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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION TWO**

THE PEOPLE ex rel. DEPARTMENT OF  
TRANSPORTATION,

Plaintiff and Respondent,

v.

JAMES CONSTANT,

Defendant and Appellant.

E054542

(Super.Ct.No. SCVSS096961)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.  
Affirmed.

James Constant, in pro. per., for Defendant and Appellant.

Ronald W. Beals, Linda Cohen Harrel, Eric J. Fleetwood, and Mark A. Berkebile  
for Plaintiff and Respondent.

Appellant James Constant is before this court once again in connection with the  
taking of his one and one-half acre parcel in Fontana (the property) by respondent  
California Department of Transportation (the State). Constant previously filed several

petitions for writ of mandate contesting that the State could rightfully take his property, which we denied, thereby affirming the taking of the property.

This is the third appeal filed by Constant in regard to this case. The details of the appeals will be set forth in more detail, *post*. This appeal is from the trial court's granting of the State's motion to tax costs based on Constant's failure to timely file his memorandum of costs pursuant to California Rules of Court rule 8.278 (rule 8.278).

Constant asks us to decide these questions:

1. Did the trial court have jurisdiction to grant the State's motion to tax costs when he has never had the opportunity to present evidence of the value of the land?
2. Until every appellate level had been exhausted, and absent a local rule relating to the time for filing a post appeal bill of costs, was the bill of costs timely filed?
3. Does taxing post appeal costs against him controvert the previous decision in the earlier decision in case E044802 and deprive him of just compensation?
4. Must property taxes be paid under Code of Civil Procedure 1268.430?

## I

### FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

In the first appeal (*People ex rel. Department of Transportation v. Constant* (May 13, 2009, E044802, E045320, & E046012) [nonpub. opn.] (Opinion I)), we found that the

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<sup>1</sup> The opinions filed in case Nos. E044802, E045320, E046012, E049886, and E049988 exhaustively documented the history of this case, and we incorporate that history into this opinion by reference. We only briefly review the background and continue with the facts of this never-ending case. We take judicial notice of the records in those cases.

taking of Constant's property located near Sierra Avenue in Fontana to create a freeway frontage road in accordance with the extension of the I-210 freeway was proper. After a trial, the jury returned its verdict that the fair market value of the property was \$390,756.85. The trial court granted the State's motion for judgment notwithstanding the verdict, finding the jury verdict did not match the valuation testimony at trial. The judgment was reduced to \$194,189. Constant was awarded \$97,094.50 (his half-interest share of the property) and the filing fee cost of \$220. The judgment in condemnation was entered on October 26, 2007. The trial court denied all other costs to Constant. We affirmed the taking of the property and compensation received by Constant. However, we remanded for the limited purpose of the trial court to determine the proper costs to be awarded Constant under Code of Civil Procedure sections 1268.710 and 1268.720.<sup>2</sup>

Upon remand, Constant was awarded his costs of suit in the amount of \$1,736.82 and appellate costs in the amount of \$11,102.14. The trial court granted the State's motion to tax costs, in part, denying Constant payment of his attorney fees and costs for preparing his trial exhibits. The trial court denied Constant's motion to set aside the judgment brought pursuant to section 663.

We affirmed the trial court's grant of the State's motion to tax costs to deny Constant attorney fees and the costs of his exhibits. (*People ex rel. Department of Transportation v. Constant* (Nov. 16, 2010, E049886 & E049988) [nonpub. opn.]

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<sup>2</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

(Opinion II.) We also affirmed the trial court's denial of defendant's motion to set aside the judgment. We awarded Constant his costs on appeal but warned him that his motion to set aside the judgment and his appeal were bordering on frivolous. The remittitur issued on January 31, 2011.

We now reach the matters pertaining to the instant appeal.

On June 22, 2011, Constant filed a memorandum of costs based on our decision that he was entitled to his costs on appeal. He requested \$11,954.07 for filing and motion fees, court reporter fees, and "Other." The "Other" included fees incurred in the United States Supreme Court and property taxes for the time period of 2002 until 2011.

The State filed a motion to tax costs. It contended that Constant's memorandum of costs was untimely and should be dismissed pursuant to rule 8.278(c)(1), which required that Constant file his memorandum of costs within 40 days of issuance of the remittitur. The remittitur issued on January 31, 2011, and the memorandum of costs was not filed until June 22, 2011. Further, the State argued the memorandum of costs included improper items for reimbursement. On July 19, 2011, Constant filed a supplemental memorandum of costs seeking payment of fees expended in the United States Supreme Court.

Constant filed a response claiming that under eminent domain law, his cost bill was not untimely. He also claimed he was entitled to his costs incurred in the United States Supreme Court and for his property taxes. He filed a second response to the motion to tax costs claiming that rule 8.278 was inapplicable.

A hearing was conducted on August 22, 2011. Constant filed written testimony in lieu of oral testimony. In that written testimony, he argued that the valuation of his property was improper. He also argued that rule 8.278 was not applicable because he was awarded costs under Code of Civil Procedure section 1268.720. He contended that he was still seeking review in the United States Supreme Court, so the judgment was not final, and there was “no local rule relating to the time for filing a post appeal bill of costs in existence when the remittitur was issued.” The trial court considered the written testimony. It then ruled, “The motion to tax costs is granted on the reasons cited by the [State]. The submission is untimely.”

The judgment was entered on September 19, 2011. Constant filed his notice of appeal citing to section 904.1 (a)(2), from the “Minute Order 8/22/11 Granting Motion to Tax Costs filed by Plaintiff State of California.”

## II

### UNTIMELY MEMORANDUM OF COSTS (RULE 8.278)

Initially, we note that Constant, in conformity with his usual practice, attempts to raise several issues on appeal that are not proper. The only issue to be determined by the trial court was the costs Constant incurred in bringing the appeal. However, as set forth, *ante*, Constant makes claims that the trial court had no jurisdiction to determine costs, that he is entitled to tax payments, and that he has never been allowed to present evidence of the value of the land taken.

“When an appellate court’s reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must*

be followed. Any material variance from the directions is unauthorized and void.

[Citations.] When, for example, ‘a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.’ [Citation.]” (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982; accord, *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530.)

The only issue to be addressed in this appeal is whether the trial court properly resolved Constant’s costs on appeal in case Nos. E049886 and E049988.

The eminent domain statute states an exception to the general rule awarding costs on appeal to the prevailing party by allowing the defendant in an eminent domain proceeding his or her costs on appeal, whether or not the defendant was the prevailing party in that appeal. An award of costs on appeal under section 1268.720 lies within the discretion of the appellate court. (*Los Angeles Unified School District of Los Angeles County v. Wilshire Center Marketplace* (2001) 89 Cal.App.4th 1413, 1419.) Section 1268.720 provides in relevant part: “*Unless the court otherwise orders*, whether or not he is the prevailing party, the defendant in the proceeding shall be allowed his costs on appeal.” (Italics added.)<sup>3</sup>

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<sup>3</sup> Constant appears to claim that these “costs” under section 1268.720 are different than other costs on appeal. He has provided no authority for this proposition, [footnote continued on next page]

Rule 8.278 details the requirements of obtaining an award of costs on appeal.

Subdivision (c)(1) provides as follows: “Within 40 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule 3.1700.”

Further, under subdivision (c)(2), “A party may serve and file a motion in the superior court to strike or tax costs claimed under (1) . . . .”

A memorandum of costs is mandatory, and failure to follow the procedure requiring that it be timely filed waives and forfeits the entitlement to these costs. (See *Moulin Electric Corporation v. Roach* (1981) 120 Cal.App.3d 1067, 1069-1070 [former Code of Civil Procedure § 1034 required filing of a memorandum of costs within 30 days after the remittitur is filed]; accord *Johnson v. Schimpf* (1928) 91 Cal.App. 26, 36.)

Here, the remittitur issued on January 31, 2011. Constant filed his memorandum of costs in the trial court on June 22, 2011, over four months after the remittitur issued. The State was entitled to closure in this case. After the 40-day deadline passed, it was entitled to consider that Constant was not claiming any costs. It had the authority to seek dismissal of the memorandum of costs since it was untimely. (See *Muller v. Reagh* (1959) 170 Cal.App.2d 151, 152.) The trial court properly denied costs because Constant failed to comply with rule 8.278.

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*[footnote continued from previous page]*

*[footnote continued from previous page]*

and we disagree. He also claims that a local rule was not in place that detailed the time for filing a memorandum of costs. No such local rule was required; rule 8.278 provides the requirements for costs on appeal.

Constant seems to contend that the time for claiming the costs on appeal were dictated by the language in section 1268.010, subdivision (a) which entitles him to full payment of the “judgment” within 30 days of the conclusion of the court proceedings. Since he was seeking review in the United States Supreme Court, he claims, the judgment was not final. Hence, his memorandum of costs was not untimely. However, Constant confuses the two judgments. He was entitled to the judgment on the payment of the taking, which he had already received. The costs on appeal awarded in case Nos. E049886 and E049988, however, are not added to the trial court judgment but constitute a separate judgment. (*Los Angeles Unified School Dist. v. Wilshire Center Marketplace, supra*, 89 Cal.App.4th at p. 1419 [costs on appeal awarded pursuant to Code Civ. Proc., § 1268.720 did not affect the finality of the underlying judgment]; see Cal. Rules of Court, rule 8.278(b)(1), (c)(3).) The costs on appeal were part of a separate judgment not affecting the original judgment. Although he claims that because his costs were denied he was not given just compensation for the taking of his property, the denial of costs was due to his own inaction and disregard for the rules of court.

Additionally, Constant argues that he is entitled not only to the costs of preparing his petition for certiorari filed in the United States Supreme Court, but also that his filing of the petition essentially extended the 40-day deadline set forth in rule 8.278. However, the costs of printing briefs in the United States Supreme Court may not be awarded by the state courts. (See *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 223-224.) Since he was not entitled to those costs, there is no support for his argument that the 40-day deadline should be extended in order for him to seek

review in the federal courts. The costs to which he was entitled were already incurred, and Constant should have filed his memorandum of costs in a timely fashion.<sup>4</sup> Moreover, he has provided no authority that supports that his costs on appeal include filing a petition for writ of certiorari in the United States Supreme Court.

The trial court properly granted the State's motion to tax costs.

### III

#### DISPOSITION

The judgment is affirmed. The State's contention that each party should pay their own costs on appeal is well taken. The general rule is that, under section 1268.720, a landowner is entitled to his costs on appeal in an eminent domain action. (*Eastern Municipal Water Dist. v. Superior Court* (2007) 157 Cal.App.4th 1245, 1256 [Fourth Dist., Div. Two].) However, appellate courts have discretion to depart from that rule, although such departures "should be rare." (*Ibid.*) This case presents such a rare circumstance. The parties shall bear their own costs on appeal.

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RICHLI

J.

We concur:

RAMIREZ

P. J.

HOLLENHORST

J.

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<sup>4</sup> Constant alludes to the fact that he filed a late memorandum of costs after the first appeal, thus excusing his late filing in this case. What procedural events occurred in the prior case are not relevant to the determination of the issues here.