No. D080942

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

MARVIN DONIUS and RINCON MUSHROOM CORPORATION OF AMERICA, INC.,
Plaintiffs and Appellants,

v.

COUNTY OF SAN DIEGO and NORTH COUNTY TRANSIT DISTRICT,
Defendants and Respondents.

On appeal from the Superior Court for the County of San Diego
Honorable Joel R. Wohlfeil
No. 37-2020-00015528-CU-PO-CTL

APPELLANTS' COMBINED REPLY BRIEF

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I. INTRODUCTION

Defendants County of San Diego (the County) and North County Transit District (NCTD) fail to salvage the erroneous judgment in their favor on plaintiffs' trespass and nuisance claims. Rather, for reasons discussed in the Opening Brief and here, the verdict underlying the judgment remains contrary to substantial evidence and premised on instructional error.

First, defendants' admission that the County's 1935 right-of-way across plaintiffs' Property was not recorded with the County Recorder's Office is fatal to the jury's determination that the County had a valid easement. Relevant statutes, supported by Supreme Court precedent in an analogous context, require that instruments conveying an interest in real property be duly recorded in the County Recorder's Office. A "survey map" depicting the easement filed with the Bureau of Indian Affairs (BIA) and recorded with the County Surveyor's Office twenty years later are insufficient because they fail to accomplish the underlying purpose of recordation—that is, to provide notice to successive owners via title searches. Nor does federal law allow the Secretary of the Interior, as the BIA's head, to convey a right-of-way easement on an Indian allotment by signing a survey map without the allottee's consent. All the more so where, as here, the allottee was a minor, unable to give consent without a guardian, whose appointment was nowhere in evidence.

Second, plaintiff Marvin Donius, the undisputed owner and resident of Property, did not impliedly dedicate the portion of his Property on which defendants claim an easement to place the

traffic light and bus stop structures at issue. Rather, Donius testified without impeachment that he only discovered the existence of the claimed easement after a property line survey conducted for purposes of an unrelated federal action shortly before he filed this suit, which revealed that the structures encroached on the Property. Absent knowledge of the Property's true boundaries, defendants fail to establish that Donius had constructive notice due to open and notorious use of plaintiffs' Property to find an implied dedication or permissive easement.

Finally, defendants' proffered special jury instructions erroneously stated that the Secretary of the Interior was authorized to convey right-of-way easements on Indian allotted land without the allottee's consent. Because plaintiffs did not advocate for these instructions and acquiesced to them without realizing that they omitted key words from the two statutes on which they were patterned, the invited error doctrine does not apply. Nor are plaintiffs barred from challenging the instructions on appeal without objecting to them in the trial court because they misstate the law, which actually provided that the Secretary's role was to approve conveyances over reservations or allotted Indian land with valid consent from the tribe or individual allottee.

Accordingly, this Court should reverse the judgment, and remand with instruction that the trial court enter judgment for plaintiffs notwithstanding the verdict or grant a new trial.

II. LEGAL DISCUSSION[1]

A. Notwithstanding Defendants' Contrary Argument, the Attempted Right-of-Way Easement Across the Property Was Void

1. The Claimed Easement Was Invalid Absent Recordation in the County Recorder's Office

Defendants do not dispute that the 1935 attempted right-of-way conveyance was never recorded in the San Diego County Recorder's Office. Instead, they argue that there is "no legal authority that to be valid an easement must be recorded with the County recorder's Office—or at all." (E.g., County RB at p. 18; see also NCTD RB at pp. 18–19.) Alternatively, they assert that the attempted conveyance was still valid because it was "recorded" with the Bureau of Indian Affair via a 1935 Road Survey Map, and then later with the County Surveyor's Office through a 1959 Road Survey Map. (*Ibid.*) But the law is to the contrary.

Civil Code § 1214, enacted in 1872 and in effect at the time of the attempted conveyance in 1935, requires recordation of any conveyance of real property to be valid:

> Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment

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[1] Because 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. Accordingly, the defendants' arguments in their respondents' briefs substantially overlap, and are addressed together here.

> affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action.

Further, Civil Code § 1169, also enacted in 1872 and in effect at the time of the attempted conveyance in 1935, requires that "instruments entitled to be recorded ***must*** be recorded by the County Recorder of the county in which the real property affected thereby is situated." (Emphasis added; see also Civil Code § 1170 ["An instrument is recorded when duly acknowledged or proved, certified, and deposited in the Recorder's office with the proper officer, and by him filed for record, by noting thereon such filing, with the minute, hour, day, and year thereof, and subscribing the same."] (West 1872).)

Because an easement is an instrument, that is, conveying the right to use real property, Sections 1214, 1169, and 1170 required the easement to be recorded in the County Recorder's Office to be valid. (See, e.g., Miller & Starr, Cal. Real Estate (3d ed. 2009) § 11:6, pp. 11-24–11-49 [listing deeds, easements, and 150 other recordable instruments]; cf. also Civ. Code, § 877.050, subd. (c.) [providing conditions for abandonment of an easement, including if no "instrument creating, reserving, transferring, or otherwise evidencing the easement is recorded"]; *Stevenson v. City of Downey* (1962) 205 Cal.App.2d 585, 592 [affirming judgment that property owner abandoned easement of vehicular access despite using wrong procedure because she recorded executed certificate and tract map specifying intent to abandon].)

Consistent with this clear statutory language, the California Supreme Court had held, albeit in a slightly different

context, that a conveyance is void and has no legal effect ***on subsequent purchasers*** of the property unless it is recorded with the County Recorder's Office. (See *Dougery v. Bettencourt* (1931) 214 Cal. 455, 461–464 [holding that actions such as depositing a certificate of sale in a desk drawer in the county recorder's office, writing on it that it was recorded at the county treasurer's request, and entering a memorandum of the sale in a non-public book devoted to certificates of sale, did not constitute valid recordation of the deed in the county recorder's office for purposes of giving notice and quieting title in purchaser's favor].)

At issue in *Dougery* was a different statute, which required recordation of the sale of private property for failure to pay taxes assessed by an irrigation district. (*Id*., at pp. 460–461.) But the holding applies here because the Court underscored that the purpose of recording in the County Recorder's Office, as opposed to giving notice of the sale in newspapers or recording by other means, is to make the instrument a matter of public record in a book kept for that purpose, thereby providing valid notice to the delinquent property owner, the property's purchaser, and the public. (*Id.* at pp.462–463.) Just as it was insufficient for notice to have been provided by newspaper in *Dougery*, it is insufficient here to make the 1935 Road Survey Map or the 1959 Road Survey Map depicting the easement available through the BIA, the County Surveyor's Office, or online generally.

Defendants' reliance on Civil Code § 1217, providing that an "unrecorded instrument is valid as ***between the parties thereto*** and who have notice thereof," does not trump Civil Code

§ 1214, providing that unrecorded conveyances are void as to third parties such as subsequent purchasers. Thus, even if the unrecorded claimed easement is valid between the County and the minor Indian who purported to convey it (assuming a guardian made the conveyance on his behalf and the Secretary of the Interior approved it), the unrecorded conveyance is still void as to subsequent purchasers like plaintiffs who received no notice of the purported transaction. (Cf., e.g., *Gamerberg v. 3000 E. 11th St., LLC* (2020) 44 Cal.App.5th 424, 434 ["when an easement or other use is not visible and does not provide actual notice to the purchaser, it must be recorded to be enforceable"].)

Accordingly, 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 on this ground alone.

2. The Secretary's Approval on the 1935 Road Survey Map Did Not Constitute the Easement Itself, Nor Did Recordation With the BIA or the County Surveyor's Office Suffice

Defendants nevertheless argue that the attempted right-of-way easement by the minor Indian was still valid because the Secretary's signed "approval" of these survey maps was tantamount to the Secretary's conveyance of the attempted right-of-way easement and the easement was "recorded" with the BIA as a survey map in 1935, and then later with the County Surveyor's Office as another survey map in 1959. (E.g., County RB at pp. 18–19; NCTD RB at pp. 19–21.) These contentions are without merit and are contrary to the law.

Preliminarily, defendants cite no law in support of the proposition that a survey map could constitute a valid, recorded easement itself. The jury was also shown a notarized easement to San Diego Gas & Electric across Tract 137, recorded in the San Diego County Recorder's Office, further undermining its conclusion that the 1935 Road Survey Map could itself be an easement. Moreover, the contention regarding alternate recordation with the BIA or the County Surveyor's Office ignores the strict requirements of statutory conveyances, and, with respect to Indian allotments, the need for the allotee's required consent and for subsequent approval by the Secretary.

As stated, assuming the surveys constituted an instrument for recording purposes under Civil Code §1169, they were never recorded in the County Recorder's Office to make them valid as against plaintiffs, who became subsequent purchasers without actual notice. (*Gamerberg*, 44 Cal.App.5th at p. 434.) However, the character of survey maps, even in the context of Indian allotments, do not qualify as instruments of conveyances that can be recorded with the County Recorder's Office for purposes of providing actual notice of a public record.

Civil Code Section 1215, enacted in 1872, which was in effect in 1935, defines the term "conveyance" as embracing "every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills." The survey maps claimed at trial as recorded conveyances were not instruments that "alienated" a right-of-way easement to the

County from the allottee as the grantor. (See, e.g., Cal. Gov. Code § 27279, subd. (a) [the term "instrument" is defined as a "written paper ***signed*** by a person or persons transferring the title"], emphasis added; *Nebraska Public Power Dist. v. 100.95 Acres of Land* (8th Cir. 1983) 719 F.2d 956, 959 [discussing "easement deeds" as signed documents.) Further, the minor Indian did not sign a survey map, but, as required, purported to sign a "conveyance deed" to be sent to the Secretary for approval as part of "Form 5-104B," "duly executed by the Allottee." (Trial Ex. 242-4; 6 CT 1631 [Senate Report No. 80-823: "easement deeds must be executed" for easements over Indian allotments].)

Absent an executed conveyance deed, substantial evidence does not support the finding that the survey maps stamped with the Secretary's approval were "instruments" of the attempted conveyance of the claimed easement by the minor Indian.

3. The Minor's Lack of Consent Through a Guardian Rendered the Attempted Right-of-Way Conveyance Void

Defendants' various arguments against additional defects in the minor's 1935 attempted right-of-way conveyance also fail.

First, defendants argue that the minor's consent was irrelevant because the Secretary had the right to convey the easement over the allotted land held in trust for the minor without the minor's consent. (E.g., County RB at pp. 8–10, 26, 33; NCTD RB at pp. 22–24, 32–34.) This is consistent with their prior argument to the jury, and testimony from defendants' expert and lay witnesses, that the Secretary, as the one holding the allotment in trust for the minor, had the right to "step in" and

convey the right-of-way easement on the minor's behalf by endorsing the 1935 and 1959 survey maps. (9 RT 1753:1–11; 10 RT 1985:5–8; 2028:9–23; 11 RT 2244–2245.) But evidence at trial showed an official acknowledgment of the need for the allottee's written consent ***in addition to*** and separate from the requirement of the Secretary's approval (Trial Ex. 242-3), which is consistent with the law. (*Fettig v. Fox* (D. ND 2020) No. 1:19-cv-096, 2020 WL 9848691, at *14 [allottee's consents and grants by the Secretary of Interior or the Secretary's designee is required for valid right-of-way interest over allotted land]; *Truskett v. Closser* (1915) 236 U.S. 223, 225 [Indian minor cannot lease allotted property without guardian ad litem and the Secretary of Interior's approval].)

In other words, despite defendants' contrary arguments, valid conveyances are made with the allottee's consent ***and*** the Secretary's approval. (See 25 U.S.C. § 405 [Secretary's approval required for conveyances by allottees]; *Bacher v. Patencio* (S.D. Cal. 1964) 232 F.Supp. 939, 941 [Secretary's approval required to ensure the transaction is fair to the Indians, including to protect against "crafty settlers and businessmen who would manage to get their land and property away from them."]; *Spector v. Pete* (1958) 157 Cal.App.2d 432, 437–440 [allottee's proposed "amended" conveyance and sale of allotted Indian land invalid "for the reason it was not approved by the Secretary of the Interior"].) Defendants' reliance on the fact that the minor was paid $50 for the attempted right-of-way conveyance (Tr. Ex. 242-4; 11 RT 2244:5-7) is irrelevant because, notwithstanding such

consideration, lack of Secretarial approval ***and*** the allottee's consent void the transaction. (*Bacher*, 232 F.Supp. at 941 [concluding that sale of allotted land "will not be allowed to stand" and will be "of no effect whatever" where allottee changed his mind after executing deed and getting "fair" consideration for the proposed conveyance absent the Secretary's approval]; 25 U.S.C. § 405 [allowing "noncompetent Indian," interpreted to include minors and the mentally ill, may sell or convey allotment subject to approval by Secretary of the Interior]; *Anchor Oil Co. v. Gray* (1921) 256 U.S. 519 [proposed lease executed between allottee and oil company deemed valid once also approved by the Secretary of the Interior]; accord *Oklahoma v. Texas* (1922) 258 U.S. 574; *Arenas v. Preston* (9th Cir. 1950) 181 F.2d 62.)

Thus, in accordance with this law, the minor allotee here had the right and authority, through a guardian, to convey a right of way on his allotment, subject to the Secretary's approval, contrary to the County's argument to the jury that the Secretary alone could proceed without the minor's consent. (E.g., 11 RT 2247:1–5 ;arguing that the BIA had the authority to give the easement for the road right-of-way].) The evidence, including a June 28, 1935 letter from the County Surveyor to the County Board of Supervisors, also acknowledged the need for separate conveyance agreements and consents: (1) one for the Tribe itself for the road right-of-away across the reservation; and (2) one for the allottees for the easements across their separate allotment land not part of the reservation. (Trial Exs. 242-3 & 242-4).

But absent such consent through a guardian ad litem, the easement was void and invalid, as illustrated by *Bacher*, supra. There, a mentally incompetent allottee, through a court appointed conservator, executed a contract to sell his allotment, and petitioned the Secretary of Interior for approval, following with the BIA would issue a fee patent to the buyers. (232 F.Supp. 939.) At the last minute, and against his conservator's advice, the allotee backed out of the sale, even though the buyers had paid 10% of the purchase price into escrow. (*Id*. at p. 940.) The court held that the allottee's consent was a "condition precedent to the final issue of the fee patent (to the buyers), and the issuance was a condition precedent to the validity of the escrow contract." (*Id*. at p. 945.) As a result, the court dismissed the buyers' action for specific performance of the contract to sell the allotment, finding it unenforceable absent the allottee's consent. (*Ibid*.)

For the same reasons, absent evidence of the minor's consent to the proposed right-of-way through a guardian rendered the transaction void. There was no legal basis for the Secretary to "step in" and make the conveyance for the minor in the absence of his consent or lack of an appointed guardian.

4. Substantial Evidence Did Not Establish the Secretary's Approval of Allottee's Conveyance, as Opposed to the Tribe's Conveyance

At trial, the County confused the Secretary's approval of the Tribe's consent to the proposed conveyance of a road right-of-way across the reservation with his approval of the individual allottees' attempted conveyance across his allotment. But the only evidence of any Secretarial approval was of a right-of-way by

the Tribe across the reservation. The June 28, 1935 letter from the County Surveyor to the County Board of Supervisors purported to secure the allottees' agreement for the easement:

> We have secured the signatures of a majority of the Indians enrolled at Rincon and the same is attached hereto for your inspection. Also, we have secured an agreement from four Allottees across the following Allotments located in the Rincon Reservation: Numbers 137, 155, 156 and 157.

(Trial Ex. 242-3). With respect to the consent by the Indian minor as to Tract 137, the allotment ultimately sold years later to plaintiffs in fee simple, nothing is mentioned about a Guardian Ad Litem having been appointed and signing the consent for the Indian minor preceding the Secretary's approval.

Moreover, whereas the letter enclosed both conveyance applications for the Secretary's approval—one set from the Tribe, Form No. 5-104 and another set from the allottees under Form No. 5-104B—there was no evidence of a conveyance deed for the right-of-way easement executed by an appointed Guardian Ad Litem, as required. Instead, page two of the June 28, 1935, letter specifically stated that the applications were "duly executed by the Allottee," meaning there was no evidence the minor's application was executed by his Guardian Ad Litem. (Tr. Ex. 242-4.) The June 28, 1935 letter's last paragraph states that the allottees' applications and the Tribe's applications were all sent to the BIA for the Secretary's approval, together with "blueprints and petitions." (Trial Ex. 242-4.). The petitions were the requests for Secretarial approval for both the road right-of-way across the

reservation and across the allotments, and the "blueprints" were the sheets to Survey Map 604 showing Secretarial approval of the map on September 10 2935. (Trial Ex. 239.)

The County argued that this "approval" by the Secretary was the approval of the application for the road right-of-way across the reservation that included the right-of-way easements across the four allotments, including that of the minor Indian, Matthew Calac. However, this ignores the separate "petitions" and consent application forms relevant to the individual allottees' consent submitted to the Secretary for approval. Thus, the approval shown on Survey Map 604 was just an approval of the survey map, not an approval of any valid consent by the minor to any conveyance, which must be separate. (*Nicodemus v. Washington Water Power Co.* (9th Cir. 1959) 264 F.2d 614, 616–617 (allotted land is no longer part of the reservation); *United States v. Oklahoma Gas & Elec. Co.* (10th Cir. 1942) 127 F.2d 349, 353–354 [distinction is to be made between granting right-of-way over and across the reservation and allotted land].)

Moreover, the County's contention that this survey map approval constitutes joint approval of the entire road right-of-way and individual easements over the allotments is contradicted by the September 27, 1937 County Board Resolution approving modification of the terms of the road right-of-way to eliminate constructing a playground. (Trial Ex. 243-2.) This County Resolution references a letter from the BIA Superintendent dated September 28, 1936, ***one year after*** the survey map was approved, which had forwarded the consent applications and

conveyance deeds to the Secretary for approval. According to the Resolution, the BIA Superintendent informed the County Surveyor that the Secretary had approved the County's application. However, there was no mention that the Secretary had approved the allottees' applications. The County's argument that the above approval should necessarily be deemed to encompass approval of the allottees' application because it would be "logical" to do so (County RB at p. 20) does not satisfy the substantial evidence test, and should be rejected as mere speculation. All the more so absent evidence that a Guardian Ad Litem was ever appointed to provide consent on the minor's behalf and execute the minor's application for Secretarial approval. (See *Kuhn v. Dep't of Gen. Servs.* (1994) 22 Cal.App.4th 1627, 1633 [appellate courts will not indulge inferences which are the result of mere speculation or conjecture in applying the substantial evidence test].)

5. The Official Duty Presumption Does Not Apply to Salvage the Evidentiary Defect

To overcome the lack of evidence showing that the Secretary did, in fact, approve the minor Indian's attempted conveyance without a Guardian Ad Litem, the County argues that it did not need direct evidence because "public officials are presumed to have properly discharged their official duties" under Evidence Code § 664. (County RB at pp. 25–26.) But this contention lacks merit for several reasons, including because the County never raised it in the trial court and never requested a jury instruction on that point. (*People v. Acevedo* (2003) 105

Cal.App.4th 195, 198–199 [reversing defendant's conviction for fleeing a police vehicle in pursuit after rejecting prosecution's reliance on presumption under Evidence Code § 664 that officials discharged their statutory duty to install red lights on emergency vehicles because jury was not instructed on the presumption's applicability and the issue was not raised below].) Here, the jury was never instructed on the Secretary's duty to approve an individual allottee's proposed conveyance, including with the appointment of a Guadian At Litem, if necessary.

Reliance on this presumption is all the more improper because it is rebuttable and, had the County raised it in the trial court, plaintiffs would have had an opportunity to overcome it. (C.f., e.g., *Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, 1381–1382 [reversing judgment for employee in wrongful discharge lawsuit where trial court failed to instruct the jury at defendant's request about the rebuttable presumption of at-will employment if there is no agreement specifying the length of employment or the grounds for termination].)

B. Substantial Evidence Does Not Establish that Plaintiff Donius Impliedly Dedicated His Property for, or Impliedly Permitted, the Placement of the Traffic Light and Bus Stop Structures at Issue

Defendants next argue that plaintiff Donius was on "notice" of either the claimed right-of-way easement or the structures being on the Property by virtue of the SDG&E poles placed on the further edge of his Property, and because a chain link fence around the Property's boundary was purportedly moved to install the traffic light structures and the bus stop pad at issue. (County

RB at p. 21.) According to defendants, by failing to do anything despite such constructive knowledge, Donius impliedly dedicated his property to them to place the structures or impliedly permitted their placement. But defendants again rely on alleged logical inferences made by the jury to impute to Donius constructive knowledge, relying on conjecture.

Donius testified without impeachment that he did not know about the County's claimed unrecorded easement on his property until he had a boundary survey done on his property in March 2020. (Trial Ex. 8; 6 RT 1199, 1200–1203.) Donius also testified he was never aware of the Property's true boundaries or that the traffic light or bus stop encroached on it until the 2020 Survey. (6 RT 1199, 1200–1203.) Thus, whether the SDG&E poles could be used by him as a basis to compare where his boundary line might be is pure speculation, which this Cout should not indulge as sufficient substantial evidence to support a finding of implied permission. (*Kuhn*, 22 Cal.App.4th at p. 1633.)

As to the relocation of the chain link fence, Donius again testified that he did not know if it was ever moved to accommodate the placement of the traffic light poles. (6 RT 1199, 1200–1203). Other than an obscure reference in a one-page engineering plan that it "should" be moved (Tr. Ex. 20), there was no direct evidence that it was, in fact, moved. For example, as the custodian of the construction records, defendants never produced any invoices or documents from subcontractors who purportedly moved the fence, and thus failed to show that it was in fact moved. While attempting to testify about the fence being moved,

the County's own expert, Matthew Webb, conceded he neither saw the fence being moved nor any invoices from subcontractors establishing that it was moved. (10 RT 2012–2014.) Webb was thus ultimately forced to concede that he could not say "with absolute certainty" that the fence was ever moved. (10 RT 2015.)

Moreover, even if the fence was moved and Donius saw it being moved during construction, he would have nothing to measure this against, since the property line survey was not done for another 16 years. Indeed, he would have no reason to believe that the fence was being moved across his boundary line and onto his property, because no one asked him for permission to move it. (6 RT 1199–1200.) On this record, this Court cannot speculate that the jury inferred that Donius had had "constructive" notice of the fence being moved to prove that he impliedly permitted defendants to install their respective structures on his property.

Nor is the fact that the traffic light poles and bus stop were "open and obvious" (County RB at p. 22) enough to provide constructive notice of either any easement or any encroachment to warrant further inquiry where, as here, the evidence established that Donius did not know where the Property's boundary line was. Indeed, that was the reason for the property line survey in 2020. But "open and notorious" assumes owners can see hostile use being conducted ***on*** their property. (*McLear-Gary v. Scott* (2018) 25 Cal.App.5th 145, 159 [discussing elements of prescriptive easement based on visible, open and notorious use sufficient to impart constructive notice of such use to owner].)

In addition, the jury never reached the issue of implied dedication or permissive easement, which was an affirmative defense much later down the verdict forms as to each defendant, by when the jury ended its deliberation after finding a valid easement (erroneously, in plaintiffs' view). (See, e.g., 5 CT 1360 [on County's Verdict Form, leaving blank questions such as "Was Defendant's use of Plaintiffs' property open and easily observable or under circumstances that would give reasonable notice to Plaintiffs?" and "Did Defendant have permission from Plaintiff to use Plaintiff's property?"]; see also 5 CT 1381 [on NCTD Verdict Form, leaving blank questions such as "Was Defendant's use of Plaintiffs property open and easily observable or under circumstances that would give reasonable notice to Plaintiffs?" and "Did Defendant have permission from Plaintiff or Plaintiffs' predecessor to use Plaintiffs' property?"].)

Because the existence of a prescriptive easement based on open and notorious use is a factual question, this Court cannot assume the jury made any findings given its failure to reach that portion of the verdict form. (See *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570 ["Whether the elements of prescription are established is a question of fact for the trial court [citation], and the findings of the court will not be disturbed where there is substantial evidence to support them."].)

In addition, the statute of limitations defense advanced by NCTD as grounds to affirm the judgment depends upon Donius having constructive notice of the disputed structures being placed on the Property. (NCTD RB at pp. 52–56.) As discussed, however,

substantial evidence does not show such constructive notice. Rather, Donius learned the true boundaries of the Property and the fact that they disputed structures were placed on it for the first time as a result of the 2020 survey, and timely filed the underlying within months. Moreover, factual findings necessary to the the statute of limitations issue are absent from the record as the jury never reached this defense either. (5 CT 1373 [on NCTD's Verdict Form, leaving blank questions such as "Were Defendants prejudiced from Plaintiffs' delay?"].)

C. Defendants Are Wrong That Plaintiffs Invited the Error in Special Instructions 10 and 16 They Proffered, Erroneously Stating that the Secretary Could Convey Right-of-Way Easements on Allotted Indian Land Without the Allottee's Consent

As discussed, no authority permits the Secretary to approve the conveyance of a right-of-way easement for an allottee without the allottee's consent, let alone a minor allottee's consent through an appointed Guardian Ad Litem. Even though Jury Instructions 10 and 16 stated otherwise, defendants argue that plaintiffs "agreed" to them, and are therefore barred from objecting to them under the invited error doctrine. (E.g., NCTD RB at pp. 37–38.) But as plaintiffs previously explained, these instructions are deemed excepted to" under Code of Civil Procedure § 647 as misstatements of the law and preserved for appellate review. (AOB, pp. 39–40; *Suman v. BMW of N. Am., Inc.* (1994) 23 Cal.App.4th 1, 9 [party harmed by jury instruction which is an incorrect statement of the law "need not have objected to the instruction or proposed a correct instruction of his own in order to

preserve the right to complain of the erroneous instruction on appeal."]; *Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7 ["A party may . . . challenge on appeal an erroneous instruction without objecting at trial."].)

Moreover, for the invited error doctrine to apply, the error must have been brought by active advocacy. (*Khoiny v. Dignity Health* (2020) 76 Cal.App.5th 390, 419–420 (counsel's statement that she was "fine with having that" was not invited error because, at most, she agreed to the form of the verdict form but in in no way advocated for it). Here too, plaintiffs' counsel did not actively advocate for Special Instructions 10 and 16. Rather, it is undisputed that plaintiffs did not propose these instructions, that they were drafted by the County, and that they were presented to the trial court by defendants without advance notice to or consultation with plaintiffs' counsel. (9 RT 1861–1862.) Moreover, the County's attorney represented that the instructions were an accurate summary of the statutes they paraphrased—25 U.S.C. §§ 311 and 341. (9 RT 1862.) For the reasons discussed, they were not. As a result, there was no invited error merely because plaintiffs' counsel acquiesced to the instructions without realizing that key words had a been omitted from the statutes.

For example, the word "permission" was deleted from the phrase "grant permission" in § 311 and the word "Congress" was deleted from the words "power of Congress to grant the right of way through any lands granted to an Indian" in § 341. As a result, whereas the instructions stated that the Secretary had authority to grant rights-of-way on allotted Indian land (5 CT

1307, 1310), the statutes actually state that the Secretary is "authorized to grant permission to the proper State or local authorities" (25 U.S.C. § 311) and that nothing shall affect the "power of Congress to grant the right of way through [Indians lands]" (25 U.S.C. § 341). Giving the jury the false impression that the BIA alone could convey the attempted right-of-way without the minor Indian's consent, the instructions prevented the jury from properly evaluating the case. Instead, the jury was misled to make the erroneous finding that the County had a valid easement to place traffic light poles on plaintiffs' Property and give NTCD an encroachment permit to place the nearby bus stop.

This error was prejudicial, resulting in a miscarriage of justice and warranting reversal. (See *LeMons v. Regents of Univ. of Cal.* (1978) 21 Cal.3d 869, 875 ["Instructional error is prejudicial where it seems probable that the error affected the verdict."]; *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 531 [where the state of the evidence supported appellant's theory of the case but the instructions either did not allow the jury to properly evaluate the case or affirmatively misled the jury, they were prejudicial].)

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III. CONCLUSION

For the reasons discussed above and in plaintiffs' Opening Brief, appellants respectfully request that this Court reverse the jury verdict and the resulting judgment in defendants' favor. This Court should also instruct the trial court to enter judgment notwithstanding the verdict in plaintiffs' favor or, in the alternative, to grant plaintiffs a new trial.

Dated: August 11, 2023

Respectfully Submitted,

MANUEL CORRALES, JR.

By: /s/ *Manuel Corrales*
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CERTIFICATE OF LENGTH

This Opening Brief was produced on a computer in 13-point Century Schoolbook font. The word count, including footnotes but exclusive of matters that may be omitted under California Rules of Court, rules 8.486(a)(6) and 8.204(c), is 5,545 words as calculated by the program used to generate the brief.

Dated: August 11, 2023

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CERTIFICATE OF SERVICE

I, Rupa G. Singh, am employed in San Diego County, California, am over the age of 18 years, and am not a party to this matter. My business address is 501 West Broadway, Suite 800, San Diego, CA 92101. On August 11, 2023, I electronically filed Appellant's Reply Brief with the Clerk of the Court of Appeal, Fourth Appellate District, Division One by using the appellate Electronic Filing System (EFS). I certify that all participants in the case, including counsel for defendants and respondents, are registered users of the EFS TrueFiling Portal and will be served by the appellate EFS system.

I further certify that, on August 11, 2023, I caused a copy of only the Reply Brief to be served on the trial court by first-class mail at the following address:

San Diego County Superior Court
Hon. Joel R. Wohlfeil
Department C-73
1100 Union Street
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct. Executed August 11, 2023 at San Diego, California.

s/ Rupa G. Singh
Rupa G. Singh