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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARVIN DONIUS et al., Plaintiffs and Appellants, v. COUNTY OF SAN DIEGO et al., Defendants and Respondents.	D080942 (Super. Ct. No. 37-2020-00015528-CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Manuel Corrales, Jr.; Niddrie Addams Fuller Singh and Rupa G. Singh, for Plaintiffs and Appellants.

Office of County Counsel, Katie A. Richardson, and Joshua M. Heinlein, for Defendant and Respondent County of San Diego.

Devaney Pate Morris & Cameron, Jeffery A. Morris, and David R. Plancarte, for Defendant and Respondent North County Transit District.

INTRODUCTION

Appellant Rincon Mushroom Corporation of America, Inc. (RMCA) operated a mushroom farming business on a five-acre parcel of land

originally designated as Tract 137 ("Tract 137" or "the Property"). The Property is largely surrounded by, but not a part of, the tribal reservation of the Rincon Band of Luiseño Indians. After working for RMCA, Appellant Marvin Donius purchased Tract 137 from the company in 1999.

A county road runs along the western border of the Property on a road right-of-way[1] through tribal land secured by the County of San Diego (County) in or around 1935. In 2001 and 2002, the Rincon tribe built a Harrah's casino directly across this road from the Property. To manage the anticipated increase in traffic near the casino's entrance, the tribe entered into a cooperative agreement with the County to make road improvements including the installation of a traffic signal. In February 2001, the County issued a construction permit to the tribe and the tribe installed a traffic signal and related equipment[2] within the County's claimed road right-of-way. Two years later, the County issued an encroachment permit to the North County Transit District (NCTD) to install a bus stop in the subject right-of-way. NCTD hired a third-party company to do the work, and the bus stop was installed in 2004.

Throughout his ownership of the Property, Donius has had ongoing issues with the tribe. In 2019, the tribe put cement blocks at the entrance to the Property and the dispute over the blocks resulted in a federal lawsuit. During the course of that litigation, a federal magistrate judge recommended

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1 As explained during trial by a civil and traffic engineer, a road right-of-way is an easement. (See also *Elliott v. McCombs* (1941) 17 Cal.2d 23, 28, 30 [explaining that a road right-of-way is a type of easement or an interest in the land "which gives a privilege to a particular person or owner of property to enjoy a right over the property of another"].)

2 A traffic engineer clarified that one traffic "signal" includes four traffic poles, a control box, and all the conduit and detectors.

that Donius conduct a boundary survey to determine who owned the property where the blocks were located. The March 2020 survey revealed that the County-operated traffic signal and NCTD-operated bus stop were installed on Tract 137. Donius testified that the surveyor, Dale Greene, told him there were no recorded easements on the Property. He further claimed he was unaware until he reviewed Greene's survey results that these structures had actually been installed on his land.

On May 26, 2020, Donius and RMCA (together, Appellants) sued the County and NCTD (together, Respondents) and the parties eventually went to trial on claims of trespass and private nuisance. At issue was whether a valid right-of-way in favor of the County existed, thereby granting the County and NCTD the right to authorize placement of the traffic light, bus stop, and related equipment on the Property, or whether Respondents required Donius's permission.

The jury returned a unanimous verdict in favor of Respondents. Specifically, as to the trespass cause of action, the jurors responded to special verdict questions and determined that Donius, but not RMCA, owned, occupied, or controlled the Property. They further concluded that Respondents "intentionally enter[ed] [Donius's] property." Finally, in response to separate questions asking if the County and NCTD "intentionally or negligently enter[ed] [Donius's] property without the permission of [Donius or Donius's] predecessor," the jury responded "No" as to both parties. On the nuisance cause of action, the jury answered only one question, concluding that Respondents did not "by acting or failing to act, create a condition or permit a condition to exist that was an obstruction to the free use of the property by [Donius]." Because the jury answered these question in the negative, it did not reach any of the questions regarding affirmative defenses.

Appellants subsequently filed a motion for judgment notwithstanding the verdict (JNOV) and a motion for a new trial. The trial court denied both motions.

On appeal, Appellants contend the record does not contain sufficient evidence to support the jury's finding that the County had a valid road easement over the Property and that Respondents, therefore, did not need their permission to allow the building of a traffic light and a bus stop on the Property. Additionally, Appellants argue the trial court erroneously instructed the jury that the Secretary of the Interior (Secretary) had the authority to convey road easements on Indian land allotted to individual owners without their consent, instead of merely having the power to approve such easements with the allottees' consent.

In response, Respondents assert that the judgment must stand as to RMCA because it did not challenge the jury's verdict that it had no ownership or possessory interest in the Property and having such an interest is a prerequisite to both trespass and private nuisance claims. NCTD also highlights that Donius did not appeal the jury's verdict as to the nuisance cause of action. Respondents otherwise contend Donius failed to meet his burden on appeal. We agree and, therefore, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[3]

Whether the County had a long-standing right-of-way over Tract 137 was a pivotal issue in this case and, thus, the parties traced evidence of interests related to the Property back nearly 100 years. The relevant history began in 1929 when the Secretary approved the allotment of Tract 137 to Matthew Calac, an Indian minor, to be held in trust by the United States

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3 We recount the facts in the light most favorable to the verdict. (See *Sacramento Sikh Society Bradshaw Temple v. Tatla* (2013) 219 Cal.App.4th 1224, 1227.)

government for his benefit for twenty-five years. In 1935, the County surveyor sent a letter to the San Diego County Board of Supervisors requesting that they execute an application for a right-of-way through the Rincon reservation and adjoining allotted lands, including Calac's, in order to construct a public highway. The letter described the proposed roadway easement and noted that Calac had agreed to accept $50 in damages for the portion of the road running across his land. The County surveyor requested that the board send the application to the Superintendent of the Mission Indian Agency at Riverside, which would then forward it to Washington for approval. A 1937 County Board of Supervisors' resolution confirmed that the County had on a file a letter from 1936 "advising of the approval by the Department of the Interior, of the County's application, and that the right of way was granted . . . ." The right-of-way is further reflected in a 1935 road survey map, labeled Road Survey No. 604, which contains a Department of the Interior endorsement indicating that the map was "Approved, subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1084),[4] and departmental regulations thereunder . . . ."[5]

In 1962, the BIA directed issuance of a fee simple patent to Calac, granting him ownership of Tract 137. The map describing his land and the order authorizing the patent were both placed on file in the Bureau of Land Management.

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4 The Act of March 3, 1901 (ch. 832, § 4, 31 Stat. L., 1084) has since been codified at 25 U.S.C. section 311.

5 The 1935 version of the road survey map depicting Road Survey No. 604 is publicly available at the Bureau of Indian Affairs (BIA). A 1959 map showing a portion of the same road survey is recorded within the County engineer and surveyor's department and is available online.

In 1969, the San Diego Gas and Electric Company (SDG&E) obtained an easement over Tract 137 for power poles. The power poles were installed on the western edge of Tract 137.

The RMCA purchased the land in 1982. In 1999, Donius purchased Tract 137 from RMCA, paying a portion of the purchase price through an exchange of his stock in the company and giving RMCA a promissory note for the remainder. He resided on the Property during at least some portion of 2001 and 2002 and then lived there "[t]he majority of the time" thereafter.

When the tribe began work on the casino in 2001, it agreed to fund improvements to the county road and its intersection with the casino. It then erected a traffic signal, with two of the poles and the control box being located on the east side of the road in the right-of-way over Tract 137. The construction plans called for the chain link fence running along the west side of Tract 137 to be relocated to the right-of-way line by the contractor. The County then granted the NCTD an encroachment permit to have a bus stop installed in the subject right-of-way. Donius acknowledged that he observed the road construction activity and saw that the traffic light poles had been placed but did not voice any objection at the time.

From 2005 until 2020, the County operated and maintained the traffic signal, and the NCTD openly transported bus passengers to and from the bus stop.

In 2020, Donius hired Greene to conduct a survey of his property. Greene located the boundary line of the former allotment by digging up brass monuments, or markers, buried 12 to 24 inches underground at the north and

south ends of Donius's property.[6] Greene found maps of the land through the county surveyor's office website and determined that a 1959 map of Road Survey No. 604 showed a right-of-way going across the Property. He also saw that the map said, "easement permit approved September 10, 1935." Although Road Survey No. 604 further indicated "permit for additional width approved," Greene did not look for the referenced permit. He otherwise relied upon a title search company to research official records and look for recorded documents like easements and said, "I have not seen evidence that there was an easement granted from that owner of Tract 137 and filed in the official records of the County of San Diego."

At trial, Donius testified that he first learned from Greene's 2020 survey that the signal posts and bus stop were inside his property line and that he was unaware of Road Survey No. 604 prior to that time. He further claimed he thought the chain link fence marked the boundary of his property, that no one had asked his permission to move it, and that he was unaware of the fence ever having been moved. When asked if he was aware that SDG&E had an easement on his property, he responded, "I believe that is correct" and acknowledged that he could see the power poles out on his property. He conceded it was a fair statement that he had not been vigilant enough about his property for the last 20 years.

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6 Greene testified that he was aware from the outset that Tract 137 was a government allotment and that he used a metal detector to look for the monuments he knew the government land office buried in the ground to mark government tracts.

DISCUSSION[7]

I.

RMCA Did Not Challenge the Jury's Finding on Appeal

The notice of appeal in this case was filed by both Donius and RMCA. On the cause of action for trespass, the jury rejected RMCA's argument that the promissory note gave it an interest in the Property and concluded that RMCA did not own, occupy, or control the Property. As to whether the County or NCTD caused RMCA to suffer a private nuisance, the jury wrote in "N/A [Not Applicable]" next to the questions asking if each of the Respondents "by acting or failing to act, create[d] a condition or permit[ed] a condition to exist that was an obstruction to the free use of property of [Donius]." Successful claims for trespass and nuisance both require a showing that the plaintiff owned or controlled the property. (See *Golden Gate Land Holdings LLC v. Direct Action Everywhere* (2022) 81 Cal.App.5th 82, 90–91 [trespass]; *Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 262 [private nuisance].)

RMCA did not challenge on appeal the jury's conclusion that it did not own, occupy, or control the Property. It is the appellant's responsibility "to support claims of error with meaningful argument and citation to authority."

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7 As an initial matter, we note that in their notice of appeal, Appellants challenge the judgment and also appeal the trial court's denials of their motion for JNOV and motion for a new trial. However, in their briefing, Appellants argue only that (1) the *jury's* findings were not supported by sufficient evidence, and (2) the trial court erroneously instructed the jury. For this reason, we focus our analysis on Appellants' challenge to the judgment. To the extent Appellants intended to challenge the trial court's rulings on its motion for JNOV and motion for a new trial, we deem their appeal of these issues abandoned due to their failure to present meaningful legal analysis. (See *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119–1120 [An appellate court is not required to "consider alleged error where the appellant merely complains of it without pertinent argument"].)

(*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*); Cal. Rules of Court, rule 8.204(a)(1)(B).) "When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration." (*Allen*, at p. 52.) Although Appellants note in their factual background section that RMCA's president believed RMCA was the Property's co-owner until Donius paid off the deed of trust and that a federal court had concluded that RMCA retained a possessory or asserted ownership interest in the Property, Appellants did not present argument challenging the sufficiency of the evidence supporting the jury's findings. Accordingly, we conclude RMCA forfeited any claims of error as to the jury's findings regarding RMCA and affirm the judgment as to RMCA.

II.

Donius Did Not Challenge the Jury's Nuisance Finding on Appeal

Donius requests that this court reverse the judgment as to his claim for nuisance. However, the jury found as to both the County and NCTD that the improvements did not obstruct the free use of the Property, a requisite element of a nuisance claim. Donius did not challenge this finding on appeal with argument or citation of authority. (*Allen*, *supra*, 234 Cal.App.4th at p. 52.) Thus, we affirm the judgment on the nuisance cause of action.

III.

The Trial Court Did Not Err in Instructing the Jury

Donius argues the trial court erroneously instructed the jury with Special Jury Instruction (Instruction) Nos. 10 and 16 that the Secretary had the authority to convey road easements on Indian land allotted to individual

owners *without* their consent.[8] In particular, he objects that while 25 U.S.C. section 311, which was the primary basis for Instruction No. 10, authorizes the Secretary to "grant permission" for a local authority to open a highway, the language of Instruction No. 10 indicated that the Secretary was "authorized to grant road rights of way." Respondents respond that the instructions are correct statements of the law, and further contend Donius waived his contention by not objecting to the instructions at trial. Further, even if the instructions could be construed as erroneous statements of the law, Respondents argue Donius invited the error by expressly agreeing to the instructions.

Courts and parties frequently use the terms "forfeiture" and "waiver" interchangeably, but they are distinct legal concepts. A party forfeits an argument by not objecting on that basis at trial, whereas "a waiver is the 'intentional relinquishment or abandonment of a known right.' " (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 & fn. 2 [If an objection could have been made in the trial court, but was not, the reviewing court will not ordinarily consider a challenge to the trial court's ruling]; *People v. Davis* (2008) 168

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8 Instruction No. 16 explained that: "The General Allotment Act of 1887 empowered the President of the United States to allot most tribal lands nationwide without the consent of the Indian nations involved. When the United States allotted a parcel to an individual Indian, the United States would hold the parcel in trust for the individual Indian for a period of 25 years or longer. While holding the allotted property in trust, the United States government had the right to grant road rights of way through the property."

Instruction No. 10 stated: "In the 1930s, the United States Secretary of the Interior was authorized to grant road rights of way through any Indian reservation or through any lands that had been allotted to any individual Indian while the United States government held the property in trust for the individual Indian."

Cal.App.4th 617, 627 [timely and specific objection generally required]; Evid. Code, § 353, subd. (a).) In this case, Donius forfeited his challenge to Instruction Nos. 10 and 16 here by not objecting to the differences in wording that he finds significant and proposing revisions or alternate instructions at trial. Where " ' "the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request *the additional or qualifying instruction in order to have the error reviewed*." [Citations.]' [Citation.] [A party's] failure to request any different instructions means he may not argue on appeal the trial court should have instructed differently." (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1319.)

Here, when the court brought up Instruction No. 16 during the first jury instruction conference and gave Donius's counsel an opportunity to comment, he responded, "Sure. That's the law." When the court reached Instruction No. 10, counsel first said "I don't know where this comes from. . . . this is not really an authority from a decision from a statute." Counsel for the County then read 25 U.S.C. section 311 verbatim[9] and indicated that, because it was confusing, he had "tried to distill it down to its essence" in the instruction. Donius's counsel then responded, "That's fine. [¶] . . . [¶] . . . he summarized what's in the code."

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9 The exact text of 25 U.S.C. section 311 provides: "The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation."

Although Donius argues these instructions were presented by Respondents without advance notice to or consultation with his counsel, his attorney had numerous opportunities to review them and raise objections but declined to do so. First, the court took a recess between the discussions of Instruction Nos. 16 and 10. Donius's counsel could have reviewed the law underlying Instruction No. 16 during the break and objected when the session resumed. Given that the instruction clearly states that it is based on the Indian General Allotment Act of 1887, it was clear which statute should have been referenced for comparison. Nonetheless, there is no indication in the record Donius's counsel researched the relevant law during the break or objected to the instructions when the discussions resumed. Second, because counsel for the County read verbatim the statutory section Instruction No. 10 was based upon, Donius's counsel had the opportunity to compare the language of the statute and the instruction. There is no indication in the record that he requested, and was denied, additional time to compare the texts. Third, the trial court reviewed the instructions with counsel again the next day and specifically gave the parties another opportunity to object to the instructions, including Instruction Nos. 16 and 10. Donius's attorney did not object. Finally, at the conclusion of that instructional conference, the court told the parties the instructions were done unless someone brought something to the court's attention the next morning. The next morning, the court gave the parties a chance to comment on the jury instructions and the verdict forms. Donius's counsel did not raise any issues with Instruction Nos. 10 or 16. By not voicing an objection to the wording of the instructions or proposing alternative instructions, after having had every opportunity to do so, Donius forfeited the right to argue on appeal that the court incorrectly

instructed the jury. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131 (*Metcalf*) [an appellant who did not request any different instructions below forfeits the right to argue on appeal that the trial court should have instructed differently].)

Donius contends we may not find such a forfeiture because parties may raise instructional error notwithstanding their failure to object when the instruction is prejudicially erroneous. He is correct that " ' "[a] failure to object to civil jury instructions will not be deemed a waiver where the instruction is prejudicially erroneous as given, that is, which is an incorrect statement of the law." ' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298, fn. 7.) However, we are not persuaded that Instruction Nos. 10 or 16 are incorrect statements of the law.

Donius argues the instructions are erroneous because the Secretary did not have authority to *convey* rights-of-way through allotted land without consent from the allottees. Rather, he contends the Secretary could only "grant permission" to public entities to establish roads through allotted land after obtaining the allottee's consent. In other words, he argues the law required the County to obtain Calac's written consent to an easement and then get the easement approved by the Secretary.

We review assertions of instructional error de novo. (*People v. Mitchell* (2019) 7 Cal.5th 561, 579; *People v. Marquez* (2023) 89 Cal.App.5th 1212, 1218.) "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

As an initial matter, we note that under Chapter 119, Section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 389, codified at 25 U.S.C. § 348), the United States "retain[ed] title to such allotted lands in trust for the benefit of the allottees." (*U.S. v. Mitchell* (1980) 445 U.S. 535, 540–541.) Specifically, 25 U.S.C. section 348 provides:

> "Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that *the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made*, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. . . ."

(Italics added.)[10] Because the Indian allottee did not hold title and could not make any conveyances or contracts related to the allotment, a public entity

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10 *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation* (1992) 502 U.S. 251, 254, from which Respondents assert they took the first two sentences of Instruction No. 16, affirms the same policies, stating:

seeking a right-of-way could not contract independently with the allottee. Instead, the entity was required to look first to statutory authority. "Prior to 1948, access across Indian lands was governed by *an amalgam of special purpose access statutes* dating back as far as 1875. . . . [including] 25 U.S.C. §§ 311 (opening of highways), 312 (rights-of-way for railway, telegraph, and telephone lines), 319 (rights-of-way for telephone and telegraph lines), 320 (acquisition of lands for reservoirs or materials), 321 (rights-of-way for pipelines); 43 U.S.C. §§ 959 (rights-of-way for electrical plants), 961 (rights-of-way for power and communications facilities)." (*Nebraska Public Power Dist. v. 100.95 Acres of Land in Thurston County, Hiram Grant* (8th Cir. 1983) 719 F.2d 956, 958 (*Nebraska Public Power*).) As the *Nebraska Public Power* court explained, "[t]his statutory scheme limited the nature of rights-of-way to be obtained, and in certain cases, created an unnecessarily complicated method for obtaining rights-of-way. Each application for a right-of-way across Indian land had to be examined painstakingly to assure that it fit into one of the narrow categories of rights-of-way authorized by statute." (*Id.* at pp. 958–959.) It was only when a right-of-way was not authorized by

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> "[T]he Indian General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, . . . empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved. The Dawes Act restricted immediate alienation or encumbrance by providing that each allotted parcel would be held by the United States in trust for a period of 25 years or longer; only then would a fee patent issue to the Indian allottee."

The government sought to avoid alienation of the allotted lands by the Indians. Thus, the Indian General Allotment Act of 1887 left them without the right to make contracts affecting the allotted lands "or to do more than to occupy and cultivate them." (*U.S. v. Rickert* (1903) 188 U.S. 432, 437.)

one of the existing statutes that "it became necessary to obtain easement deeds, approved by the Secretary of the Interior, from each of the Indian owners." (*Nebraska Public Power*, at p. 959.)

Contrary to Donius's selective reading of *Nebraska Public Power* and the legislative history behind the 1948 Act that modified the process for obtaining public rights-of-way such that the Secretary could grant rights-of-way across Indian lands for all purposes (25 U.S.C. § 323), we see no evidence that it was uniformly the case before 1948 that individual allottees had to execute an easement deed that was then sent to the Secretary for approval. To the contrary, as *Nebraska Public Power* makes clear, that was the procedure *only if* one of the "amalgam of special purpose access statutes" did not apply to provide the Secretary with authority to grant the right-of-way. (*Nebraska Public Power*, *supra*, 719 F.2d at pp. 958–959.) Likewise, the passage Donius cites from the legislative history of 25 U.S.C. section 323 applied only to the procedure applicable to the Osage Indian lands in Oklahoma. (S. Rep. No. 80-823, 80th Cong., 2nd Sess. (1948), p. 1035, Explanation of the Bill.) A Senate subcommittee ultimately recommending expanding the bill to apply to all rights-of-way on all Indian lands. (*Id.* at 1034.) In writing to the Senate committee in support of such an expansion, the Under Secretary of the Interior explained (as later cited in *Nebraska Public Power*) that: "At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute . . . ." (*Id.* at p. 1036.) He also clarified that only when one of these statutes did not apply must the right-of-way "*then* be obtained by means of

easement deeds executed by the Indian owners and approved by the Secretary of the Interior." (*Ibid.*, italics added.)

Thus, there was nothing erroneous about the instructions in this case because 25 U.S.C. section 311 did apply and afforded the Secretary authority to grant the right-of-way. (See *U. S. v. State of Minnesota* (8th Cir. 1940) 113 F.2d 770, 773 [explaining that a right-of-way over an Indian allotment may be acquired by 25 U.S.C. § 311 or by a condemnation proceeding under 25 U.S.C. § 357].) We see no meaningful distinction between the language in 25 U.S.C. section 311 authorizing the Secretary to "grant permission" for a local authority to open a highway and Instruction No. 10's language indicating that the Secretary was "authorized to grant road rights of way."[11] In fact, in the *Oklahoma* case, it appears the state of Oklahoma employed the same procedure utilized here. The state applied to the Secretary in 1926 to open a public highway across allotted land, provided a map of definite location, and sought damages on behalf of the restricted Indian allotment owners. (*Oklahoma*, *supra*, 127 F.2d at p. 351.) In 1928, "the Assistant Secretary of the Interior approved the application by endorsing on the map of

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11 We note that the County indicated in its response brief that Instruction No. 10 was also based upon 25 U.S.C. section 341, which states that: "Nothing in this act shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation." Donius objects that section 341 authorizes Congress, not the Secretary, to grant rights-of-way through Indian lands. We do not find this argument persuasive because Congress, through legislation such as 25 U.S.C. section 311, vests the Secretary with such authority. (See, e.g., *U.S. v. Oklahoma Gas & Elec. Co.* (10th Cir. 1942) 127 F.2d 349, 352–353 (*Oklahoma*) [discussing in reference to another statute how, via statute, "Congress authorized the Secretary of the Interior to permit the use of rights-o[f]-way"].)

definite location the following: 'Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058-1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.' " (*Ibid.*) The highway was then opened and established. (*Ibid.*) The reviewing court found no issues with this procedure.

Furthermore, to the extent there is any question, the 1929 Regulations of the Department of the Interior Concerning Rights of Way Over Indian Lands (hereafter Regulations) provide clarification and also further support the conclusion that the County followed the proper procedure. Regulations 6 and 50 require each application for grants of land for right-of-way purposes to be accompanied by a map. (Regs. at pp. 2, 8.) Regulations 52 and 79 mandate that damages be assessed to compensate the Indians and discuss negotiating the allotment owner's agreement and "written acceptance of the awards." (*Id.* at pp. 8, 13.) Where an Indian objects to the appraisement, Regulation 79 clarifies that the Secretary's approval may be given "even though no amicable settlement has been reached with the Indians." (*Id.* at p. 13.) There is no discussion of an Indian withholding consent to the opening of the road or any procedure to be followed in those circumstances.

Upon satisfactory compliance with these regulations, Regulation 85 provides that the Secretary will give approval to "each application, map, and schedule of damages submitted hereunder and thereupon construction work may proceed." (Regs., *supra*, at p. 14.) There is no mention of the need to issue an easement deed or record such in a county recorder's office before beginning construction. Instead, the original of the map is then to be "transmitted to the General Land Office for notation upon the records of that bureau and filing in its permanent files, and the duplicate part shall be placed in the permanent files of the Bureau of Indian Affairs." (*Id.*, at p. 14

[reg. 86].) In this case, the County followed this procedure and the 1935 map was indeed placed on file with the BIA.

As a result, we find no error in Instruction Nos. 10 and 16's use of the phrase "grant road rights of way" in describing the authority of the Secretary and the United States government, respectively, nor do we find the instructions lacking because they do not expressly require Indian consent. We also conclude it was not reasonably likely the jury somehow applied the instruction in an impermissible manner.

IV.

Substantial Evidence Supports the Jury's Verdict on Donius's Trespass Cause of Action

Donius challenges the sufficiency of the evidence demonstrating that the County and NCTD had permission to enter the Property without his consent. Specifically, he contends the 1935 easement that purportedly gave the County a right-of-way across Tract 137 did not grant it permission because the easement was not recorded in the County recorder's office. Additionally, Donius disputes that the 1935 Road Survey Map itself constituted a valid easement.

A. *Additional Facts*

The jury was instructed that, to establish that Respondents trespassed, Donius had the burden to prove: "1. [Appellants] owned, occupied or controlled the property; 2. [Respondent] County of San Diego, although not intending to do so, negligently caused another person [Rincon Indian Tribe] to enter [Appellants'] property; and that [Respondent] North County Transit District, although not intending to do so, intentionally or negligently entered [Appellants'] property; 3. [Appellants], or [Appellants'] predecessor, did not give permission for the entry; 4. [Appellants'] were harmed; and

5. [Respondent's] conduct was a substantial factor in causing [Appellants'] harm."

It was undisputed at trial that the County and the NCTD never asked for Donius's consent to install the signal and the bus stop, and he did not object to their construction because he did not realize at the time that these items were being placed on his property. As for his predecessor, Donius does not dispute that Calac offered what appeared to be written consent, but he argues here, as he did at trial, that this consent was invalid because Calac was a minor.

Regarding the purported easement, the jury was instructed that "[a]n easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be less than the right of ownership." They also were told that, "[w]hen an easement is based on a grant, the extent of the easement is determined by the terms of the grant. The interests specifically expressed in the grant and those necessarily incident thereto pass from the owner to the easement holder."

B. *Legal Standard*

Normally, when a trier of fact has resolved a factual dispute, the appellate court reviews the ruling for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632 (*Winograd*).) "When a civil appeal challenges findings of fact, the appellate court's power begins and ends with a determination of whether there is any substantial evidence—contradicted or uncontradicted—to support the trial court findings." (*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 582 (*Schmidt*).) On substantial evidence review, we do not reweigh evidence and we accept all evidence supporting the verdict, disregard contrary evidence, and draw all reasonable inferences to affirm the trial court. (*Id.* at p. 581.)

However, " '[i]n a case where the trier of fact has determined that the party with the burden of proof did not carry its burden and that party appeals, "it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." [Citations.] Instead, "where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence *compels a finding in favor of the appellant as a matter of law*." [Citation.] Specifically, we ask "whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " ' [Citation.] This is 'an onerous standard' [citation] and one that is 'almost impossible' for a losing [party] to meet, because unless the trier of fact made specific factual findings in favor of the losing [party], we presume the trier of fact concluded that '[the party's] evidence lacks sufficient weight and credibility to carry the burden of proof.' " (*Estes v. Eaton Corp.* (2020) 51 Cal.App.5th 636, 651 (*Estes*).)

C. *Analysis*

Our review on appeal generally is limited to the issues presented to us by the appellant. In this case, Donius framed this issue as one requiring substantial evidence review. Such a review entails only an assessment of whether sufficient *facts* support the jury's verdict. (*Schmidt*, *supra*, 44 Cal.App.5th at p. 582.) In making this determination, "[w]e review the sufficiency of the evidence to support a verdict under the law stated in the instructions given, rather than under some other law on which the jury was not instructed." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 674–675 (*Bullock*); *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.) "Absent instructional error . . . for an appellate court to review a verdict under a rule of law on which the jury was not instructed would allow reversal of a judgment on a jury verdict, requiring a retrial, even though neither the jury nor the court committed error."[12] (*Bullock*, at p. 675.)

But that is exactly what Donius asks us to do here. As he succinctly states in his reply brief, his primary argument is that: "absent recordation in the County Recorder's Office, the claimed right-of-way easement is void as a matter of law, rendering clearly erroneous the jury's verdict to the contrary and warranting reversal of the judgment." But although it is undisputed that the County did not record an easement in the County recorder's office, the jury also was not instructed on Donius's view that an easement had to be recorded in that office to be valid. Rather, that legal claim was presented only via attorney argument and as the court expressly, and correctly, instructed the jury: "I will tell you the law that you must follow to reach your

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12 No instructional error is present in this case. As discussed *ante*, we find no error with Instruction Nos. 10 and 16, and Donius cannot allege instructional error related to recordation of easements because no instructions on this topic were requested or given.

verdict. . . . If the attorneys say anything different about what the law means, you must follow what I say." Absent evidence that the jury was instructed by the court on the legal proposition that an easement must be recorded in the County recorder's office to be valid, there is no basis for concluding the jury's verdict is clearly erroneous.

In civil cases, "each party must propose complete and comprehensive jury instructions supporting his or her theory of the case." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 151; *Metcalf*, *supra*, 42 Cal.4th at p. 1131 [noting also that neither a trial nor reviewing court is obligated to articulate for a civil plaintiff that which he has left unspoken]; see generally Fairbank et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2023) ¶ 14:3, pp. 14-1, 14-2 ["Jury instructions are the *blueprint* for the legal theories advanced in a case. Applicable jury instructions identify the *elements of proof* for each such claim and defense and guide development of the *case theme*."].) The fact that Donius did not provide the jury with a legal pathway to reaching his desired conclusion—that the County's easement was not valid because it was not recorded in the County recorder's office—does not render the evidence insufficient to support the verdict.[13] The jury's province is solely as finders of fact; " 'issues of law are triable by the court.' " (*Stofer v. Shapell Industries, Inc.* (2015) 233 Cal.App.4th 176, 188.) If Donius sought resolution of "a disputed issue of law based upon undisputed facts," that was not an issue for the jury but rather "a legal issue of the sort which is

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13 To the extent he relies on Greene's testimony that an unrecorded easement is not valid, this is improper because expert witnesses may not offer legal conclusions. (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 122 ["an expert may not testify about issues of law or draw legal conclusions"].)

traditionally the peculiar province of the court." (*Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 619.)[14]

Accordingly, we turn to the determination properly before us which is whether sufficient evidence supports the verdict under the law stated in the instructions given. (See *Bullock*, *supra*, 159 Cal.App.4th at pp. 674–675.) And, given that it was Donius's burden to prove lack of permission, Donius must meet the higher standard applicable when there is a failure of proof at trial and demonstrate that the evidence compelled a verdict in his favor. (*Estes*, *supra*, 51 Cal.App.5th at p. 651.) We conclude he has not done so.

The County presented substantial evidence that it did not *need* Donius's permission to allow others to enter and put improvements on the Property because it had obtained a valid right-of-way in or around 1935 from the Secretary on Calac's behalf. It first presented a letter documenting the County's application, which described the proposed easement and represented that Calac had agreed to accept $50 in damages. It then offered the 1937 County Board of Supervisors' resolution confirming that the Department of the Interior had approved the application and granted the right-of-way. This resolution was on file with the BIA. The County also

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14 We also note that, to the extent Donius intended to make a legal instead of factual argument on appeal, he provided no legal authority in his opening brief for the proposition that an easement must be recorded in the County recorder's office to be valid. Only in his reply brief does he provide support for this position. It is well settled that "[o]bvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant" (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11) and, thus, " ' "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before . . . ." ' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.) Donius has not demonstrated good cause for failing to present legal authority supporting his argument in his opening brief. Therefore, we will not address these arguments.

presented a map of Road Survey No. 604 showing the easement and depicting the Department of the Interior's endorsement that the map was "Approved, subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1084), and departmental regulations thereunder . . . ." As previously noted, the 1935 map was publicly available at the BIA and the 1959 map referencing the 1935 approval of the easement was recorded within the County engineer and surveyor's department and also available online. The County's expert surveyor agreed that these documents were significant, commenting that for Greene to "ignore Road Survey Number 604, which he obviously knew about . . . on a project that was part of the tribal reservation and not do a further investigation, you know, could lead the property owner to think that those rights didn't exist."

The County supported this evidence with the instructions to the jury discussed *ante* indicating that the procedure the County employed in obtaining the right-of-way comported with applicable laws at the time. Instruction No. 16 explained in pertinent part that: "[w]hile holding the allotted property in trust, the United States government had the right to grant road rights of way through the property." Instruction No. 10 explained that: "In the 1930s, the United States Secretary of the Interior was authorized to grant road rights of way through any Indian reservation or through any lands that had been allotted to any individual Indian while the United States government held the property in trust for the individual Indian." These instructions informed the jury that, regardless of Calac's age, the government did not require his consent because the Secretary could authorize the right-of-way. Through this lens, the letter regarding the application, County Board of Supervisors' resolution, and map collectively provided evidence of " 'reasonable . . . , credible, and of solid value . . . ' "

(*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633) that the Secretary did indeed grant the right-of-way in this case. Although Donius asks us to, at best, draw different inferences from the evidence, on substantial evidence review we must accept all evidence supporting the verdict and draw all reasonable inferences to affirm the verdict. (*Schmidt*, *supra*, 44 Cal.App.5th at p. 581.) Under this standard of review, we conclude substantial evidence supported the jury's conclusion that the County *had* permission to allow the tribe and NCTD to enter the property. Accordingly, we are not persuaded that the evidence compels a finding in favor of Donius as a matter of law.[15] (*Estes*, *supra*, 51 Cal.App.5th at p. 651.)

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15 Donius acknowledges in his reply brief that, "[b]ecause the County issued an encroachment permit to the NCTD under the belief that it had a valid right-of-way easement over plaintiffs' Property, the NCTD's liability stands or falls on the validity of County's asserted easement." Because we conclude substantial evidence supports the jury's conclusion that the County had a valid easement that granted it permission to enter Donius's land, we further conclude the jury's verdict in favor of NCTD is supported by substantial evidence. In so doing, we observe that bus stops appear to fall within the gambit of allowable uses within an easement, as this term was defined for the jury (again, the jury was instructed that "[a]n easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be less than the right of ownership.")

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

CASTILLO, J.