Case No. S248141

IN THE SUPREME COURT 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 the 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 Superior Court of the State of California
for the County of Orange
Superior Court Case No. 30-2012-00605637
Honorable Kirk H. Nakamura, Judge Presiding

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATE CASES

STATE STATUTES

OTHER

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

1. INTRODUCTION

Defendants and Respondents Orange County Transportation Authority and the People of the State of California, acting by and through the Department of Transportation (collectively the "Agencies") submit that review is needed because the Court of Appeal's decision poses a direct conflict to the decision in *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal. App. 4th 1029, which authorized the use of Code of Civil Procedure section 1260.040[1] to decide issues of liability in inverse condemnation actions. The existence of that conflict is not disputed.

Additionally, whether section 1260.040 may be used to decide issues of liability in inverse condemnation cases is an important question of law that effects both sides of the inverse condemnation bar. Review is needed here because the decision of the Court of Appeal takes away a useful procedural tool and the decision is ambiguous as to its scope. Plaintiffs and Appellants Evan Weiss, Belinda Harry, Michael Hayes, Michaele Hayes, Ross Shaw, Debbie Shaw and 1819 MSC, LLC (collectively "Appellants") attempt to explain the ambiguity, but the attempt fails. The language of the Court of Appeal's opinion is impossible to reconcile. This ambiguity will have the effect of stifling, if not preventing entirely, all future use of section 1260.040 in inverse condemnation, even for motions not seeking a liability determination.

Review is also needed because the Court of Appeal applied the wrong standard for determining when a provision of the Eminent Domain Law may be applied in inverse condemnation. The Court of Appeal's

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[1] All further statutory references are to the Code of Civil Procedure.

standard, if allowed to stand, would impose an impossibly high standard for the use of eminent domain statutes in inverse condemnation cases.

2. THE DECISION DIRECTLY CONFLICTS WITH *DINA*

Appellants argue that the Court of Appeal's decision did not conflict with *Dina*. (Answer, p. 5.) In support of that position, Appellants contend that the Court of Appeal was the first to decide the applicability of section 1260.040 to inverse condemnation actions, arguing that the *Dina* court never made that decision. (Answer, p. 5, citing 151 Cal. App. 4th at p. 1041, fn. 3.) But the Court of Appeal did not make a definitive decision about the applicability of section 1260.040 to inverse condemnation actions. (Opn.,[2] p. 32 ["we see no objection to applying section 1260.040 to resolve legal issues regarding *compensation* to foster settlement in inverse condemnation cases."], italics in original; but see, Opn., p. 18 ["we reject the Agencies' request that we 'import [section 1260.040] into the body of inverse condemnation law as a matter of judicial development.'"].) In any event, whether the Court of Appeal was the first to decide the application of section 1260.040 to inverse condemnation is not the primary conflict.

The primary conflict is that the Court of Appeal held that section 1260.040 cannot be used to decide issues of liability in an inverse condemnation action (Opn., pp. 10, 39), which is the exact opposite holding of *Dina* (151 Cal. App. 4th at p. 1047), a conflict readily acknowledged by the Court of Appeal (Opn., pp. 2, 11, 13, 21).

3. THE DECISION IS AMBIGUOUS

Appellants argue that the decision created "a carefully analyzed road map" for the inverse condemnation bar to follow. (Answer, p. 6.) But the

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[2] References to "Opn." are to the Court of Appeal's slip opinion, a copy of which is attached as Exhibit A to the Petition for Review. All page numbers cited are to the pagination as it appears on Exhibit A to the Petition.

opposite is true. The Court of Appeal's suggestion that it might entertain section 1260.040 motions in inverse condemnation actions "to resolve legal issues regarding *compensation* to foster settlement" (Opn. p. 32, italics in original), provides no road map to future litigants because the decision fails to define what kinds of legal issues fit that description (other than to exclude legal issues of liability).

Moreover, the more confusing issue for litigants is the Court of Appeal's inconsistent statements about the scope of its holding. The decision is unclear about whether the holding is limited to deciding that issues of liability may not be decided in inverse condemnation cases using a section 1260.040 motion or whether it should be read to prohibit the use of section 1260.040 motions in inverse condemnation cases regardless of their aim.

For the decision to have been internally consistent on this point, as Appellants contend, the Court of Appeal needed to explain that it was not deciding whether section 1260.040 could ever be applied in inverse condemnation actions, that it was only deciding that section 1260.040 cannot be used to decide issues of liability in inverse condemnation actions. The Court of Appeal did not say that. Rather, the court held that it was refusing to import section 1260.040 into the body of inverse condemnation law (Opn. p. 18) and that section 1260.040 cannot be used to decide issues of liability (Opn. p. 10) but might apply in inverse condemnation to decide "compensation issues" (Opn. p. 34). This position is internally inconsistent and confusing to future litigants.

4. THE COURT OF APPEAL APPLIED THE WRONG STANDARD

Like the Court of Appeal, Appellants take the position that a provision of the Eminent Domain Law can only be imported into inverse condemnation upon a finding of legislative intent authorizing its use in

inverse. (Answer, p. 8.) This argument ignores the Legislature's delegation of the development of inverse condemnation law to the judiciary. (Cal. Law Revision Com. Com., 19 West's Ann. Code Civ. Proc. (1982 ed.) foll. §1230.020, p. 395. ["The provisions of Eminent Domain Law are intended to supply rules only for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development."].) This argument also ignores the test established by the Fourth District Court of Appeal in *Chhour v. Community Redevelopment Agency* (1996) 46 Cal. App. 4th 273.

In *Chhour*, the court was presented with a case involving a business owner who sued a redevelopment agency in inverse condemnation for loss of business goodwill under section 1263.510. The agency argued that the business was not entitled to goodwill damages because section 1263.510 applies only in eminent domain. And because goodwill is not compensable as a matter of constitutional law, the agency argued that the business owner was barred from recovering lost goodwill under any theory. (*Id.* at p. 278.)

The question before the court in *Chhour* was under what circumstances a provision of the Eminent Domain Law could and should be imported into the body of inverse condemnation law. The court examined the legislative commission minutes to the Eminent Domain Law, which stated that the law "is drafted with the intent to provide rules for eminent domain law and that the title is neutral with respect to the applicability of any of its provisions to inverse condemnation actions." (46 Cal. App. 4th at p. 279.)

According to the *Chhour* court: "'Neutral' does not mean antagonistic." (*Ibid.*) The court reasoned that the Legislature's neutrality and delegation meant that the courts had the power to import any provisions of the Eminent Domain Law unless the Legislature had created obstacles to importation. (*Id.* at pp. 280-281.) A good example of such an obstacle is

found in section 1263.530, which states: "Nothing in this article is intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business." The *Chhour* court held that absent an obstacle, courts are empowered to decide whether importation serves the same policy objectives in inverse as it does in direct condemnation. (46 Cal. App. 4th at pp. 281-82.)

The *Chhour* framework was adopted by the Second District Court of Appeal in *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal. App. 4th 1028, 1038, fn. 10 (importing section 1265.110, citing *Chhour*) and impliedly in *Dina*. The court in *Dina* also assumed that the provisions of the Eminent Domain Law could be adopted into inverse condemnation law absent legislative intent or good reason to the contrary. (151 Cal. App. 4th at pp. 1041, fn. 3.) Like the Appellants here, the *Dina* plaintiffs argued "that the statute cannot be construed to operate to terminate an action because it does not contain language suggesting that it was intended to allow the trial court to adjudicate liability or enter judgment." (*Id.* at p. 1044.) The court applied the *Chhour* approach instead, holding:

> "But neither does the statute contain any limiting language indicating that the resolution of an evidentiary or legal issue cannot dispose of an action. We will not read into the statute a restriction that is not there."

(*Ibid.*)

The Court of Appeal, here, did not look for obstacles. It looked for the opposite: indicia of intent that the Legislature contemplated importation, either in the words of the statute or its legislative history. The court applied the wrong standard.

The *Chhour* approach is better. It recognizes the judiciary's broad power, granted by the Legislature, to fashion procedures and substantive developments in inverse condemnation law. It recognizes, too, that the provisions of the Eminent Domain Law will not typically contain indicia of intent allowing for importation because of the Legislature's delegation.

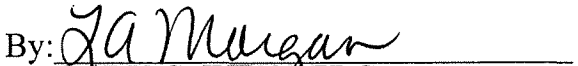
The Court of Appeal's approach ignores the general practice of cross-pollination between inverse and direct condemnation. (e.g., *Chhour, supra*, 46 Cal. App. 4th at p. 280; *Mt. San Jacinto Community College District v. Superior Court* (2004) 117 Cal. App. 4th 98, 105; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal. App. 4th 592, 607.) And it significantly limits the judiciary's power to develop inverse condemnation law. This approach imposes a needlessly-high bar for importation.

Review is needed, if for no other reason, than to provide clear guidance on the best approach for deciding when, a provision of the Eminent Domain Law should be adopted into the body of inverse condemnation law.

5. CONCLUSION

The Agencies respectfully request the Court grant the Petition for Review.

DATED: April 10, 2018 WOODRUFF, SPRADLIN & SMART

By: 

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CERTIFICATE OF WORD COUNT

The text of the brief, including footnotes, consists of 1,670 words as counted by the Microsoft Word 2016 word processing program used to generate the brief.

DATED: May 7, 2018 WOODRUFF, SPRADLIN & SMART

By:

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STATE OF CALIFORNIA, COUNTY OF ORANGE

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Kathleen Moore

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STATE OF CALIFORNIA
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