Filed 9/24/19 Rio Mesa Holdings v. Fidelity National Title Insurance CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RIO MESA HOLDINGS, LLC,

Plaintiff, Cross-defendant and Appellant,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Defendant, Cross-complainant and Appellant.

F074641

(Super. Ct. No. 13CECG00867)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Moskovitz Appellate Team, Myron Moskovitz, James Ardaiz, Kathleen DeSantis, and Paul Katz; Baker, Manock & Jensen, John G. Michael and J. Jackson Waste for Plaintiff, Cross-defendant and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Scott M. Reddie and James P. Wagoner; Best Best & Krieger, Robert J. Hanna and William E. Robinson; California Appellate Law Group, William N. Hancock and Anna-Rose Mathieson for Defendant, Cross-complainant and Appellant.

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In the mid-2000's, Rio Mesa Holdings, LLC (Rio Mesa) acquired a large expanse of real property in Madera County between Highway 41 and the San Joaquin River and planned a large-scale suburban development that would include access to the river. However, access to the river required admittance into a gated community that has existed since the 1980's. Rio Mesa purchased a $25 million title insurance policy. The residents of the gated community as well as their homeowners' association sued Rio Mesa. The superior court determined the residents of the gated community could generally keep out nonresidents, but Rio Mesa could use the roads within the neighborhood to a certain degree. The extent to which our court affirmed these findings on an earlier appeal and cross-appeal is in question.[1]

Following that lawsuit, Rio Mesa asked its insurer, Fidelity National Title Insurance Company (Fidelity), to indemnify it against losses sustained due to lack of access through the gated community. Fidelity denied the claim and Rio Mesa filed an action. Before trial, the superior court concluded Rio Mesa had *no* right to enter the gated community, granted Rio Mesa's summary adjudication motion, and denied Fidelity's motion to exclude evidence of Rio Mesa's lack of access. Ultimately, the jury found Fidelity was obligated to pay Rio Mesa $25 million, the face amount of the policy. The court denied Fidelity's motions for judgment notwithstanding the verdict (JNOV) and a new trial on liability. However, deeming the jury's award excessive, the court granted Fidelity's motion for a new trial on damages.

On appeal, Rio Mesa asks us to reverse the order granting Fidelity's new trial motion in part and reinstate the $25 million award. On cross-appeal, Fidelity contends

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1 Our earlier opinion is contained in the appellant's appendix of the present appeal. That prior opinion was partially published; the nonpublished portions of the opinion fall within the exception to California Rules of Court, rule 8.1115(b)(1). (See *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999 (*Sumner Hill*); see also *id*. (May 5, 2012) F058617 [nonpub. opn.].)

the court should have granted its JNOV motion. Alternatively, Fidelity asserts it is entitled to a new trial on liability and damages because the court erroneously granted Rio Mesa's summary adjudication motion, precluded evidence of Rio Mesa's right to enter the gated community, and instructed the jury Rio Mesa has no such right.

We conclude Fidelity is entitled to a new trial on liability and damages.

FACTS AND PROCEDURAL HISTORY

I. Prior lawsuit brought against Rio Mesa

a. *Background*

Sumner-Peck Ranch, Inc. (Sumner-Peck) owned and operated Peck Ranch, over 1,500 acres of agricultural land between Highway 41 and the San Joaquin River off of Road 204. In the 1980's, Sumner-Peck wanted to subdivide a portion of Peck Ranch to create custom residential lots on bluffs overlooking the river. In 1983, Madera County approved this subdivision, known as Sumner Hill. An amended final subdivision map (the Amended Map), which was recorded in 1985, depicted a tract of 49 lots on approximately 160 acres (the 49-Lot area) surrounded by several "Outlots" lettered A through J, a road system, and other appurtenant facilities providing the infrastructure of the subdivision. As a condition for approval, Madera County required Sumner-Peck to install a security gate and perimeter fence to keep pets away from nearby cattle-grazing operations and minimize the need to dispatch law enforcement to such a remote neighborhood.

The 49-Lot area is bordered on the west by Outlots A and B and on the east by Outlot C. Outlot D is bordered on the west by Outlot C and on the east by the San Joaquin River. Killarney Drive, Sumner Hill's paved main road, provides access to the 49-Lot area from Road 204. Killkelly Road, a dirt road, branches off Killarney Drive within the 49-Lot area and traverses the steeply sloped land on Outlots C and D en route to the river. According to the Amended Map, Sumner Hill's roads were originally

dedicated for public use. However, in the 1990's, Madera County vacated its interest in the roads.

Before sales of the residential lots began, Sumner-Peck installed a passcode-activated security gate at the front entrance on Killarney Drive and a perimeter fence surrounding the 49-Lot area. " 'PRIVATE PROPERTY—NO TRESPASSING' " signs were posted at the entrance and other locations. The real estate agent hired to market and sell the lots advised prospective buyers that they would live in a private, gated community and have unrestricted river access via Killkelly Road and distributed marketing brochures highlighting these enhancements. By late 1989, all of the lots were sold. Title to each lot was transferred by a deed that described the real property conveyed by reference to the Amended Map. After the subdivision's CC&R's[2] were amended in 1988, the Sumner Hill Homeowners' Association (the Association) has been responsible for maintaining the front entrance gate and the perimeter fence. In 2002, with Sumner-Peck's knowledge, the Association installed a passcode-activated security gate at the top of Killkelly Road.

For over two decades, residents in the 49-Lot area (the 49-Lot residents) enjoyed the amenities of a private, gated community and unrestricted vehicular and pedestrian access to the river. Only they and Sumner-Peck knew the passcodes for each security gate. When uninvited nonresidents found their way to the neighborhood, the 49-Lot residents asked them to leave; law enforcement intervened on occasion.

In 2003, Sumner-Peck agreed to sell Peck Ranch and Sumner Hill's Outlots to Ciao Properties, LLC, which later assigned all of its rights to Rio Mesa. In November 2004, following close of escrow, the property was conveyed for $25 million. Rio Mesa had notice of the private, gated nature of the 49-Lot area and the 49-Lot residents' use of Killkelly Road to access the San Joaquin River. Nevertheless, in 2005, it announced

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[2] " 'CC&R's' " is an abbreviation for the " 'covenants, conditions and restrictions' " recorded as mutually enforceable servitudes binding the parcels of a particular tract.

plans for Tesoro Viejo, a massive residential and commercial development that would feature an access route to the San Joaquin River through the 49-Lot area via Killkelly Road. Rio Mesa hoped river access would boost the marketability and value of Tesoro Viejo's residential lots. It installed its own locked gate near the top of Killkelly Road and hired private security guards to patrol for trespassers, preventing the 49-Lot residents from visiting the river.

b. *Superior court proceedings*

In April 2006, the 49-Lot residents[3] and the Association sued Rio Mesa.[4] They asserted "three families of rights: (1) the right to access the San Joaquin River over Killkelly Road through Outlots C and D; (2) the right to have a private[,] gated subdivision; and, (3) the right to prevent [Rio Mesa] from developing on any of the [O]utlots within the subdivision." The superior court identified the "ultimate issue" as "the extent to which" Rio Mesa was "restricted from" "develop[ing] the real property surrounding the 49 residential lots" "as a consequence of legal rights possessed by the property owners of the Sumner Hill subdivision."

In various briefs, the parties debated whether an easement by necessity arose with respect to the Outlots. In their request for a statement of decision, the 49-Lot residents and the Association specifically asked the court to "address the following controverted issues: [¶] . . . [¶] 27. Whether the owner(s) of [O]utlot[s] C and D have an easement of necessity to ingress and egress through the subdivision. [¶] . . . [¶] 49. Whether the

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3 Each of the individual plaintiffs was a 49-Lot resident, but not all of the 49-Lot residents were parties to the action. For the sake of brevity, we refer to the individual plaintiffs collectively as the 49-Lot residents.

4 Tesoro Viejo, Inc., was also named as a defendant. It "is the entitlement . . . and development arm of Rio Mesa" and "was in the process of obtaining the entitlements for the development and had an option to purchase the property from Rio Mesa." In this opinion, for the sake of brevity, "Rio Mesa" refers to both Rio Mesa Holdings, LLC, and Tesoro Viejo, Inc.

owner or owners of Outlots A and B do not have an easement of necessity over paved subdivision roads because of the location of the [a]ccess [r]oad through those parcels affording access to Road 204." In its request for a statement of decision, Rio Mesa asked the court to resolve "each of the principal controverted causes of action, claims and issues at trial, including the following: [¶] . . . [¶] (n) Irrespective of plaintiffs' rights to maintain a private[,] gated subdivision, do Outlots C and D nonetheless enjoy an easement of ingress and egress by necessity over Killkelly Road and Killarney [Drive] to Road 204?" (Fn. omitted.)

Following a bench trial, the court issued a statement of decision on July 21, 2008. It determined the buyers of the 49 Lots of the subdivision received title to the lots purchased, but Sumner-Peck, "upon the recordation of the Amended . . . Map and the sale of the [49 residential] lots," "own[ed] fee title to the real property of the subdivision, including the roads and [O]utlots"; subsequently, Rio Mesa "continue[s] to own fee title to the land upon which the road system was developed" and "to all of the roads within the subdivision." However, the court found the 49-Lot residents and the Association to have implied and equitable easements to use these roads. It also found the 49-Lot residents and the Association to have "an equitable right to maintain the subdivision as a private[,] gated community." The court explained:

> "For the past twenty-two years, [Sumner Hill] has operated in fact as a private[,] gated subdivision. There is only one paved entrance to the subdivision, which is located on Killarney Drive just off of . . . Road 204. On Killarney Drive . . . is a security gate which has existed for the past twenty-two years, and which requires a pass code to enter. There is a fence entirely circling the 49 residential lots, but located well within the boundaries of the subdivision. [¶] . . . [¶]
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> ". . . [W]hatever the original reasons for the requirement of the gate and the perimeter fence may have been, they were a reality when the 49 individual lots were marketed and sold. It would have been objectively reasonable for the original prospective purchasers of the 49 individual lots, and for any prospective purchasers of the lots upon re-sale thereafter, to

> believe that the subdivision was private and gated. [Next], the security sought by [Madera] County . . . was certainly more than the façade of a gate. In other words, what was going to lessen the need for calls to [law enforcement] at the subdivision was not a gate through which entrance would be allowed by the general public, but a locked gate and fence for which entrance would be restricted to residents and their guests. This is the very essence of a private[,] gated subdivision. . . . Finally, the subdivision was represented and marketed as being a private[,] gated subdivision. . . . It is difficult to envision at what other conclusion a prospective purchaser could possibly have arrived than the conclusion that the subdivision was a private[,] gated subdivision. . . ."

The court concluded Rio Mesa could utilize the roads and develop Outlots A through D in a manner consistent with the 49-Lot residents and the Association's rights as well as "the nature of the subdivision as a private[,] gated subdivision." For instance, Rio Mesa "[could] not place a gate on any portion of the roads in the subdivision so as to impede the use of all of the roads within the subdivision by the plaintiffs, the individual lot owners, and their guests and invitees."

As to certain "specific questions" posed by the 49-Lot residents and the Association in their request for a statement of decision, the court responded:

> "C. Roads
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> "23. Whether all roads in the Sumner Hill subdivision are owned by the . . . Association . . . .
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> "FINDINGS TO REQUEST 23: [¶] No. Fee title to the land is owned by [Rio Mesa]. . . . Association owns the road improvements and the lot owners have easements over all of the roads within the subdivision. [¶] . . . [¶]
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> "27. Whether the owner(s) of [O]utlot[s] C and D have an easement of necessity to ingress and egress through the subdivision.
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> "FINDINGS TO REQUEST 27: [¶] No. The current owners of [O]utlots C and D own fee title to the land upon which the road system is located, and have a right to utilize the road system in a manner

which is not inconsistent with the easement rights of the . . . [A]ssociation and the individual lot owners. [¶] . . . [¶]

"34. Whether [Association] owns Killkelly Road.

"FINDINGS TO REQUEST 34: [¶] No.

"35. If not [Association], who owns Killkelly Road?

"FINDINGS TO REQUEST 35: [¶] [Rio Mesa] own[s] fee title to the land upon which Killkelly Road is located, and the individual lot owners have easement rights over said road.

"36. Whether [Association] owns Killarney Drive

"FINDINGS TO REQUEST 36: [¶] [Rio Mesa] own[s] fee title to the land upon which Killarney Drive is located, the . . . Association owns the road improvements, and the individual lot owners have easement rights over said road. [¶] . . . [¶]

"49. Whether the owner or owners of Outlots A and B do not have an easement of necessity over paved subdivision roads because of the location of the [a]ccess [r]oad through those parcels affording access to Road 204.

"FINDINGS TO REQUEST 49: [¶] The current owners of Outlots A and B own the fee title to the land upon which the road system is located, and have a right to utilize the road system in a manner which is not inconsistent with the easement rights of the . . . [A]ssociation and the individual lot owners. [¶] . . . [¶]

"K. Additional Issues [¶] . . . [¶]

"97. Whether the Sumner Hill subdivision is a private subdivision in the sense that the [Association] may legally exclude the general public from entering the subdivision.

"FINDINGS TO REQUEST 97: [¶] Yes. [¶] . . . [¶]

"99. Whether access through the locked security gate at the entrance to the subdivision may be limited by [the Association] to the residential lot owners, their invitees and to the owner(s) of Outlots C and D.

"FINDINGS TO REQUEST 99: [¶] Yes, but also to the owner(s) of Outlots A and B, and to the owners of any other real property within the private, gated subdivision, and their guests and invitees. [¶] . . . [¶]

"104. If [Rio Mesa] own[s] the paved roads in the subdivision (i.e., Killarney Drive . . .), based on what conveyance or instrument did they acquire such an ownership interest from Sumner[-]Peck . . . ?

"FINDINGS TO REQUEST 104: [¶] . . . Sumner[-]Peck . . . is not a party to this action, and the court therefore can not make a finding of ownership as between Sumner[-]Peck . . . and [Rio Mesa]. [Rio Mesa] will be left to resolve that issue directly with Sumner[-]Peck . . . . However, as between the parties to this action, the court finds that the plaintiffs did not attain fee title to the land over which the roads are located, and [Rio Mesa] own[s] fee title to the land over which the roads are located." (Fn. omitted.)

As to certain "specific request[s]" posed by Rio Mesa in its request for a statement of decision, the court responded:

"B. Private[,] Gated Subdivision

"1. Do plaintiffs have a legal right to maintain some form of private[,] gated subdivision? . . .

"FINDINGS TO REQUEST B1: [¶] Yes. [¶] . . . [¶]

"(c) What specific rights are encompassed within plaintiffs' right to maintain a private[,] gated subdivision?

"FINDINGS TO REQUEST B1(c): [¶] The right to maintain a private, gated subdivision includes such rights reasonably implied from such right.

"(d) Do plaintiffs' rights to maintain a private[,] gated subdivision include the right to limit or restrict [Rio Mesa's] development of Outlots A-[D] in any manner, and i[f] so, in what manner?

"FINDINGS TO REQUEST B1(d): [¶] Yes. . . . Development within Outlots A through D must be consistent with the right of the existing lot owners to maintain the subdivision as a private, gated subdivision.

"(e) May [Rio Mesa] develop Outlots A-[D] free of any restrictions that would otherwise arise from plaintiffs' right to maintain a private[,] gated subdivision so long as [Rio Mesa] develop[s] Outlots A-[D], or portions thereof, in a manner that would prevent residents and invitees from accessing the private[,] gated subdivision?

"FINDINGS TO REQUEST B1(e): [¶] Yes. . . . Development within Outlots A through D must be consistent with the right of the existing lot owners to maintain the subdivision as a private, gated subdivision.

"(f) May [Rio Mesa] develop a portion of . . . Outlots A-[D] commercially so long as state and local law permits and so long as the commercial portion is developed in a manner that would prevent owners, tenants and invitees from accessing the private[,] gated subdivision?

"FINDINGS TO REQUEST B1(f): [¶] Yes. . . . Development within Outlots A through D must be consistent with the right of the existing lot owners to maintain the subdivision as a private, gated subdivision.

"(g) Do plaintiffs' rights to maintain a private[,] gated subdivision include the right to maintain the perimeter fence and security gate at its present location or only around the 49 numbered lots?

"FINDINGS TO REQUEST B1(g): [¶] The court has not found that the plaintiffs or the individual property owners have a right to maintain the perimeter fence and security gate at its present location. Therefore, . . . the location of the perimeter fence and security gate may be moved, provided that [Rio Mesa] undertake remediation measures to maintain the subdivision as a private, gated subdivision for the existing 49 individual lot owners. [¶] . . . [¶]

"(j) May [Rio Mesa] relocate the perimeter fence provided that the relocated fence continues to prevent access to the private[,] gated subdivision for persons other than residents and invitees of the private[,] gated subdivision?

"FINDINGS TO REQUEST B1(j): [¶] Yes. [¶] . . . [¶]

"(l) Are any of the lands within the private[,] gated subdivision other than the numbered lots subject to the Sumner Hill CC&R[']s? If so, what are the legal and factual bases for the Court[']s conclusion?

"FINDINGS TO REQUEST B1(l): [¶] Yes. This finding would be implicit from the finding by the court that the Sumner Hill subdivision includes the 49 individual lots, the roads and all of the [O]utlots identified on the Amended . . . Map, in conjunction with the finding that the 49 individual lot owners have the right to maintain a private, gated subdivision. If the new development occurs within Outlots A through D, and such development is maintained within the perimeter fence and security gate which maintain the subdivision as a private, gated subdivision for the existing 49 lots, then such development would be subject to the Sumner Hill CC&R[']s. If the new development occurs within Outlots A through D, and such development is maintained outside the perimeter fence and security gate which maintain the subdivision as a private, gated subdivision for the existing 49 lots, then such development would not be subject to the Sumner Hill CC&R[']s.

"(m) May [Rio Mesa] allow persons to access the [San Joaquin] River through Outlot D, provided such access is made available through adjacent lands outside the private[,] gated subdivision and not through the 49 numbered lots or subdivision roads?

"FINDINGS TO REQUEST B1(m): [¶] Yes.

"(n) Irrespective of plaintiffs' rights to maintain a private[,] gated subdivision, do Outlots C and D nonetheless enjoy an easement of ingress and egress by necessity over Killkelly Road and Killarney [Drive] to Road 204? . . .

"FINDINGS TO REQUEST B1(n): [¶] Yes. [¶] . . . [¶]

"C. Development of the Outlots

"1. May plaintiffs restrict in any manner [Rio Mesa's] development of Outlots A-[D]? . . .

"FINDINGS TO REQUEST C1: [¶] Yes. . . . Development within Outlots A through D must be consistent with the rights of the existing lot owners to maintain the subdivision as a private, gated subdivision. [¶] . . . [¶]

"2. Will all future owners of lots on Outlots A-I ("Future Owners") have the right to use all the roads in the subdivision if such Outlots are within the private[,] gated subdivision?

"FINDINGS TO REQUEST C2: [¶] Yes.

"3. Will all Future Owners have the right to use the subdivision roads to access the [San Joaquin R]iver if they are within the private[,] gated subdivision?

"FINDINGS TO REQUEST C3: [¶] Yes." (Fn. omitted.)

A judgment "[b]ased on [the] Statement of Decision" was entered on June 22, 2009.[5] It read in part:

> "The court finds as follows:
>
> "a. [Rio Mesa] ha[s] fee ownership to the real property over which all of the roads within the subdivision are located, and the individual lot owners within the subdivision have implied and equitable easements to all of the roads within the subdivision . . . . [Rio Mesa] may not utilize any of the roads within the subdivision in any manner which is inconsistent with the rights of the individual lot owners within the subdivision to maintain the subdivision as a private[,] gated subdivision. [¶] . . . [¶]
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> "d. [Rio Mesa] may develop and build on Outlots A through D, but may do so only in a manner which is consistent with the rights of the individual lot owners within the subdivision to maintain the subdivision as a private[,] gated subdivision."

c. *Appellate proceedings*

On appeal, Rio Mesa disputed the findings that the 49-Lot area "[i]s a private, gated subdivision from which the public could be excluded," the 49-Lot residents and the Association "have easement rights to use Killkelly Road for access to the river," and "Outlots A through D [a]re subject to the development restrictions contained in the Sumner Hill CC&R's," inter alia. (*Sumner Hill*, *supra*, 205 Cal.App.4th at p. 1016.) On cross-appeal, the 49-Lot residents and the Association disputed the finding that Rio Mesa "ha[s] fee title ownership of the roads in the subdivision," inter alia. (*Ibid*.) The parties did not appear to contest the easement-by-necessity finding.

We concluded the superior court erred when it determined Rio Mesa has fee ownership of all portions of Sumner Hill's roads. (*Sumner Hill*, *supra*, 205 Cal.App.4th

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5 The 49-Lot residents and the Association also sought damages for slander of title and nuisance. In a bifurcated proceeding, a jury found in their favor and awarded both compensatory and punitive damages. We affirmed these verdicts on appeal.

at p. 1038; see *id*. (May 5, 2012) F058617 [nonpub. opn.].) In the nonpublished portion of our opinion, we reasoned:

> "Plaintiffs contend the trial court erred because it failed to consider the legal effect on road ownership of the eventual sale of the individual residential lots to the homeowners. Plaintiffs are correct.
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> "Absent clear evidence of a contrary intent, certain presumptions will prevail regarding the construction of deeds. [Citation.] Civil Code section 1112 states: 'A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears *from the grant*.' (Italics added.) The statute applies equally to streets. (See *Neff v. Ernst* (1957) 48 Cal.2d 628, 635-636; Sts. & Hy. Code, § 8308.) To the same effect is Civil Code section 831, which states: 'An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.'
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> "Consequently, '[i]t is well settled that where land is conveyed by a deed describing the property conveyed as a specifically numbered lot or block as designated on a map, which map also shows such property to be bounded by a street or highway, the grant will be considered as extending to the center of the street or highway, unless it clearly appears that it was intended to make a side line instead of the center line the boundary.' [Citation.] In such cases, 'the purchaser of the lot owns one-half of the adjacent street in fee in addition to the lot measurement, as a matter of law *unless the grant manifests a different intent*.' (*Safwenberg* [*v. Marquez* (1975)] 50 Cal.App.3d [301,] 309 [(*Safwenberg*)], italics added.) In *Neff v. Ernst*, *supra*, 48 Cal.2d at page 635, the court explained: '[I]t will be presumed that where property is sold by reference to a recorded map the grantee takes to the center of the street or streets shown on the map as bounding the property, even though the streets shown therein appear to have been vacated or abandoned or the deed itself refers to the streets as having been vacated or abandoned. *The presumption continues to apply in the absence of a clear expression in the deed not to convey title to the center line*.' (Italics added.) [¶] . . . [¶]
>
> "In the present case, each of the 49 residential lots in the Sumner Hill subdivision abutted one or more of the roads in the subdivision. Moreover, when the residential lots in the subdivision were purchased, the grant deeds conveyed title to each lot by reference to the Amended Map and nothing in the deeds expressed the intent to make the boundary

something other than the center line of the road. On this point, there was no conflict in the evidence: The grant deeds were clear on their face. And their legal effect under the presumption was likewise certain. (*Safwenberg*, *supra*, 50 Cal.App.3d at p. 309 ['That is not ambiguous which is certain as a matter of law'].) As a matter of law, therefore, when the residential lots were conveyed, each individual lot owner acquired fee ownership to the center of the road abutting his or her land.

"Nor would [Madera] County's act of vacating the subdivision roads change our analysis. When a public agency vacates or abandons a street or road, the public easement is extinguished and ceases to exist, but title to the street or road, free of the public easement, remains in the owner of the fee and passes to his or her successors. (Sts. & Hy. Code, §§ 8350, 8351; *Safwenberg*, *supra*, 50 Cal.App.3d at pp. 307-308.) And, on the question of who owns the fee, we reiterate the well-settled rule that when lots adjoining a street or road are conveyed by reference to a recorded map, the lots abutting the street or road include fee ownership to the center line thereof, unless a contrary intent was indicated in the deed. No such contrary intent was shown in the grant deeds here.

"Applying the presumption to the facts before us, we conclude that abutting land owners in Sumner Hill subdivision own fee title to the center of the streets. Even a cursory glance at the Amended Map reveals that the vast majority of Killarney Drive is bordered on each side by residential lots. An exception would appear to be where small portions of the road are bordered by Outlots A or B (which are owned by [Rio Mesa]). . . . Although Killkelly Road is primarily bordered by Outlots C and D, which are owned by [Rio Mesa], that is not the complete picture. Lots 7 and 8 abut Killkelly Road on opposite sides where it branches off of Killarney Drive. In addition, Lots 8 and 10, respectively, border on the southerly half of Killkelly Road from the center line of Killarney Drive to the easterly boundary of Lot 10. It is clear that individual lot owners own . . . most all of Killarney Drive and some portions of Killkelly Road. . . ." (*Sumner Hill*, *supra*, F058617, fn. omitted.)

In a footnote, we added:

"[O]nce they were vacated, the roads in the 49-Lot area were owned in fee by the lot owners pursuant to their rights as abutting owners, with a small portion of such roads also owned by [Rio Mesa], as successor-in-interest of Sumner-Peck's land (the servient tenement). Of course, the servient tenement's interest in the roads is subject to the equitable easement rights of the lot owners." (*Sumner Hill*, *supra*, F058617.)

We also concluded the court erred when it determined the CC&R's apply to Outlots A through D. (*Sumner Hill*, *supra*, 205 Cal.App.4th at p. 1038; see *id*. (May 5, 2012) F058617 [nonpub. opn.].)

On the other hand, we affirmed the 49-Lot residents and the Association have implied and equitable easements to use the other roads in Sumner Hill, including the section of Killkelly Road that traverses Outlots C and D. (*Sumner Hill*, *supra*, F058617 [nonpub. opn.].) We explained:

> "*Danielson v. Sykes* (1910) 157 Cal. 686 (*Danielson*) established the following principle: 'When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys it necessarily implies or expresses a design that such passageway shall be used in connection with the lots and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off. The making and filing of such a plat duly signed and acknowledged by the owner . . . is equivalent to a declaration that such right is attached to each lot as an appurtenance. A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot.' (*Id.* at p. 690.) In the present case, it is not disputed that the deeds transferring title to each of the individual residential lots did so by reference to the Amended Map. That map clearly depicts not only the residential lots but the subdivision roads, including Killkelly Road, which is shown as continuing over Outlots C and D down to the San Joaquin River. Accordingly, based on *Danielson* the trial court correctly held that 'as each residential lot was sold, each individual purchaser attained an easement over all of the roads depicted on the Amended Map, including a road easement over Killkelly Road from its commencement at Killarney Drive and continuing thereafter through Outlot D to the San Joaquin River.'
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> "The trial court's ruling on this issue also rested on the case of *Bradley v. Frazier Park Playgrounds* (1952) 110 Cal.App.2d 436 (*Bradley*). In *Bradley*, the owner and seller of subdivision lots represented to prospective purchasers that certain land in the center of the subdivision, consisting of 10 to 12 acres, would remain a common area for the use of lot owners as a playground and recreation area. Sales agents placed great emphasis on the fact that lot owners in the subdivision would be able to have unrestricted access to the common area, and the purchasers of lots relied on these representations. (*Id.* at pp. 436-441.) The subdivision

contained in excess of 1,700 numbered lots within several tracts, and subdivision maps of the several tracts were recorded and lots were sold according to said maps. A 'general subdivision map' was created, showing all the numbered lots, the ' "commons" ' and other unnumbered areas, with a notation on the map indicating that all streets, trails and other unnumbered areas were ' "reserved for the use of the owners of real property within said subdivision and are not dedicated to the public." ' (*Id.* at p. 437.) The general subdivision map was not recorded. (*Ibid.*) Years after the inception of the subdivision, title to the common area was transferred to another party, and the land was fenced in and used for livestock. The lot owners filed suit for a declaration of their rights and the trial court granted them perpetual use of the common area and ordered that the fence be removed. The trial court's ruling was based on the fact that when the subdivision lots were marketed and sold, it was represented to prospective purchasers that they would have unrestricted access to the common area that would be permanently set aside as a recreation area or playground. (*Id.* at p. 441.) The trial court held the lot owners had *equitable easements* for access to the common area. The owner of the common area appealed.

"The Court of Appeal affirmed, noting the evidence supported the trial court's finding that the subdivider and sales agents intended to create and set aside a portion of the subdivision as a ' "commons" ' or playgrounds, for the specified use and benefit of the purchasers of the lots in perpetuity. The general subdivision map had so indicated and representations were made to that effect. Furthermore, the lot owners' claims based on the seller's representations were known to the new owner of the common area, or, at least, the evidence was such as to impart notice. (*Bradley*, *supra*, 110 Cal.App.2d at p. 442.) The main question on appeal was whether on the basis of the above facts the trial court had legal authority to hold that the lot owners had an ' "equitable easement" ' to use the common area, where no such right of use or easement was granted by the written conveyance. The Court of Appeal answered that question in the affirmative, relying on the principles set forth in *Danielson*: 'It was said in *Danielson v. Sykes*, [*supra*,] 157 Cal. 686, that where a lot conveyed by deed is described by reference to a map, such map is made a part of the deed; that if streets are marked on the ground in the absence of a map, and lots are sold on the representation that such streets exist, the appurtenant right to use the streets, not expressed in the deed, rests upon an equitable estoppel; [and] that the right of the owner may be enforced in equity with respect to all the streets which the particular lot owner has occasion to use . . . .' (*Bradley*, *supra*, at p. 443.)

> "In the present case, as in *Bradley*, there was ample evidence of representations made to purchasers regarding rights of use and access to a particular area. Sumner-Peck's authorized sales agent and the written marketing brochure given to prospective purchasers clearly represented that all lot owners at Sumner Hill would have a right of access to the San Joaquin River. The sole access road to the river from the subdivision was Killkelly Road. Accordingly, under *Bradley* the lot owners acquired equitable easement rights to use Killkelly Road as a means of gaining access to the river. Such easement rights to use Killkelly Road included a corresponding right to use the other roads within the 49-Lot area of the subdivision (i.e., Killarney Drive . . .), since such other roads would be necessary for some or all lot owners when traveling to and from Killkelly Road, depending on the location of the person's lot. In light of the specific representations made to purchasers of residential lots, along with the depiction of roads on the Amended Map and in the written brochure, we think the trial court was correct in concluding that the *Bradley* doctrine of equitable easements provided a separate basis for the trial court's decision regarding the homeowners' easement rights." (*Sumner Hill*, *supra*, F058617 [nonpub. opn.], fns. omitted.)

We also agreed the 49-Lot residents and the Association have the right to maintain the 49-Lot area as a private, gated community.[6] We reasoned:

> "[H]ere the trial court found that Sumner-Peck constructed the security gate and fence before residential lots were sold and then marketed and sold the lots on representations to purchasers that the 49-Lot area was a private, gated community; the purchasers of lots relied on such representations; the 49-Lot area had been overtly maintained as such for 22 years; and [Rio Mesa] w[as] on notice of the lot owners' claims as to the private, gated nature of the subdivision. . . . Although the Amended Map did not reflect the security gate or perimeter fence, it is clear that once [Madera] County required the installation of such features as a condition of map approval, Sumner-Peck and its sales agent made that reality a selling point by representing to purchasers that the residential lots were within a gated and

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6 In a footnote, we recognized the ambiguity of the phrase " 'private, gated *subdivision*,' " as used by the superior court. (*Sumner Hill*, *supra*, F058617 [nonpub. opn.], italics added.) With respect to Sumner Hill, the term "subdivision"—broadly construed—includes everything depicted on the Amended Map, i.e., the 49-Lot area as well as the surrounding Outlots. We clarified the 49-Lot residents and the Association have a right to exclude the general public from the 49-Lot area but "not the entirety of the acreage on the surrounding Outlots." (*Ibid.*)

private haven for the lot owners' security and privacy. Moreover, the representations were not only made orally, but were set forth in writing: the written marketing brochure represented that Sumner Hill was a secure, gated community and the brochure included a site map depicting the location of the 'Entrance Security Gates.' Applying *Bradley*, *supra*, 110 Cal.App.2d 346, we conclude on this record the trial court did not abuse its discretion in finding the 49-Lot area was a private, gated residential area.

"To recapitulate, Sumner-Peck, as owner and developer of the original parcel (the servient tenement), by virtue of its actions and representations, effectively set aside the 49-Lot area as a private, gated residential area and caused purchasers to rely thereon. Consequently, under principles of estoppel, the purchasers of the residential lots and their successors acquired appurtenant rights to maintain the 49-Lot area as a private, gated community. This means that the lot owners and the Association may continue to exclude the general public from that area—at least in the absence of a law requiring otherwise, and none has been brought to our attention. As a further incident of these appurtenant rights, the lot owners may continue to use portions of the servient tenement (now [Rio Mesa]'s land) for maintenance of a security gate and fence for the purpose of excluding the general public from the 49-Lot area. All of these rights on the part of the plaintiffs and other lot owners are founded on established principles relating to equitable easements (see *Bradley*, *supra*, 110 Cal.App.2d 436), as applied to the unique circumstances of this case." (*Sumner Hill*, *supra*, F058617 [nonpub. opn.], fns. omitted.)

Our opinion's disposition read:

"On [Rio Mesa's] appeal, the trial court's order determining that the CC&R's apply to the Outlots is reversed. On [the 49-Lot residents and the Association's] cross-appeal, the trial court's order determining road ownership is reversed. In all other respects, the judgment is affirmed. . . ." (*Sumner Hill*, *supra*, 205 Cal.App.4th at p. 1038.)

On December 31, 2012, the superior court entered an amended judgment "conforming the Original Judgment to the decision of the Court of Appeal[] . . . ." It read in part:

"The court finds as follows:

"a. Each owner of a lot or Outl[o]t that abuts a subdivision road owns the fee interest to the land up to the centerline of the subdivision road that abuts such lot or Outl[o]t. The individual lot owners within the

subdivision have implied and equitable easements to all of the roads within the subdivision . . . . [Rio Mesa] may not utilize any of the roads within the subdivision in any manner which is inconsistent with the rights of the individual lot owners within the subdivision to maintain the subdivision as a private[,] gated subdivision. [¶] . . . [¶]

"d. [Rio Mesa] may develop and build on Outl[o]ts A through D, free and clear . . . of any encumbrance arising out of the Sumner Hill CC&R's, but may do so only in a manner which is consistent with the rights of the individual lot owners within the subdivision to maintain the subdivision as a private[,] gated subdivision."

II. Current lawsuit brought against Fidelity by Rio Mesa

a. *Background*

In 1995, Madera County updated its general plan and adopted the Rio Mesa Area Plan, "a subset of the general plan" that called for a 15,000-acre master-planned community near Highway 41 and the San Joaquin River. Peck Ranch was central to the Rio Mesa Area Plan.

Robert McCaffrey, Rio Mesa's manager and owner of Rio Mesa's parent company McCaffrey Homes, became aware of Peck Ranch in the late 1990's. In 2003, McCaffrey's appraiser opined the market value of the property was $25,000,000. On November 25, 2003, McCaffrey, in his capacity as president of Ciao Properties, LLC, agreed to purchase Peck Ranch and the Outlots for $25 million. A closing date was scheduled for "not later than" November 25, 2004.

During the due diligence period, McCaffrey visited Peck Ranch and the Outlots multiple times. He was aware of the 49-Lot area, the security gate at the front entrance on Killarney Drive, the perimeter fence, and the various " 'PRIVATE PROPERTY—NO TRESPASSING' " signs but did not question Sumner-Peck, the 49-Lot residents, or the Association about them. Fidelity, with which Rio Mesa enjoyed a "long-term business relationship," prepared a preliminary report. The report provided "an advance look at or a preview or an offer to issue a title insurance policy on certain terms" and included "exceptions": "a list of things" "turned up in the public record," i.e., "the paper trail of

land titles," "that will not be covered by the policy." Nothing indicated the 49-Lot residents owned the roads within the 49-Lot area. Escrow closed in November 2004.

Tesoro Viejo, Rio Mesa's proposed development,[7] provided for vehicular and pedestrian access to the San Joaquin River from the west of the 49-Lot area "through the gate" of the 49-Lot area "crossing over Killarney, down Killkelly." West of the 49-Lot area would be a town center, 3 million square feet of industrial, retail, and commercial space, and over 5,000 residential units. East of the 49-Lot area would be 54 residential units on Outlot C and a canoe shop on Outlot D. McCaffrey believed the amenity of river access was needed to charge premium prices for residential lots and thereby recoup his investment in the land and infrastructure. Rio Mesa purchased a title insurance policy from Fidelity to "insure[], as of [November 23, 2004], against loss or damage, not exceeding [$25 million], sustained or incurred by [Rio Mesa] by reason of: [¶] . . . [¶] . . . [l]ack of a right of access to and from the land." (Italics omitted.) Rio Mesa also purchased customized endorsements, which provide greater coverage. They read in part:

> "[Fidelity] hereby insures [Rio Mesa] against loss or damage which [Rio Mesa] shall sustain by reason of the failure of any [of] the parcels of land . . . to be contiguous to each other. [¶] . . . [¶]
>
> "[Fidelity] also insures [Rio Mesa] against any loss or damage which [Rio Mesa] shall sustain by reason of lack of ingress and egress to and from Outlots C and D, lying within and adjacent to Killkelly Road (vacated) and lack of ingress and egress to and from Outlots A and B lying within and adjacent to Killarney Road (vacated)."

b. *Lower court proceedings*

In 2013, following the action involving the 49-Lot residents and the Association, Rio Mesa filed the current lawsuit. It alleged, inter alia, Fidelity committed breach of

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[7] Rio Mesa submitted a "Proposed Tesoro Viejo Specific Plan" dated August 31, 2007. This plan was approved in 2008 and a revised version was approved in 2012.

contract by failing to pay $25 million, the face amount of the title insurance policy, for the damage caused by lack of access through the 49-Lot area.[8]

i. Pretrial

Rio Mesa moved for summary adjudication of the following issues, inter alia: (1) whether it has a right as the owner of Outlots A and B to use all subdivision roads depicted in the Amended Map for access to and from the Outlots; and (2) whether the superior and appellate courts "finally determined" the foregoing question in the prior litigation. On these matters, the superior court granted Rio Mesa's motion. In an order dated August 12, 2015, the court detailed:

> "Rio Mesa contends that by virtue of the Statement of Decision, the Opinion, and the Amended Judgment in the [prior] litigation, it has no right to use the Roads in the [49-Lot area] and therefore no access to Outlots C and D by virtue of its ownership of Outlots A and B . . . . The court agrees . . . . [¶] . . . [¶]
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> "As to the issue of ownership of the [49-Lot area] roads, the Court of Appeal reversed the trial court, finding the [49-Lot residents] owned fee title to the center line of the streets . . . . [¶] . . . [¶]
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> "The Court of Appeal also held that the individual lot owners of the 49 residential lots within the Sumner Hill subdivision owned an implied or equitable easement to use all the roads in the subdivision, including the use of Killkelly Road through Outlot D as access to the San Joaquin River. [Citation.] Finally, the Court of Appeal held the individual owners of the 49 lots in the Sumner Hill subdivision may exclude the general public from that area. Although the Court of Appeal did not define the term 'general public' in its opinion, given the context of the Court's discussion of the issue, this court interprets that phrase to include Rio Mesa and its successors. . . . [¶] . . . [¶] . . . [T]he Court of Appeal repeatedly refers to the owners of lots within the 49-Lot area, rather than the entire subdivision, which would include [Rio Mesa]'s Outlots A, B, C and D. The Court then holds the owners of the 49 lots, not the owners of property within the entire subdivision, have appurtenant rights to exclude the general public. This court therefore concludes that the Court of Appeal found that even though Rio Mesa owns property within the subdivision as depicted in the Amended

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8 Rio Mesa also alleged Fidelity acted in bad faith.

Map, it may be precluded by the owners of property within the 49-Lot area from using Killarney Drive and Killkelly [R]oad to access Outlots C and D and the San Joaquin River.

"This conclusion is consistent with the terms of the Amended Judgment which was entered in the [prior] litigation following the decision of the Court of Appeal. . . . [¶] . . . [¶]

". . . [A]ccording to the Court of Appeal, the purchasers of the lots and their successors acquired appurtenant rights to maintain the 49-Lot area as a private, gated community and, importantly here, to exclude the public, including Rio Mesa and its successors, even though it is the owner of Outlots A, B, C and D. [Citation.] The inescapable conclusion is that Rio Mesa has no legal ability to access Outlots C and D, or the San Joaquin River, from Outlots A and B . . . . [¶] . . . [¶]

". . . [T]he court has found it was adjudged in the [prior] litigation that Rio Mesa was precluded from using the Road System within the 49-Lot area. Thus, in the [prior] litigation it was finally determined that Rio Mesa does not have the right to use the Road System within the Tract as a lot owner or pursuant to an implied easement."

Fidelity moved to "exclude evidence of lack of access to Outlots C and D." The court denied the request. It reiterated:

"As this court has found, the owners of the 49 lots within Sumner Hill have the right to exclude the public, including Rio Mesa, from using the subdivision roads to access Outlots C and D."

ii. Trial testimony

John Sanger was Rio Mesa's real estate attorney who negotiated the title insurance policy with Fidelity's representatives and drafted the customized endorsements. Sanger was concerned about safeguarding entry through the 49-Lot area, and wanted "particular endorsements that assured access between Road 204 and to Outlots A and B and C and D and among the [O]utlots . . . ." Regarding the "contiguity endorsement," Sanger testified:

"To me a contiguity endorsement ensures that there is contiguity, whether physical or legal – well, certainly legal, and usually physical, among all of the different legal parcels that make up the property being acquired to ensure against any gaps that would prevent treating . . . the entire acquired area as one unit. [¶] . . . [¶]

> ". . . [T]he contiguity endorsement assures that there are no gaps . . . between the various parcels being acquired such that you can treat the entire property as a unit, and that naturally leads also to the ability to move freely among the parcels, to have access, legal access, among the parcels. I was following a belts and suspenders approach to the endorsements, and that was one endorsement that would contribute to fulfilling those purposes."

Gary Walker was employed by Fidelity as a title officer between August 2002 and November 2007. Before Rio Mesa acquired Peck Ranch and the Outlots, Walker had already "worked on some transactions for . . . McCaffrey" and "knew" McCaffrey was a developer. (Boldface omitted.) He "realized" "at the time of close" Rio Mesa intended to develop Peck Ranch and the Outlots. Following the acquisition, Walker issued the title insurance policy and the original endorsements, which were "intended . . . to cover access by an easement" "over Killarney and Killkelly" "to the outlying parcel[s]," i.e., Outlots C and D. (Boldface omitted.) He was aware Outlots A and B lacked physical contiguity with Outlots C and D. Thereafter, Walker communicated with Sanger, who wanted to modify the language of the endorsements. Sanger's revisions were eventually adopted. As to the customized access endorsement, Walker understood its purpose was "to insure an easement for Rio Mesa to travel over Killarney and Killkelly to reach Outlots C and D . . . ." (Boldface omitted.) As to the customized contiguity endorsement, he understood its purpose was "to make sure that all of the parcels were either touching or that there was some way to get between them . . . ." (Boldface omitted.)

At trial, Walker affirmed he "understood at the time [he] issued the endorsements that the reason that Rio Mesa wanted the endorsements . . . [was] so that when the property was developed, the future purchasers of lots from Rio Mesa could go from the western part of the property to Outlot[s] C and D and the river . . . ." (Boldface omitted.)

iii. Jury instructions and verdict

Prior to deliberation, the court instructed the jury:

"You are advised that it has been determined, as a matter of law, that Rio Mesa . . . has no right of access through the Sumner Hill subdivision. [¶] 'Access' means an ability to enter, approach or pass to or from. [¶] . . . [¶]

"Rio Mesa . . . claims that Fidelity . . . breached its duty to pay it for a loss covered under an insurance policy. To establish this claim, Rio Mesa . . . must prove all of the following: One, that Rio Mesa . . . suffered a loss which was covered under the title policy with Fidelity . . . ; two, that Fidelity . . . was notified of the loss as required by the policy; and [three], the amount of the covered loss that Fidelity . . . failed to pay.

"You will be asked to determine the meaning of ambiguous terms within an insurance policy. You must make this determination not on the basis of what you think the terms mean, but rather on the basis of what you believe the parties to that contract intended those terms to mean at the time they negotiated the policy. Your goal is to make sure that the contract is interpreted in the way that the parties who formed it would have intended.

"Rio Mesa and Fidelity dispute the meaning of the following words contained in their contract. 'Contiguous,' 'access' and 'parcel.'

"Rio Mesa claims that 'contiguous' means 'having full access between [Rio Mesa's property west of Outlots A and B] to Outlots C and D,' and 'having full access between Outlots A and B on the one hand, and Outlots C and D on the other.' [¶] Rio Mesa claims that 'access' means the ability to transit over Killarney Drive and Killkelly Road through the subdivision for purposes of development. [¶] Rio Mesa also claims that the term 'parcel' means all legal parcels, including the [O]utlots, that constitutes the subject property. [¶] . . . [¶] Rio Mesa must prove its interpretation is correct.

"In deciding what the words of a title insurance policy mean, you must decide what the parties intended at the time the policy was issued. You may consider the usual and ordinary meaning of the language used in the policy, as well as the circumstances surrounding the issuance of the policy. [¶] . . . [¶]

"A title insurer has no indemnity obligation under the title policy until a loss results from an insured-against defect in title. [¶] . . . [¶]

"If you find that Fidelity breached its duty to pay Rio Mesa for a loss covered under the title policy, the damages Rio Mesa may recover for that

breach are limited to the lesser of: A, the policy limits of $25 million; or B, the diminution in value."

In a special verdict, the jury found Rio Mesa suffered a covered loss and Fidelity was obligated to pay $25 million.[9]

iv. Posttrial motions

Fidelity filed a JNOV motion. It claimed the superior court in the prior lawsuit expressly determined Rio Mesa has an easement by necessity and collateral estoppel barred relitigation of this matter in the current lawsuit. Alternatively, Fidelity argued Rio Mesa could enter the 49-Lot area on the bases of abutter's rights and *Danielson v. Sykes* (1910) 157 Cal. 686. The court denied the motion in an order filed October 18, 2016. It specified:

> "Fidelity argues th[at] Rio Mesa now has and always has had access to Outlots C and D and that the court erred in determining otherwise. The court's finding that Rio Mesa had no access and its instruction to the jury to that effect was based on an interpretation of the Statement of Decision, the Appellate Opinion and the Amended Judgment in the [prior] litigation.[10] [¶] . . . [¶]
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> "Fidelity also attempts to isolate one of the findings of the trial court in the [prior] litigation to suggest that it found the existence of an easement by necessity and that finding survived the appeal. . . . [¶] . . . [¶] Fidelity then cites the . . . language from the Disposition of the Court of Appeal . . . . Finally, Fidelity cites to the Amended Judgment, which expressly permits development by Rio Mesa of Outlots A through D and argues that the court would not have permitted such development unless access existed to Outlots C and D to Road 204.
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> "It appears to the court that Fidelity's argument assumes too much for the following reasons: (1) It is obviously impossible for this court to know why the trial court in the [prior] litigation made a finding that Rio

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[9] The jury also found Fidelity acted in bad faith. In a bifurcated proceeding, the court awarded an additional $1,705,801.68 in attorneys' fees pursuant to *Brandt v. Superior Court* (1985) 37 Cal.3d 813.

[10] The court rehashed the same points it made in its summary adjudication order. (See *ante*, at pp. 22-23.)

Mesa had an easement by necessity over the roads in the subdivision after it had already found Rio Mesa had outright ownership of those same roads. Fidelity has not shown, however, that the issue of easement by necessity was raised in the pleadings in that case, discussed at all by the trial court in the Statement of Decision other than to the extent it made [the] finding . . . , or discussed by the Court of Appeal in its review of the judgment. (2) Fidelity has cited to no provision in the original Judgment in the homeowners' litigation granting Rio Mesa an easement by necessity over the roads in the subdivision. It is the Judgment from which the appeal was taken, not the Statement of Decision. Thus, Fidelity's argument that the Court of Appeal left intact the trial court's finding of an easement of necessity ignores that fact that such an easement was not awarded in the Judgment. (3) Finally, there is no specific provision in the Amended Judgment granting access of any kind to Outlots C and D. . . . [¶] . . . [¶]

"Fidelity argues that it was conclusively determined in the [prior] litigation that Rio Mesa had access through the Sumner Hill subdivision to Outlots C and D by way of an easement of necessity and this finding is collateral estoppel with regard to the issue of access in this case. . . . [¶] . . . [¶]

"The court rejects Fidelity's argument for the following reasons: (1) Beyond citing to what appears to be a stray finding by the trial court in the Statement of Decision, Fidelity has not demonstrated the claim of an easement of necessity was actually litigated in the [prior] litigation. It has not cited to any pleading in such litigation where the issue was even raised. (2) Fidelity has also not shown that the issue of easement by necessity was ever litigated in this litigation. Though Fidelity cho[o]ses to characterize the issue in broader terms, i.e., access, which certainly was an issue in this case, the finding which Fidelity seeks to assert as collateral estoppel here . . . addressed only the issue of easement by necessity. (3) As has been mentioned, the trial court's Statement of Decision is internally inconsistent because on the one hand it awards Rio Mesa fee ownership of the roads in the subdivision and, on the other hand, also appears to award Rio Mesa an easement by necessity. (4) Fidelity claims the Court of Appeal left intact the trial court's finding of an easement by necessity. However, the appeal was taken not from the Statement of Decision, but from the original Judgment. Fidelity has not cited to any provision of the Judgment which awarded an easement by necessity to Rio Mesa. On this record, the court cannot find the Court of Appeal left an award of an easement by necessity intact. (5) In any event, the Court of Appeal very clearly held that the 49 lot owners in the Sumner Hill subdivision had the right to exclude the public, including Rio Mesa, from the subdivision. (6) Finally, there is no

express award of an easement by necessity in the Amended Judgment which was not appealed from and concluded the action between those parties. [¶] . . . [¶]

"Fidelity argues that as a matter of law Rio Mesa has access through Sumner Hill to Outlots C and D under the doctrines of abutter's rights and/or *Danielson* Rights. [¶] . . . [¶]

". . . [T]he plain fact is that . . . *Danielson* rights were litigated in the [prior] litigation and, while the Court of Appeal found that the 49 lot owners within the Sumner Hill private[,] gated community possessed *Danielson* rights, it did not as to Rio Mesa and it did find that the 49 lot owners had the right to maintain their community as a private, gated subdivision and to exclude the general public, including Rio Mesa and its successors. The Amended Judgment distinguishes between the individual lot owners and the owner of the Outlots and grants the individual lot owners . . . implied and equitable easements to all of the roads within the subdivision . . . . [I]t goes on to provide '[Rio Mesa] may not utilize any of the roads within the subdivision in any manner which is inconsistent with the rights of the individual lot owners within the subdivision to maintain the subdivision as a private[,] gated subdivision.' [Citation.] Thus, if Rio Mesa ever had *Danielson* or abutter's rights, they were extinguished in the [prior] litigation." (Some italics omitted.)

Fidelity also filed a motion for new trial on liability and damages. It claimed it was entitled to a new trial because the court "prejudicially erred in giving the 'no access' instruction" and "preclud[ed] Fidelity from presenting any evidence or argument that Rio Mesa had actual access to Outlots C and D through the 49 homeowner lots." (Boldface omitted.) The court denied the motion in part in the October 18, 2016 order.[11] It specified:

"Fidelity argues that the court prejudicially erred in giving . . . the 'no access' instruction . . . . The 'no access' instruction simply informed the jury that 'it has been determined, as a matter of law, that Rio Mesa . . . has no right of access through the Sumner Hill subdivision. . . . [¶] . . . [¶] The 'no access' instruction was read because it was consistent with the court's determination at the summary judgment stage of the case that Rio Mesa has no access from . . . Outlots A and B[, as well as its property west

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11 As noted, the court granted Fidelity's new trial motion as to damages.

of Outlots A and B,] to Outlots C and D. . . . The court rejects Fidelity's contention that the reading of this instruction constituted error. [¶] . . . [¶]

"Fidelity argues the court erroneously and prejudicially excluded evidence . . . . Part of the evidence consists of evidence that Rio Mesa had access through the Sumner Hill subdivision to Outlots C and D. As has been mentioned, this evidence was correctly excluded because the court determined as a matter of law that no such legal access existed."

DISCUSSION

I. Fidelity's cross-appeal

a. *The findings of the superior court in the prior lawsuit post-appellate review.*

In its opening brief, Fidelity asserts:

"There is no dispute the trial court in the [prior] litigation made express findings that . . . Rio Mesa has access through the 49-Lot area security gate, . . . Rio Mesa has an easement for ingress and egress by necessity through the 49-Lot area to and from Outlots C and D, . . . and . . . the general public has no access through the 49-Lot area. This Court affirmed the finding that the general public has no access through the 49-Lot area. . . . [T]he other . . . findings . . . were left intact by this Court, were incorporated into the amended judgment and became final."

Fidelity's interpretation of what was previously affirmed on appeal undergirds its contentions on this cross-appeal. Therefore, as a threshold matter, we examine the superior court's earlier statement of decision and judgment as well as our subsequent opinion.

i. Statement of decision and judgment

"The interpretation of the effect of a judgment is a question of law within the ambit of the appellate court." (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.) "In case of doubt regarding the meaning or consequence of a judgment, or any part of it, the whole record may be examined to ascertain the meaning." (*Ibid.*)

Upon the request of any party in a nonjury trial, the superior court shall issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues . . . ." (Code Civ. Proc., § 632.) "The request for a

statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision." (*Ibid.*) "A statement of decision gives the trial court 'an opportunity to place upon [the] record, in definite written form, its views of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which judgment rests.' [Citation.]" (*A.G. v. C.S.* (2016) 246 Cal.App.4th 1269, 1282, italics omitted.)

In its statement of decision, the superior court determined Rio Mesa, as Sumner-Peck's successor in interest, owned fee title to the real property in Sumner Hill upon which the road system is located. It expressly found Rio Mesa owned Killarney Drive and Killkelly Road. However, the court also determined the 49-Lot residents and the Association had implied and equitable easements to use the subdivision roads and an equitable right to maintain a private, gated community. Regarding the latter, the 49-Lot residents and the Association could "exclude the general public from entering" the 49-Lot area and limit access to themselves and their invitees, "the owners of any other real property within the private, gated [community], and their guests and invitees," and the "owner(s) of Outlots A [through D]." Considering the statement of decision as a whole, "owner(s) of Outlots A [through D]" clearly referred to Rio Mesa. The court specified that future owners of lots within the private, gated subdivision could use the subdivision roads and could use those roads to access the river, and Rio Mesa could allow persons access to the river through Outlot D provided those persons did not traverse through the private, gated subdivision or the 49 Lots or subdivision roads. The court did not state that it was granting access through the 49-Lot area to either Rio Mesa's invitees or the future owners of its lots located outside of the private, gated subdivision.

The court also addressed the controverted issue of whether an easement by necessity arose with respect to the Outlots. In response to the 49-Lot residents and the Association's question as to whether "the owner(s) of [O]utlot[s] C and D ha[d] an easement of necessity to ingress and egress through the subdivision," the court stated,

"No. The current owners of [O]utlots C and D own fee title to the land upon which the road system is located, and have a right to utilize the road system in a manner which is not inconsistent with the easement rights of the . . . [A]ssociation and the individual lot owners." Likewise, in response to the 49-Lot residents and the Association's question as to whether "the owner or owners of Outlots A and B do not have an easement of necessity over paved subdivision roads because of the location of the [a]ccess [r]oad through those parcels affording access to Road 204," the court stated, "The current owners of Outlots A and B own the fee title to the land upon which the road system is located, and have a right to utilize the road system in a manner which is not inconsistent with the easement rights of the . . . [A]ssociation and the individual lot owners." Later, in response to Rio Mesa's question as to whether "Outlots C and D nonetheless enjoy an easement of ingress and egress by necessity over Killkelly Road and Killarney [Drive] to Road 204" "[i]rrespective of plaintiffs' rights to maintain a private[,] gated subdivision," the court stated, "Yes." In our view, this "reflects [the court's] alternate position" and was "not inconsistent with other findings." (*Louis Lesser Enterprises, Ltd. v. Roeder* (1962) 209 Cal.App.2d 401, 412.) Such alternative findings are not improper. (*Ibid.*)

In a nutshell, the superior court recognized the 49-Lot residents and the Association's equitable right to maintain a private, gated community. Generally, a nonresident cannot enter the 49-Lot area without an invitation from an owner of real property within the private, gated community or from the Association. An exception was carved out for Rio Mesa and Rio Mesa alone, whose right was tethered to outright ownership of the interior roads; in the alternative, the court found an easement by necessity with respect to Outlots C and D. It found Rio Mesa's right to enter and use these roads, though, limited and subordinate to the 49-Lot residents and the Association's equitable right to maintain a private, gated community.

A judgment "[b]ased on" the statement of decision was entered. Although the judgment never explicitly referred to the easement-by-necessity finding, that finding is

not superfluous. The judgment never referred to the court's finding that the CC&R's apply to Outlots A through D, yet Rio Mesa successfully challenged that finding on appeal.

ii. Appellate opinion

In the disposition of our opinion, we (1) reversed "the trial court's order determining that the CC&R's apply to the Outlots"; (2) reversed "the trial court's order determining road ownership"; and (3) affirmed the judgment "[i]n all other respects."[12] (*Sumner Hill*, *supra*, 205 Cal.App.4th at p. 1038.)

In the body of our opinion, we rejected the finding that Rio Mesa owns the entirety of Sumner Hill's roads. With regard to the roads within the 49-Lot area, we specifically found Rio Mesa, at most, shares ownership with the 49-Lot residents over the few small and disconnected segments of Killarney Drive that border either Outlot A or Outlot B on one side; otherwise, most of the roads within the 49-Lot area, including the segments of Killarney Drive and the top of Killkelly Road comprising an integral portion of the access route to the San Joaquin River, have been exclusively owned by the 49-Lot residents ever since the lots were sold in the 1980's. (*Sumner Hill*, *supra*, F058617.) We explicitly affirmed, inter alia, the 49-Lot residents and the Association's right to maintain a private, gated community and "exclude the general public from" the 49-Lot area on the ground of estoppel. (*Ibid*.) By contrast, we made no mention of the superior court's alternative easement-by-necessity finding. Nothing demonstrated either party challenged it on appeal or cross-appeal. We reversed "the trial court's order determining that the CC&R's

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12 "The appellate court has the authority in the disposition to 'affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had.' " (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 313 (*Ducoing*), quoting Code Civ. Proc., § 43.) "In interpreting the language of a judicial opinion, the appellate court looks to the wording of the dispositional language, construing these directions 'in conjunction with the opinion as a whole.' [Citations.]" (*Ducoing*, *supra*, at p. 313.)

apply to the Outlots" and "the trial court's order determining road ownership" but otherwise affirmed that judgment "[i]n all other respects." (*Sumner Hill*, *supra*, 205 Cal.App.4th at p. 1038.) Hence, we necessarily left the easement-by-necessity finding intact. (See *Ducoing*, *supra*, 234 Cal.App.4th at p. 313 ["The appellate court need not expressly comment on every matter intended to be covered by the disposition. The disposition is construed according to the wording of its directions, as read with the appellate opinion as a whole."].)

b. *Fidelity's JNOV motion*

"[T]he purpose of a JNOV is 'to prevent the moving defendant from the necessity of undergoing any further exposure to legal liability when there is insufficient evidence for an adverse verdict.' [Citation.]" (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 794.) "A motion for [JNOV] may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68; see *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [" 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value."].) "The court must accept as true the evidence supporting the jury's verdict, disregarding all conflicting evidence and indulging in every legitimate inference that may be drawn in support of the judgment." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1058.)

"On appeal from the denial of a motion for [JNOV], we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.) "If sufficient evidence supports the verdict, we must uphold the trial court's denial of the JNOV motion." (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1285.)

"[An] insurer owes the insured a duty to indemnify claims that are covered by the [insured's] policy." (*Risely v. Interinsurance Exchange of the Automobile Club* (2010) Cal.App.4th 196, 208.) "Wrongful failure to provide coverage . . . is a breach of contract." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.)

Here, prior to trial, the court's summary adjudication order established Rio Mesa had no right to enter or use the roads within the 49-Lot area and therefore no ability to access Outlots C and D and the San Joaquin River. (See Code Civ. Proc., § 437c, subd. (n)(1) [where summary adjudication motion is granted, the matter so adjudicated "shall be deemed to be established" at trial].)[13] The record—viewed in the light most favorable to the verdict—shows Rio Mesa purchased a title insurance policy from Fidelity. That policy insured against loss or damage "sustained or incurred . . . by reason of: [¶] . . . [¶] . . . [l]ack of a right of access to and from the land." (Italics omitted.) (See Civ. Code, § 1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."]; see also *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 ["While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply."].) Additional endorsements insured against loss or damage due to "lack of ingress and egress to and from Outlots C and D," "lack of ingress and egress to and from Outlots A and B," and "the failure of any [of] the parcels of land . . . to be contiguous to each other." (See *Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65

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13 In view of this order and the corresponding jury instruction, the latter of which was presumably followed (see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803-804), we reject the suggestion the JNOV motion should have been granted because Rio Mesa—contrary to this order and instruction—could enter the 49-Lot area on the basis of abutter's rights and *Danielson*.

We further point out, in our earlier opinion via footnote, we acknowledged Rio Mesa owns "a small portion of" the roads within the 49-Lot area but stressed its interest "is subject to the equitable easement rights of the lot owners." (*Sumner Hill*, *supra*, F058617 [nonpub. opn.].)

Cal.App.4th 21, 29 ["Since endorsements are part of the insurance contract, the rules of interpretation apply equally to these provisions."].) Substantial evidence supported the verdict against Fidelity.

Fidelity remarks the superior court in the prior lawsuit made an alternative easement-by-necessity finding and—on the basis of collateral estoppel—the court in the current lawsuit was barred from relitigating this finding. In essence, Fidelity is asking us to undo the effects of the summary adjudication order, the denial of Fidelity's motion to "exclude evidence of lack of access to Outlots C and D," and the instruction to the jury that Rio Mesa "has no right of access" through the 49-Lot area. As noted, a JNOV motion focuses on whether sufficient evidence supported a jury's verdict. Fidelity's concern, though, rests with the judicial actions that precluded consideration of certain facts in the first place. We do not believe a JNOV motion is the proper vehicle to review the propriety of evidentiary rulings and the like. (Cf. *Donahue v. Ziv Television Programs, Inc.* (1966) 245 Cal.App.2d 593, 609-610 [if the trial court mistakenly admitted the plaintiff's incompetent evidence as to damages, it should not be able to grant a JNOV motion on the basis that damages were not proven by legally competent evidence since the plaintiff had a right to rely on the ruling; a new trial is the proper remedy].)

c. *The superior court's pretrial rulings and jury instruction*

Next, Fidelity contends:

> "The trial court's erroneous pre-trial rulings and jury instruction based on those rulings took the central issue in this case—whether the access Rio Mesa had through the 49-Lot area is the access insured under the title policy—away from the jury and effectively directed a verdict on liability in favor of Rio Mesa. . . . [B]ecause the trial court effectively prevented the jury from deciding the central issue in this case, Fidelity is entitled to a new trial on all aspects of the case."

Code of Civil Procedure section 437c "authorizes motions for summary adjudication that 'reduce the costs and length of litigation' by limiting the substantive areas of dispute. [Citations.]" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th

830, 859; see Code Civ. Proc., § 437c, subds. (f), (t).) If a summary adjudication motion is granted, the matter so adjudicated "shall be deemed to be established" at trial. (Code Civ. Proc., § 437c, subd. (n)(1).) "Summary adjudication is a severe remedy and should be used with caution . . . ." (*Everett v. Superior Court* (2002) 104 Cal.App.4th 388, 392.) "A trial court's order granting a motion for summary adjudication is reviewed de novo." (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1471.)

In granting Rio Mesa's summary adjudication motion, the court concluded (1) Rio Mesa has no right to enter or use the roads within the 49-Lot area and no ability to access Outlots C and D and the San Joaquin River; and (2) the court in the prior litigation "finally determined" this point. These conclusions also undergird the court's decisions to deny Fidelity's motion to "exclude evidence of lack of access to Outlots C and D" and instruct the jury that Rio Mesa "as a matter of law" "has no right of access through the" 49-Lot area. Given our analysis of the statement of decision, original judgment, and appellate opinion in the prior litigation (see *ante*, at pp. 6-20), the court's conclusions were incorrect. The easement-by-necessity finding remains intact, negating the premise on which the pretrial rulings and jury instruction rested. We agree with Fidelity that these rulings and jury instruction in tandem "effectively directed a verdict on liability in favor of Rio Mesa." (See *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at pp. 803-804 ["Absent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed.' "]; *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677 ["Denying a party the right to testify or to offer evidence is reversible per se."].) Thus, a new trial is warranted. (See *Smith v. Wells Fargo Bank, N.A.*, *supra*, 135 Cal.App.4th at p. 1490.)

d. *Collateral estoppel*

In the event of a new trial, Fidelity asks us to "instruct the court below that, based on [collateral estoppel], the following findings are conclusive in the new trial: (1) Rio

Mesa and its invitees have access through the 49-Lot area security gate; (2) Rio Mesa has an easement of ingress and egress by necessity over Killkelly Road and Killarney [Drive] to Road 204; and (3) Rio Mesa can develop Outlots C and D."

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*); see *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1565-1566 ["[A]n 'issue' includes any legal theory or factual matter which could have been asserted in support of or in opposition to the issue which was litigated."].) "Traditionally, [courts] have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements. [Citation.]" (*Lucido*, *supra*, at p. 341.)

In the prior lawsuit brought against Rio Mesa, the 49-Lot residents and the Association claimed "three families of rights: (1) the right to access the San Joaquin River over Killkelly Road through Outlots C and D; (2) the right to have a private[,] gated subdivision; and, (3) the right to prevent [Rio Mesa] from developing on any of the [O]utlots within the subdivision." The parties, inter alia, debated in various briefs whether an easement by necessity arose with respect to the Outlots and asked the superior court to resolve this "controverted" question in its statement of decision. In said statement, the court found (1) the 49-Lot residents and the Association have implied and equitable easements to use the subdivision roads, including Killkelly Road; (2) the 49-Lot residents and the Association have an equitable right to maintain the 49-Lot area as a private, gated community; (3) Rio Mesa may develop Outlots A through D in a manner

consistent with the 49-Lot residents and the Association's aforementioned rights and subject to the CC&R's; and (4) Rio Mesa may nonetheless use the roads within the 49-Lot area, in a manner consistent with the 49-Lot residents and the Association's aforementioned rights, because Rio Mesa owns the subdivision roads or—in the alternative—"Outlots C and D . . . enjoy an easement of ingress and egress by necessity over Killkelly Road and Killarney [Drive] to Road 204 . . . ." (See *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511 ["For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding."]; *Carroll v. Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 491 [memorandum opinion and other evidence extrinsic to judgment roll may be used to ascertain what issues were determined in a former action].)

On appeal and cross-appeal from the original judgment, our court affirmed the rights of the 49-Lot residents and the Association but rejected the findings that Rio Mesa owns the entirety of the roads within the 49-Lot area and the CC&R's apply to the Outlots. We affirmed the judgment in all other respects and an amended judgment "conforming the Original Judgment to [our] decision" was entered. Because we rejected the superior court's determination of road ownership, its alternative easement-by-necessity finding was the sole basis for Rio Mesa's limited right to enter and use the roads within the 49-Lot area. (See *Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1451 [" ' "In order for the determination of an issue to be given preclusive effect, it must have been necessary to a judgment." ' "].)

"Even assuming all the threshold requirements are satisfied, however, [the] analysis is not at an end. [Courts] have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting." (*Lucido*, *supra*, 51 Cal.3d at pp. 342-343.) "Those policies include conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial

system, and avoiding the harassment of parties through repeated litigation." (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 879.) Here, public policies weigh in favor of applying collateral estoppel. In the action underlying the present appeal and cross-appeal, the superior court grounded its decisions to grant Rio Mesa's motion for summary adjudication, deny Fidelity's in limine motion, and issue a "no access" jury instruction on the mistaken notion the prior litigation "finally determined" Rio Mesa has *no* right to enter and use the roads within the 49-Lot area. Collateral estoppel would preclude similar rulings at the new trial. Since the relitigation of such findings would be proscribed, judicial resources would be conserved.

At the new trial, the following findings are to be given conclusive effect: (1) Outlots C and D enjoy an easement by necessity through the 49-Lot area to Road 204; (2) Rio Mesa, the holder of this easement by necessity, may enter and use the roads within the 49-Lot area in a manner consistent with the 49-Lot residents and the Association's rights to use the subdivision roads and maintain the 49-Lot area as a private, gated community; and (3) Rio Mesa may develop Outlots A through D in a manner consistent with the 49-Lot residents and the Association's aforementioned rights.

II. Rio Mesa's appeal

Rio Mesa's appeal pertains to the measurement of damages. Our conclusion that Fidelity is entitled to a new trial renders this appeal moot. (See *Downtown Palo Alto Com. for Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 391 ["[A]n appeal presenting only abstract or academic questions is subject to dismissal as moot."].)

DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings consistent with this opinion. The superior court is directed to vacate its order granting Rio Mesa Holdings, LLC's motion for summary adjudication and enter a new order

denying the motion. Rio Mesa Holdings, LLC's appeal is dismissed. Costs on appeal are awarded to Fidelity National Title Insurance Company.

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DETJEN, Acting P.J.

WE CONCUR:

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PEÑA, J.

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DE SANTOS, J.