

Case No. S248141

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EVAN WEISS, BELINDA HENRY, MICHAEL HAYES, MICHEALE
HAYES, ROSS SHAW, DEBBIE SHAW, and 1819 MSC, LLC,

Plaintiffs and Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through
its Department of Transportation; and ORANGE COUNTY
TRANSPORTATION AUTHORITY,

Defendants and Respondents.

After a Published Decision by the Court of Appeal
Fourth Appellate District, Division Three, Case No. G052735

Appeal from the Orange County Superior Court
Superior Court Case No. 30-2012-00605637
Honorable Kirk H. Nakamura, Judge Presiding

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Plaintiffs and Appellants¹ (collectively the “Weiss Parties”) ask the Court to deny review of this case (“*Weiss*”). The Court of Appeal’s Opinion below in *Weiss* (the “Opinion”) is the first published authority to thoroughly analyze the language and purpose of *Code of Civil Procedure*² section 1260.040 and consider the Law Revision Commission Comments in light of an objection to the applicability of section 1260.040 to inverse condemnation liability proceedings. In *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029. (“*Dina*”), the applicability of section 1260.040 to inverse condemnation liability was ***not*** disputed by the parties. The Weiss Parties ask the court to deny the review sought by petitioning parties People ex rel. Department of Transportation (“CalTrans”), and Orange County Transportation Authority (“OCTA”) (CalTrans and OCTA, collectively, “Agencies”).

II. BACKGROUND

The factual, legal, and procedural background of this case has been extensively discussed by the Court of Appeal in its Opinion. (See Opinion pp. 3-8).

¹ Plaintiffs and Appellants are Evan Weiss, Belinda Harry, Michael Hayes, Michael Hayes, Ross Shaw, Debbie Shaw, and 1819 MSC, LLC.

² All further references are to California *Code of Civil Procedure* unless otherwise noted.

III. ARGUMENT

A. Not Every Conflict in Case Law Warrants Supreme Court Review; Review of *Weiss* is Not Necessary

The *Weiss* Opinion carefully analyzes section 1260.040, the legislative history, and the Law Revision Commission Comments to conclude section 1260.040 does not apply to inverse condemnation liability proceedings. *Dina* applied section 1260.040 to inverse condemnation in the absence of an objection by the parties to the applicability of 1260.040 to inverse condemnation proceedings.

In *Dina*, the appellate court supported the lower court's findings that plaintiffs "failed to proffer any competent evidence" to support their case, including inverse condemnation, nuisance, or trespass. *Dina* at 1049. That court's discussion of the applicability of section 1260.040 to inverse condemnation was limited to the following: "Appellants, however, do not challenge the applicability of section 1260.040 on the ground that this action involved inverse condemnation rather than eminent domain, and we see no basis for declining to apply the statute to an inverse condemnation action." *Dina* at 1041, fn3.

Not declining to apply a statute to a case lacking competent evidence and without a challenge to the applicability of the statute, as in *Dina*, is qualitatively different from *Weiss*, where a challenge to the applicability of the statute was asserted, and the Court carefully reviewed the lower case,

statutory language, legislative history, and Law Revision Commission analysis to conclude that section 1260.040 was not intended to and does not apply to inverse condemnation liability cases.³

Moreover, in Respondents' Supplemental Brief ("RSB") filed by Agencies below, they stated, "In no published opinion has a court decided whether section 1260.040 applied to inverse condemnation actions. [fn2 omitted] This is a matter of first impression...Section 1260.040 does not directly apply to inverse condemnation actions." (RSB p. 7).

Not every conflict in the case law warrants Supreme Court review. Some fact-specific appellate court decisions, such as *Dina*, can be further developed by subsequent Appellate Court decisions, without wasting the scarce resources of the California Supreme Court. This is such a case. With *Weiss*, courts now have a carefully analyzed road map to follow.

Review is not warranted.

B. The Rationale for the Opinion is Correct and Well Founded

1. The Opinion is internally consistent.

In *Weiss*, the Court concludes that section 1260.040 does not apply to the question of liability in inverse condemnation cases and reverses the

³ *Dina* also concluded section 1260.040 allowed the court to determine companion causes of action for nuisance and negligence. Clearly, these are not contemplated in the eminent domain law or Section 1260.040 as determined in *Weiss*. (Opinion p. 23). Even Petitioning Agencies acknowledge in Footnote 1 of their Petition for Review they do not challenge the *Weiss* Court's Opinion on that ground.

trial court on that ground. The Court specifically mentioned that no issue of compensation was presented in *Weiss*. (Opinion p. 2). The Court’s determination that section 1260.040 is not applicable to inverse condemnation liability proceedings is not inconsistent with leaving open the possibility of applying section 1260.040 to legal issues regarding compensation in inverse condemnation cases.

2. The Opinion quotes from and is consistent with a leading commentator’s views.

The Opinion is consistent with a noted commentator on the subject, referenced below in Petitioner’s Supplemental Opening Brief, and quoted in the Opinion. The Court stated:

As a respected commentator oft-cited by the Law Revision Commission in its Recommendation to the Legislature to adopt AB 237 later concluded in criticizing *Dina*: “The motion in limine procedure of CCP § 1260.040, which was enacted to determine key disputed evidentiary points before trial in a direct condemnation [proceeding] [citation] was used to address liability in an inverse case in *Dina* Although a motion for summary judgment may have been appropriate in that case, in the author’s view **the motion in limine was not the proper vehicle to dispose of the case.**” (2 Matteoni, *Condemnation Practice in California* (Cont. Ed. Bar. 3d ed., Oct. 2016 update) *Trial Preparation and Trial*, § 17.8, p. 17-17; see Recommendation, *supra*, 30 Cal. Law Revision Com. Rep., pp. 573, 579, 585 & fns. 1, 17, 31 [citing 1 Matteoni, *Condemnation Practice in California* (Cont. Ed. Bar. 2d ed. 2000) *Trial Preparation and Trial*, §§ 9.2, 9.14, 9.12, pp. 364, 389-90, 384-385.) We agree with Matteoni’s conclusion. (Opinion pp. 21-22). (emphasis added).

Mr. Matteoni has submitted an Amicus Curiae Letter in Opposition to Agencies’ Petition for Review.

C. Agencies' Arguments are Not Supported by the Language and Intent of Section 1260.040

Agencies' effort to import section 1260.040 into the body of inverse condemnation law with respect to issues of liability, even before an expert exchange is required, advocates creating a new dispositive motion in limine procedure that would be uniquely applicable to inverse condemnation cases, despite that there is no mention of inverse condemnation in section 1260.040. The *Weiss* Court carefully analyzed the statutory language and Law Revision Commission Comments to support its Opinion. The language and the intent of section 1260.040 do not support Agencies' position.

Review should be denied.

IV. CONCLUSION

Respondents respectfully ask this Court to deny the Agencies' Petition for Review.

Dated: April 26, 2018

**PETERSON LAW GROUP
PROFESSIONAL CORPORATION**

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing Answer to Petition for Review was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the Answer, is 1,081 words, exclusive of the matters that may be omitted from the count pursuant to the rules.

Dated: April 26, 2018

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PROFESSIONAL CORPORATION**

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CERTIFICATE OF SERVICE

I, Keith D. Cooper, Jr., am employed in the County of Orange, California. I am over the age of 18 years and not a party to the within action. My business address is 19800 MacArthur Boulevard, Suite 290, Irvine, California 92612.

On April 27, 2018, I served the **ANSWER TO PETITION FOR REVIEW** by sending one copy by US Mail addressed to each of the following recipients:

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I also served a PDF copy of the brief on the Supreme Court of California by electronic transmission in accordance with Supreme Court Rules Regarding Electronic Filing Rule 3(a) and by U.S. Priority Mail (2-day service) in accordance with Supreme Court Rules Regarding Electronic Filing Rule 5(b)(2).

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

Executed on April 27, 2018, at Irvine, California.



Keith D. Cooper, Jr.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **WEISS v. DEPARTMENT OF
TRANSPORTATION**

Case Number: **S248141**

Lower Court Case Number: **G052735**

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

4/27/2018

Date

/s/John Peterson

Signature

Peterson, John (101215)

Last Name, First Name (PNum)

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