362 #15.) When the Habibis purchased the property, there

[6] The Habibis disputed this fact only to extent of pointing out that it was the Soofer family trust that obtained title. (3 App. 365 #25.)

was already some fenced-off landscaping in the remainder of the easement area. (2 App. 168 #19; 3 App. 362 #19.)

Thus, the illustrative plan shows a paved surface width of 12.5 feet, with a 7.5-foot strip running along its northern edge. (2 App. 177.) This litigation concerns the Habibis' claims to that 7.5-foot strip and the similar one at the northern edge of the 30-foot easement crossing the Burney property.

Disputed or Partially Disputed Evidence re Obstructions in Easement

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The Soofers presented evidence that the Habibis' expanded the landscaping within the unpaved area of the easement, including by placing rocks, a trellis, trees, flowers and a 4-inch brick border. (2 App. 168 #20.) They also presented evidence that the Habibis' planting extended into the 30-foot easement on the Burney property. (2 App. 168 #21.) But, in addition, they put forward evidence that this didn't prevent anyone from walking through the area. (2 App. 169 #23.)

The Habibis did not dispute the fact that they expanded the landscaping into these areas, but disputed the Soofers' account of the extent and impact. (3 App. 363 #20; 3 App. 363 #21; 3 App. 364 #23.) The Habibis' evidence was that it effectively prevented others from using this area. For example, Joanne Habibi testified that it was

difficult to walk through the areas they had improved and landscaped because of the density of what was planted there, the number of boulders, and the presence of a hedge; although she would go into the area to maintain the land, she had to use care and caution in doing so. (3 App. 360 #20, citing to 3 App. 488 [Joanne Habibi declaration].) She realized that the previous owners of the Soofer property considered that this prevented the use of this area, but stated that she had told them that this was her intent and that she and her husband were claiming prescriptive title. (3 App. 364 #23, citing to 3 App. 480.)

A person who resided between 1980 and 2006 at 226 Ortega Ridge Road (i.e., in what later became the Soofer property) testified that the Habibis brought in "huge" rocks and boulders, which they placed on both sides of the paved driveway area; he also spoke of the "numerous" trees, yucca plants, and other landscaping elements; he said that the landscaped area was not useable for driving or walking through, because of all the obstacles, added to which he would have felt he was trespassing on the Habibis' property; this didn't matter, however, since the paved area was wide enough; all of this remained the case until he moved away in 2006. (3 App. 363 #20, citing to 4 App. 607-609 [David Hernandez declaration].) A contractor who worked at 226 Ortega Ridge Road before the Soofers owned it testified that it was "obvious" to him that the landscaped areas at issue had become the Habibis' private

yard and patios for their exclusive use. (3 App. 363 #20, citing to 4 App. 629 [Jon Rasmussen declaration].)

Disputed or Partially Disputed Evidence re the Purpose of the Easement

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The Soofers claimed that the "purpose" of the 20-foot wide easement was for "public safety." (2 App. 167 #7.) They cited to a declaration by Brad Avrit, a civil and safety engineering expert whom they had retained. (2 App. 167 #7, citing to 3 App. 328-330.) Avrit relied for his opinion on the conditions pertaining to the creation of the lot split in 1972. (3 RT 328.) He also opined that a purpose of having a 20-foot easement is to allow two vehicles to pass one another, including in an emergency, but did not cite to any authority for that specific proposition other than his own judgment. (3 App. 328-329.)

The Habibis disputed this. (3 App. 360 #7.) Referring to the verified allegations in the first amended complaint, they said the easement was for access. (3 App. 360 #7 citing to 2 App. 182.) They also responded that the evidence was immaterial, since public safety does not feature in the elements for adverse possession. (3 App. 360 #7.)

In an amended version of their separate statement, filed two days later, they cited to additional evidence that was wholly contrary to the Soofers' contention that the

purpose of the 20-foot easement was for public safety.[7] (4 App. 808 #7.) Specifically, they produced evidence that for 10 years or more, the local fire department and the County had been fully aware of the actual width of the driveway and fully content with it (4 App. 808 #7, citing to the materials summarized below):

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[7] The amended separate statement was filed on May 24, 2013, two days after the deadline for an opposition. (4 App. 805.) The additional evidence to which this amended document cited was in the original set of exhibits, however. While a court has discretion to refuse to consider late-filed papers when ruling on a motion, the court minutes or order *"must"* so state when this discretion is exercised. (Cal. Rules Ct., rule 3.1300(d), emphasis added.) Here, the court noted the late filing of the amended opposition, but did not strike the amended separate statement or indicate that it would not consider it; it indicated only that it would not consider the late-filed evidentiary objections that came with them. (5 App. 885.) The Soofers had filed an objection to the late filing. (4 App. 844-845.) However, they did not secure a ruling on this objection except as to the Habibis' evidentiary objections. Generally, waiver occurs where a party does not secure a ruling on an objection. (See, e.g.: *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129 [evidentiary objections]; *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1087, fn. 5 [objection to assertion of affirmative defense that had not been properly pled]; *People v. Valdez* (2012) 55 Cal.4th 82, 122 [objection to improper ex parte communications]; *People v. Vargas* (2001) 91 Cal.App.4th 506, 534 [laches objection to enforceability of plea bargain].) The Habibis do not believe that this evidence is ultimately material to the legal issue before the Court, since "public safety" is not a defense to adverse possession. But, for the reasons just stated, the evidence should be considered as part of the evidentiary pool if the issue is reached.

- In March 2003, Chief Martinez — the then fire chief of the Carpinteria-Summerland Fire Protection District — wrote to Skip Prusia — the then owner of 226 Ortega Ridge Road[8] — that the easement was considered "grandfathered" and that "there would be no basis" for the Fire District to mandate the owners to widen the driveway to conform to what he described as the "recommendations" the District had issued in 1972. (4 App. 702.) This letter came about after Prusia had contacted the Fire District asking them to take up the issue — Prusia, like the Soofers after him, wanted a 20-foot paved approach to his house. (4 App. 697, 701.) The Fire District was advised by its outside counsel[9] at the time that not only would there be no basis for it to mandate a wider paved area, but there would be no basis for "*any* regulatory agency" to do so, either. (4 App. 701, emphasis added.) Plainly, therefore, in 2003 the Fire District did not consider the width of the driveway to raise safety concerns.

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[8] Prusia was identified as a former owner of the property in various parts of the cited materials. (See, e.g., 4 App. 698 [handwritten note regarding Prusia wanting to talk about "blocked easement"].)

[9] Mark Manion, who gave this advice, is identified elsewhere in the cited papers as an attorney at the law firm of Price, Postel & Parma. (See, e.g., 4 App. 743.)

- Later that year, in December 2003, Ed Foster — an inspector from the Fire Prevention Bureau — wrote to the County's Planning and Development department setting forth the fire protection requirements for a planned remodel and unit addition at 226 Ortega Ridge Road. (4 App. 719-720.) He listed nine separate requirements. (4 App. 719-720.) Widening the paved area of the easement was *not* one of them.
- Shortly after, and in response to a further request from what appear to have been the Soofers' then-attorneys, Foster stated that the "private driveway" necessary for the project at 226 Ortega Ridge Road would need to be a minimum of 12 feet wide. (4 App. 721.) A "private roadway" — which apparently would lead up to the private driveway — would need to be 16 feet in width. (4 App. 721.)
- In March 2005, the Prusias' continued to press the point, trying to get the Fire District to require a 20-foot width. (4 App. 740.) Responding, the Fire District indicated that it approved wording on a covenant and deed restriction pertaining to the property that spoke of a 20-foot driveway *"unless some reduced width is agreed to by the Fire District."* (4 App. 741, emphasis added.) So, once again, the Fire District was refusing to enforce a 20-

foot requirement. The "unless agreed" part captured the point — it *had* agreed to the narrower one.

- The matter of the driveway width was raised yet again some six years later when the Soofers bought their property. (4 App. 750.) In September 2011, the Carpinteria-Summerland Fire Protection District wrote to lawyers apparently retained by the Soofers: "The section of the driveway fronting on 228 Ortega Ridge Road [the Habibi residence] *is currently in compliance with the fire district requirements*. This section of driveway serves the property at 226 Ortega Ridge Road and was *measured at twelve feet*." (4 App. 751, emphasis added.) The same letter also found other portions of the driveway to be acceptable. For the convenience of the Court, a copy of this letter is included in the addendum at the back of this brief. (Cal. Rules Ct., rule 8.204(d).)

Also cited in the amended Habibi separate statement were certified copies of the County Planning and Development permit history for 226 and 228 Ortega Ridge Road showing numerous permits being processed between 2000 and 2011 without any indication that the driveway width was an issue. (4 App. 808 #7, citing to 4 App. 639-642.)

In addition, the amended separate statement drew to the court's attention the aforementioned covenant and deed restriction (CDR), in which the Prusias were given

permission to add a second unit to their property and conduct other construction without any change to the easement driveway over the Habibi and Burney properties. (4 App. 808 #7, citing to 4 App. 744.) The CDR was executed and recorded in May 2005 and was between the Prusias (or, technically, an entity they owned) and the Fire District. (4 App. 744, 746-747.) In this document, the Prusias agreed to certain restrictions binding on them *and* their successors-in-interest in return for being able to make the various improvements to their property. (4 App. 744.) The document — while, in part, a little difficult to understand without reference to explanatory information — is significant for two reasons that are plain on its face:

1. It shows that the easement across the Habibi property was no longer the *only* fire access.
2. The parties, as part of the covenant, expressly *agreed* that the easement across the Habibi property was to remain the same.

Specifically, the recitals noted that the 226 property now benefited from additional "emergency and secondary" access through a neighboring development known as Summerland Heights and a road named Meadows Lane (originally Summerland Heights Lane). (4 App. 744.) This was referenced as meeting "the minimum standards for emergency and fire access road requirements." (4 App. 745.)

The CDR provided that in the event that the Summerland Heights secondary access ceased to be available, the owners of 226 Ortega Ridge Road would have to construct a different 20-foot roadway to replace it. (4 App. 745.) Crucially, referring to the existing driveway easement across the Habibi and Burney properties, it added: "The portion of the access road located from the intersection of Summerland Heights Road to the [226] Property shall remain as improved.[10]" (4 App. 745.) The term "as improved" referred to the *existing* state of the driveway. (See Black's Law Dictionary (10th ed. 2014) ["to improve" land means to develop it, whether this results in an increase or a decrease in value].) So the Prusias — binding themselves *and* their successors in interest — agreed to leave the width of the paved driveway across the Habibi and Burney properties as it stood in 2005.

Undisputed Evidence re the Soofers' Action in Paving Over the Disputed Portion of the Driveway

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After the Soofers bought their property, they advised the Habibis that they intended to expand the paved portion

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[10] There is a map (also included in the materials cited in the amended separate statement), which, although truncated, points to the "subject property" — apparently referring to 226 — at one end of a roadway leading from an intersection with Summerland Heights Lane. (4 App. 808 #7, citing to 4 App. 724.) That is the portion containing the existing access that was to remain unchanged.

of the driveway. (2 App. 169 #27; 3 App. 365 # 27.) Subsequently, the Soofers took it upon themselves to do just that. (2 App. 170 #30; 3 App. 366 # 30.) The Habibis disputed this fact only in differing on the Soofers' precise choice of words; there was no substantive dispute about what objective actions the Soofers took. (3 App. 366 #30.)

The Soofers admitted that there had been no negotiated resolution. (2 App. 169 #28.) Thus, it is undisputed that they had resorted to self-help. In the process of so doing, they removed the landscaping elements and trees that the Habibis had placed in the disputed area. (2 App. 170 #31; 3 App. 366 # 31.) They dumped some of this on the Habibis' property, and had their workers remove the remainder. (2 App. 170 #32; 3 App. 367 # 32.) As a result of the Soofers' actions, the paved driveway was widened from its historical 12-feet all the way up to, or almost all of the way up to, the edge of the 20-foot recorded area. (2 RT 170 #33; 3 RT 367 # 33.[11])

[11] There was a dispute as to whether the paved width became 19.5-foot (Soofer version) or the full 20-feet (Habibi version). That difference is, for the purposes of this appeal, not material.

ARGUMENT

- 1 -

The Grant of Summary Judgment is Subject to De Novo Review and any Doubts Must be Resolved in the Habibis' Favor

"The grant and denial of summary judgment or summary adjudication motions are subject to de novo review." (*Nakamura v. Superior Court* (2000) 83 Cal.App. 4th 825, 832.) In undertaking its independent review, this Court applies the same analysis as the trial court. (*Herrington v. Superior Court* (2003) 107 Cal.App.4th 1052, 1056.)

The Court identifies the issues framed by the pleadings, determines whether the moving party has negated the nonmoving party's claims, and determines whether the opposition has demonstrated the existence of a triable issue of material fact. (*Herrington v. Superior Court*, *supra*, 107 Cal.App.4th at pp. 1056-1057.) Summary adjudication is appropriate if all the papers submitted show there is no triable issue of fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

In determining whether there is a triable issue, the Court construes the moving party's evidence strictly, and the non-moving party's evidence liberally. (*Alex R. Thomas*

& Co. v. Mutual Service Casualty Ins. Co. (2002) 98 Cal.App.4th 66, 72.) Due to the drastic nature of summary judgment, any doubts about the propriety of granting the motion must be resolved in favor of the party opposing it. (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355-356.)

The moving party in a summary judgment proceeding bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If defendants moving for summary judgment fail to meet this burden, their motion must be denied and the plaintiff need not make any showing at all. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) "There is no obligation on the opposing party… to establish anything by affidavit unless and until the moving party has by affidavit stated facts… necessary to sustain a judgment in his favor." (*Ibid.*)

This argument will initially focus on the Habibis' fourth cause of action to quiet title to the disputed portion of the 20-foot easement by adverse possession. Later, it will briefly address the first and second causes of action (the first seeking declaratory and injunctive relief, and the second to quiet title by prescription in the 30-foot easement). Those two involve — at least, in large part — the same issues.

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- 2 -

The Trial Court Correctly Found There Was a Triable Issue of Fact as to Whether the Ordinary Elements for Adverse Possession Were Met

An easement, whether created by grant or use, may be extinguished by the user of the "servient" tenement through adverse possession.[12] (*Ross v. Lawrence* (1963) 219 Cal.App.2d 229, 232.) "Under this general rule, a court may conclude that an easement has been extinguished where the owner of the servient tenement, under an adverse claim of right, with notice thereof to the owner of the dominant tenement, continuously during a period of five years, uses the servient tenement in such a manner as to obstruct its use for easement purposes by the latter owner." (*Ibid.*)

To put it another way, the general principles of adverse possession apply to reclaiming land that was previously the subject of an easement on one's property. In California, the elements of adverse possession are: "(1) tax payments, (2) actual possession which is (3) open and notorious, (4) continuous and uninterrupted for five years,

[12] As a reminder, a property benefited by an easement (i.e., the Soofer one in this case) is the "dominant tenement," while the one burdened (i.e., the Habibi one) is the "servient tenement." (*Murphy v. Burch* (2009) 46 Cal.4th 157, 163.)

(5) hostile and adverse to the true owner's title, and (6) under either color of title or claim of right." (*California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1803.)

As to the tax payments, the Soofers did not put forward any evidence that taxes were not paid, so the burden did not shift to the Habibis to put on any evidence as to that point. (See *Consumer Cause, Inc. v. SmileCare*, *supra*, 91 Cal.App.4th at p. 468.) (That said, given that it was undisputed that the Habibis owned the land over which the 20-foot easement existed, it would be reasonable to infer that they paid taxes even if the burden had shifted.)

As to the other elements, the Superior Court correctly concluded that there was a triable issue of fact as to whether the Habibis had occupied the disputed portion of the easement in a manner sufficient to gain adverse possession. (5 App. 889.) The Soofers had suggested that the planting didn't prevent access. But others testified otherwise.

According to the Habibis' evidence, it was very difficult to walk through the areas they had improved and landscaped because of the density of what was planted there, the number of boulders, and the presence of a hedge. (3 App. 363 #20, citing to 3 App. 488.) The previous owners of the Soofer property considered that this prevented their use of this area, and Joanne Habibi told

them that this was, indeed, the intention. (3 App. 364 #23, citing to 3 App. 480.)

A person who lived between 1980 and 2006 in 226 Ortega Ridge Road testified that the Habibis brought in "huge" rocks and boulders, which they placed on both sides of the paved driveway area; he also spoke of the "numerous" trees, yucca plants, and other landscaping elements; he said that the landscaped area was not useable for driving or walking through during the time until he moved, because of all the obstacles, added to which he would have felt that he was trespassing on the Habibis' property. (3 App. 363 #20, citing to 4 App. 607-609.) A contractor who worked at the 226 Ortega Ridge Road before the Soofers owned it testified that it was "obvious" to him that the landscaped areas at issue had become the Habibis' private yard and patios for their exclusive use. (3 App. 363 #20, citing to 4 App. 629.)

The Soofers didn't even try to suggest that the Habibis' actions were not spread over at least five years. The dispute was about the impact and extent of the hostile and adverse use, not the duration.

The Habibis could offer much more from the record to support the existence of a triable issue of fact (further testimony as well as photographs). But they will not labor the point, since they are in agreement with the trial court thus far. The court *expressly* stated that it was *not* granting summary judgment on these issues. (5 App. 889.) If the

argument was *simply* whether there was a triable issue of fact about the ordinary elements of adverse possession, then the trial court would have denied the Soofers' motion and this case would have been set for trial.

So the argument now turns to the points of contention. This is that the court did not limit itself to those "ordinary," settled elements of adverse possession. Rather, it imposed additional requirements of its own and granted summary judgment on that basis:

- The first was that the fact that the 20-foot easement was created as part of a lot split, supposedly meant that the Subdivision Map Act ("SMA") preempted the claim for adverse possession.
- The second was that there was, supposedly, a public-safety basis for disallowing any claim for adverse possession that would narrow the theoretical width of the easement.

As shown below, neither of those theories is supported by law.

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- 3 -
As a Matter of Law, the Subdivision Map Act Does Not Bar the Habibis' Claims for Adverse Possession

3.1 The Subdivision Map Act could not prevent adverse possession in this case, because the 1972 lot split did not create a "subdivision"

"The purpose of the Subdivision Map Act is to regulate and control the design and improvement of subdivisions with consideration for their relation to adjoining areas…." (9 Cal. Real Est. (Miller & Starr) § 25:11 (3d ed.).)

Here, it is undisputed that the Habibi and Soofer parcels were created through a 1972 division of a larger parcel into three separate ones. (2 App. 166 #3, citing to 3 App. 316.) The Soofers' theory — adopted by the trial court — was that this created a subdivision, as a result of which the concurrently recorded easement could, under the SMA, *only* be altered by going back to the County, and not through adverse possession. This theory is flawed on several grounds. The first and most basic is that the 1972 lot split did *not* create a "subdivision" under the law that existed at the time. While all subdivisions may involve lot splits, not all lot splits create subdivisions.

In *Bright v. Board of Supervisors* (1977) 66 Cal.App. 3d 191, the "only" issue was whether an owner's "proposed division of land [was] subject to the Subdivision Map Act." (*Id.* at p. 193.) This involved examining whether there was substantial evidence that a proposed plan constituted a "subdivision." (*Id.* at pp. 193-194.) In order to answer that question, the Court examined which types of actions involving land fell under the scope of the SMA, pointing out that subdividing land without complying with the Act was a criminal offense. (*Id.* at p. 193.)

As it happened, the *Bright* Court answered this question citing to the law in 1972 — the same year in which the lot split in the *present* case took place. It wrote:

> At the time this decision was made, the applicable statute defined a subdivision as '. . . any real property, improved or unimproved, or portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, which is divided for the purpose of sale, lease, or financing, whether immediate or future, by any subdivider into *five or more parcels*; . . .' (Stats.1972, Ch. 706, p. 1287; formerly Bus. & Prof.Code § 11535; now Gov.Code §§ 66424, 66411-12, 66428, 66475.)
> (*Bright v. Board of Supervisors*, *supra*, 66 Cal.App.3d at p. 193, emphasis added.)

The key point there is that under the law that was effective in 1972, a subdivision needed to involve creating *"five or more parcels"* out of the previously undivided land. Here, as noted above, the lot split involved taking one lot

and making only *three* smaller ones out of it. (2 App. 116 #3; 3 App. 359 #3.) Since fewer than five were involved, it did not meet the then-applicable requirement for a subdivision to be created. Hence, the SMA did not apply.

The current version of the SMA provides that it does not apply to any parcel that was sold or leased in compliance with or exempt from any Act or local ordinance regulating subdivision design and improvement in effect at the time the subdivision was established. (Gov. Code, § 66499.30, subd. (d).) Hence, the fact that the "five-parcel minimum" is no longer in the statutory scheme does not retroactively place the Habibi lot under the SMA (even if, *arguendo*, the SMA would otherwise preempt claims for adverse possession).

The argument is *that* simple. It need go no further.[13] However, the Habibis will also show how even if this fundamental flaw in the grant of summary adjudication is overlooked, the SMA would still not act as a bar to their claims.

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[13] The Habibis acknowledge that the argument just made about no subdivision having been created under the law as it stood in 1972 was not put before the trial court. However, that should not bar it from consideration. The Habibis *did* argue against the application of the SMA generally. (See, e.g., RT 3-18.) And new arguments that involve pure questions of law, which turn on undisputed facts, may be considered on appeal, especially if errors are readily correctable and the parties have an opportunity to address the merits during briefing. (*Francies v. Kapla* (2005) 127 Cal.App.4th 1381, 1386.)

3.2 Even if the 1972 lot split did create a subdivision, the Habibis are not seeking to alter the recorded boundaries that arose from the 1972 lot split

The next piece of the argument — should it be reached — is equally simple. It is that the adverse possession that is claimed would not change the "subdivision" — even if the 1972 lot split were classified as falling under the SMA. No boundary would be changed. The three parcels involved would remain identical in terms of all their metes and bounds. All that would change would be the width of the private easement crossing the Habibi parcel, compared with the one that was originally recorded.

3.3 Even when the SMA is invoked, the law allows for adverse possession of a previously recorded easement

The Habibis acknowledge that when the current SMA is invoked, its scope, by its terms, includes the "location and size of all required easements and rights-of-way." (Gov. Code, § 66418.) However, there is nothing in that provision that prevents the adverse possession of parts of those easements. The fact that the SMA's scope includes the creation of easements does not mean that the SMA preemptively occupies the field such that other applicable doctrines under state law are excluded from judicial review. This is all the more so since adverse possession, despite its roots in the common law, is *itself* recognized by

statute. (See, e.g., Code Civ. Proc., §§ 324, 325; Civ. Code, §§ 1006, 1007.) Furthermore, case law shows that adverse possession can, indeed, occur.

In *Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, the Court reviewed a case involving an easement that was put in place at the time of a subdivision. In 1980, the Keplers (defendants) purchased a number of contiguous lots in the subdivision, as well as a 20-foot strip running along their eastern edge. (*Id.* at p. 1377.) This strip was the western half of a 40-foot right of way known as Diplomat Avenue, which was one of the streets shown in the original subdivision map recorded in 1924. (*Id.* at p. 1379.) In other words, the street ran to one side of the Keplers' lots, and the Keplers owned the side of the street adjacent to those lots.

Four years after the Keplers purchased their lots, Tract Development (plaintiff) purchased some other lots in the same subdivision. (*Tract Development Services, Inc. v. Kepler*, *supra*, 199 Cal.App.3d at p. 1380.) These were on the other side of Diplomat Avenue — in other words, across the street from the Keplers' lots. (*Id.* at p. 1381.)

Tract was aware of the existence of the streets outlined by the subdivision map, and began grading Diplomat Avenue as part of its plan to build homes on the lots it had just purchased. (*Tract Development Services, Inc. v. Kepler*, *supra*, 199 Cal.App.3d at p. 1381.) Soon after, Tract noticed the Keplers were erecting a fence down

the middle of Diplomat Avenue — i.e., they were fencing off the side of Diplomat Avenue that was on land they owned. (*Ibid.*) Tract asked the Keplers "to honor the easement as shown on the subdivision map and to relocate [the] fence," but the Keplers did not do so. (*Ibid.*) Tract then sued the Keplers, claiming that it was entitled to an easement over their property. (*Id.* at pp. 1377, 1381.) Under the specific facts of that case, the trial court found for Tract and the Keplers appealed. (*Id.* at p. 1377.)

The Keplers put forward several theories as to why they should have been allowed to fence off the land. (*Tract Development Services, Inc. v. Kepler*, *supra*, 199 Cal.App. 3d at p. 1381.) The one that is relevant to the present case was their theory that the easement was terminated by prescription (which, as discussed later, is a variant of adverse possession). (*Ibid.*)

The Court of Appeal concluded that on the specific facts of that case, substantial evidence supported the trial court's conclusion that the elements of prescriptive extinguishment of the easement were not satisfied since the Keplers' actions had not been "sufficiently hostile, open, notorious or under claim of right." (*Tract Development Services, Inc. v. Kepler*, *supra*, 199 Cal.App. 3d at pp. 1387-1388.) However, the discussion of the legal principles makes clear that, as a matter of law, the Keplers *could* — if those factual elements had been satisfied — have extinguished the easement over the side of Diplomat

Avenue they owned, *notwithstanding the fact that the easement had come about as part of the original recorded and mapped subdivision*.

The Court first quoted from a case from the California Supreme Court: "It is a thoroughly established proposition in this state that when one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, and that *this private easement is entirely independent of the fact of dedication to public use*, and is a private appurtenance to the lots, of which the owners cannot be divested *except* by due process of law." (*Tract Development Services, Inc. v. Kepler*, *supra*, 199 Cal.App.3d at pp. 1381-1382, citing to and quoting from *Danielson v. Sykes* (1910) 157 Cal. 686, 689, internal quote marks omitted, emphasis added.)

Breaking down the above, this "thoroughly established proposition" stands for the following: (1) The creation of a subdivision necessarily involves the creation of easements; (2) but those easements are private to the lots (even if there is *also* a dedication to public use); and (3) like other easements, they *can* be lost by operation of law.

Later in the opinion, in the discussion of adverse possession, the Court expressly stated that an easement obtained in these conditions *could* be extinguished: "An easement obtained by grant, such as the one here, may indeed be lost by prescription, e.g., when the owner of the servient tenement makes a use of his or her own land in a manner which is adverse to the rights represented by the easement." (*Tract Development Services, Inc. v. Kepler*, *supra*, 199 Cal.App.3d at p. 1386.)

So the present case and *Tract Development* have much in common:

- In both cases, the easement came about when land was split into smaller parcels than existed before.
- In both cases, the easements were recorded as being of a specified width.
- In both cases, the easements were for purposes of access. But in neither case was it suggested that ingress or egress would no longer be possible were the easements to be narrowed as a result of adverse possession.

In the proceedings below, the Habibis cited *Tract Development*. (See, e.g., RT 10.) The Superior Court's order granting summary judgment also referred to the case. (5 App. 888.) There, the court sought to distinguish it on the ground that in *Tract*, the county had previously expressly abandoned the easement after a former owner had asked it to do so. (5 App. 888, citing to *Tract Development*

Services, Inc. v. Kepler, *supra*, 199 Cal.App.3d at p. 1383.) That reasoning was flawed, however. For a start, nothing in *Tract* states that what led to the possibility of adverse possession — if the elements had been satisfied — was the abandonment.

But, even if this is somehow read into the opinion, that aspect of the facts in *Tract* is not applicable to the present case. The opinion in *Tract* indicates that at the time the Diplomat Avenue easement was created, there was a dedication to public use. (*Tract Development Services, Inc. v. Kepler*, *supra*, 199 Cal.App.3d at p. 1383.) Here, there was no such dedication. Thus, there was nothing of that sort to abandon.

"A dedication is the application of real property to a public use by the acts of its owner which clearly manifest the intent that it be used for a public purpose." (10 Cal. Real Est. (Miller & Starr) § 26:1 (3d ed.).) Here, the easement at issue was a private one benefiting the Soofer property alone. Whereas Diplomat Avenue was a public street serving numerous addresses, the driveway crossing the Habibis' land doesn't go anywhere except to the Soofer property. There is no authority that a shared driveway easement, even if recorded, constitutes a dedication for public use.

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3.4 The Habibis presented evidence that public agencies were content to have the driveway easement be 12 feet wide

Of course, even without a dedication, a county or public entity still has control over land within its jurisdiction by its authority to issue development and building permits and to exercise eminent domain if exigent circumstances require. Here, however, there was no evidence of any such thing.

To the contrary, the Habibis presented evidence that the public agencies involved were perfectly content with the actual width of the driveway, of which they were fully aware, and had, as a practical matter, officially abandoned any interest in having it be 20-feet wide. This argument will not restate all the evidence from the Statement of Facts (found at pp. 11-17, *supra*), but will summarize it as follows: For years, the Soofers and the previous owners of their property had tried to get the Carpinteria-Summerland Fire Protection District to weigh in on their behalf and insist that the paved area of the easement be increased to 20 feet; and for years, the District steadfastly declined to do so, saying that while the width fell short of what had originally been called for, it nonetheless satisfied their standards and could be considered "grandfathered in"; moreover, the Fire District entered into a covenant and deed restriction with the Soofers' predecessors-in-interest, in which both signing parties effectively abandoned any

claim to a wider paved driveway over the land at issue as part of a bigger deal involving the expansion of the property at 226 Ortega Ridge Road. (See, e.g., 4 App. 701, 702, 719-720, 745, 751.)

Typical of the Fire District's position was this, set forth in September 2011: "The section of the driveway fronting on 228 Ortega Ridge Road [the Habibi residence] *is currently in compliance with the fire district requirements*. This section of driveway serves the property at 226 Ortega Ridge Road and was measured at *twelve feet*." (4 App. 751, emphasis added.) So, in the eyes of the Fire District, a 12-foot width was fine.

Moreover, as noted above, there was the 2005 covenant and deed restriction entered into between the Fire District and the Soofers' predecessors-in-interest — *and binding on the latters' successors* — which provided that the driveway easement across the Habibi property need *not* be changed as part of a deal under which the 226 Ortega Ridge Road property was further developed, essentially because there was a guarantee of a continuing *alternative* emergency access route. (4 App. 745.) If one is looking for some sort of "official," signed-and-sealed abandonment by a public agency, that surely is one.

In addition, there was evidence that the County had processed numerous planning permits related to the two properties between 2000 and 2011 without any indication

that driveway width was an issue. (4 App. 639-642; 4 App. 634 [supporting declaration].)

Thus, there was — *at the very minimum* — a triable issue of fact as to whether the public authorities had, in effect, "abandoned" any position that the driveway had to be 20-foot wide — assuming, *arguendo*, that one reads the law as requiring some form of abandonment. Plainly, it is not the task of this Court to work its way through all of these factual issues to determine the ultimate merits. All that the Habibis ask is that they have their day in Superior Court in order to take their case to trial.

- 4 -

There is No "Public Safety" Exception to Claims of Adverse Possession and, Even if There Were, There Would be a Triable Issue of Fact in this Case

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The Superior Court went further than reading into the law a requirement that there be some type of abandonment. It essentially added a further element to the laws of adverse possession by indicating that adverse possession cannot, as a matter of law, occur if it would result in a compromise to public safety as judged by a court. Specifically, in explaining its decision, the court stated: "The court takes judicial notice pursuant to Evidence Code section 452(h) that Southern California and particularly Santa Barbara County are particularly

vulnerable to wild fires." (5 App. 886.) So this seems to suggest that the court granted summary adjudication, at least in part, on the premise that fires are a problem in Santa Barbara County, and, therefore, that anything that might be conducive to their spread cannot be allowed as a matter of law.

Taken at its face, the court was saying that no adverse possession can occur in Santa Barbara County if there is a possibility that it could increase the spread of wild fires. There is no authority for such a rule. Maybe one could make a public policy argument in favor of such a law. But that is *not* the law. It is an idea whose supporters need to take up with the Legislature.

Furthermore, even if one surmised that, in the abstract, a Superior Court *could* rule that public safety is a full defense against a claim for adverse possession (not that it was even pled as an affirmative defense), there would surely have to be grounds for such an assessment more localized than a broad-brush assessment about an entire county based on judicial notice of regional risks. And even then, there would — in this case — have been a triable issue of fact as to whether the width of the driveway did compromise public safety, keeping in mind the Fire District's view that it did not.

Here, the Superior Court did more than step into the shoes of the jury, as is often the case when summary judgment is erroneously granted. It also stepped into the

shoes of the Fire District in determining whether something *was* an acceptable risk. And it then stepped into the shoes of the Legislature in adding "public safety risk" as a full defense to a claim of adverse possession. All of this meant that the grant of summary judgment was an overreaching act on multiple grounds.

- 5 -

Summary Judgment Should Also Not Have Been Granted on the First and Second Causes of Action

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5.1 Summary judgment on the second cause of action to quiet title on a portion of the 30-foot easement by prescription was erroneous for the additional reason that the Burney lot was not part of the three-lot split that created the Soofer and Habibi parcels

Thus far, the argument has focused on the fourth cause of action to quiet title to the disputed portion of the 20-foot easement by adverse possession.

With the second cause of action — that relating to the 30-foot easement (the portion of the driveway covering the Burney property), the doctrinal basis was not adverse possession, but prescription. The two are very similar, but not identical. Miller & Starr summarizes the differences as follows: "Although the terms 'title by prescription' and 'adverse possession' are sometimes used interchangeably,

the term 'prescription' usually refers to the method by which a right of use, such as an easement, is acquired by using property for the same prescribed period of time, whereas 'adverse possession' refers to an acquisition of title." (6 Cal. Real Est. (Miller & Starr) § 16:1 (3d ed.).)

The reason why prescription applies to the second cause of action is that with adverse possession, there is a requirement that the claiming party have paid taxes on the land at issue; with prescription, that does not apply. (See *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.) Since the Habibis do not own the land over which the 30-foot easement passes, they do not pay taxes on it and, hence, prescription is the appropriate doctrine for that part of their case.

That said, aside from the taxes, the elements for prescription are essentially the same: "The elements necessary to establish an easement by prescription are open and notorious use of another's land, which use is continuous and uninterrupted for five years and adverse to the land's owner." (*Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1308.) The cases talk about obtaining an easement by prescription, and that is what the Habibis were doing in the 30-foot area — they were obtaining an easement for their own private-use purposes on what previously was part of a shared easement for access; they were not claiming title to the land in question.

The arguments about why there is a triable issue of fact as to the established elements are the same with the 30-foot areas as with the 20-foot one — the evidence about the extent of the Habibis' planting, landscaping and so forth and the effect that it had. The evidence, for the most part, did not break down the Habibis' incursions into the 20-foot and 30-foot portions, but treated it as one and the same. Indeed, the Superior Court, in expressly stating that it was not granting summary judgment on the issue of whether the Habibis' takeover of the disputed space was sufficient in scope did not distinguish between the 20- and 30-foot portions. (5 App. 889.) Thus, the evidence need not be restated for this discussion of the second cause of action.

However, there is one crucial difference about the 30-foot area for the purposes of this appeal, and that is that the Burney property — on which it exists — was *not* part of the lot split that gave rise to the Habibi and Soofer properties. The Soofers' separate statement referenced the evidence about the 1972 lot split that created the two properties, indicating that a third property was also created. (2 App. 166 #3.) And what the cited evidence there makes clear is that the third property was *not* the Burney one, but a completely separate parcel at an address — 2176 Lillie Avenue — that doesn't feature in this dispute. (2 App. 166 #3, citing to 3 App. 316.) So the record does not show that the 30-foot easement came about as a result of the lot

split. Indeed, the Superior Court's order, while stating that the 20-foot easement was a condition of the three-way subdivision, does not make that assertion about the 30-foot one. (5 App. 887.)

What this means is that *even if* the fact that the 20-foot easement was a condition of the lot split giving rise to the Habibi and Soofer properties meant that the SMA acted as a bar to a claim of adverse possession, that would *not* apply to the 30-foot easement, which is on a parcel *separate and unrelated to the three-parcel lot split*. Likewise, the "public safety" rationale adopted by the trial court would not apply to the 30-foot area, either — since that rationale was an extension of the SMA argument, rather than a completely separately grounded one. (See 5 App. 889 [second paragraph on that page of court's order].) Thus, even if this Court were to adopt the Superior Court's thinking on the SMA/public-safety issues, it should still reverse with regard to the second cause of action, to which those would not be applicable.

5.2 Summary judgment on the first cause of action for declaratory and injunctive relief was erroneous for the same reasons as the others

Lastly, the first cause of action was for declaratory and injunctive relief and, effectively, captured the entire dispute under that alternative umbrella. There are no separate issues as to that cause of action. Therefore,

judgment should be reversed as to that one for the same reason as with the others.

CONCLUSION

For the reasons argued above, the judgment should be reversed and the matter remanded so that the first, second, and fourth causes of action of the Habibis' complaint can proceed to trial.

April 17, 2015 Respectfully submitted,

THE LAW OFFICE OF JOHN DERRICK,
a professional corporation

_____
by John Derrick
Attorney for Appellants
Joanne Habibi and Ali Habibi

CERTIFICATE OF WORD COUNT

I certify that the text of this brief, as counted by the Apple Pages word processing software, consists of 9,604 words (including footnotes but excluding the tables of contents and authorities, this certificate, and the attached proof of service).

April 17, 2015

THE LAW OFFICE OF
JOHN DERRICK,
a professional corporation

by _____
John Derrick
Attorney for Appellants

PROOF OF SERVICE

I am over 18 years of age and not a party to this action. I am a resident of the county where the mailing described herein took place. My business address is 21 E. Pedregosa Street, Santa Barbara, CA 93101.

On April 17, 2015, I sent from Santa Barbara, California, the following documents:

APPELLANTS' OPENING BRIEF

APPELLANTS' APPENDIX (VOLUMES 1-5)

I served the documents by enclosing them in envelopes and depositing the sealed envelopes with the United States Postal Service, postage fully prepaid. The envelopes were addressed and mailed as follows:

SEE ATTACHED SERVICE LIST

Per Rules of Court, rule 8.212(c)(2), service on the California Supreme Court was effected by the filing of an an electronic copy with the Court of Appeal.

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

April 17, 2015

_____

John Derrick

SERVICE LIST

Scott Mahler
Ryan Squire
Garrett & Tully, PC
225 South Lake Avenue, Suite 1400
Pasadena, California 91101

Scott E. Spell
Law Offices of Scott E. Spell, APC
11755 Wilshire Blvd., Ste. 1250
Los Angeles, CA 90025

Office of the Clerk
Santa Barbara Superior Court
1100 Anacapa Street
Santa Barbara, CA 93101
(Delivered for the attention of Judge Herman; brief only, not Appendix)