COURT OF APPEAL – SECOND DIST.
FILED
Mar 04, 2020
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM McCHESNEY et al.,

Plaintiffs and Respondents,

v.

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,

Defendant and Appellant.

B295879, B296931

(Los Angeles County Super. Ct. No. EC064522)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Curtis A. Kin and William D. Stewart, Judges. Reversed.

Century Law Group, Karen A. Larson; Law Office of M. Martinez and Marla A. Martinez for Plaintiffs and Respondents.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Lann G. McIntyre, Wendy S. Dowse; Friedenthal, Heffernan & Brown, Kevin N. Heffernan and Jay D. Brown for Defendant and Appellant.

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Plaintiffs William McChesney and 1201 Victory Associates, Inc., own four parcels of land adjacent to Interstate 5 in Los Angeles County.[1] After the State of California, acting by and through the Department of Transportation (Caltrans), widened the freeway, plaintiffs sued to recover compensation for inverse condemnation. The trial court conducted a bench trial on the issue of liability and ruled in favor of plaintiffs based on evidence that the freeway expansion resulted in increased noise, vibration, and dust causing a diminution in value of plaintiffs' properties. A jury subsequently determined that plaintiffs were entitled to $1,211,859 in compensation. The court thereafter awarded plaintiffs prejudgment interest in the amount of $484,430.25, reasonable attorney fees in the amount of $818,544, and costs in the amount of $183,627.31. Caltrans appealed from the judgment and the order awarding attorney fees.

We agree with Caltrans that the evidence is insufficient to support the finding that Caltrans had taken or damaged plaintiffs' property. We therefore reverse the judgment.

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[1] According to the operative complaint, plaintiff 1201 Victory Associates, Inc., is the owner of three of the four properties, and McChesney owns the fourth. It does not appear from our record, however, that title to the four subject parcels was actually litigated or decided. At trial, McChesney described himself as the purchaser and "principal owner" of the properties. He also said that he and his daughter share legal title to one parcel, but he considers the house to belong to his daughter. A subdivision map and rental agreements in evidence indicate that the corporate plaintiff is the owner of at least some parcels. In its statement of decision, the court referred to McChesney as the owner of the properties and the corporate plaintiff as "his business." We will refer to the plaintiffs as the owners of the parcels.

FACTUAL AND PROCEDURAL SUMMARY

In 1996 plaintiffs purchased four contiguous parcels of land in Los Angeles County, each adjacent to property owned by Caltrans and used for the Interstate 5 freeway. At that time and place, the freeway was four lanes wide in each direction. A sound wall was in place near the edge of the freeway, about 40 feet from the border separating plaintiffs' and Caltrans's properties. In the unimproved area between the wall and the plaintiffs' properties, there were trees that stood about 30 to 40 feet high.

Plaintiffs' parcels are located west of the southbound lanes of the freeway. When plaintiffs purchased the parcels, there was a single-story house on one lot; the other three lots were vacant. Plaintiffs rented out the house as a single-family residence and rented the vacant lots out as parking lots.

In 2000, plaintiffs decided to build a two-story house on each of the three vacant lots. Construction of the homes was completed in late 2004 and, after briefly marketing the properties for sale, plaintiffs began renting them out in 2005. For most of the relevant time, and at all times since 2013, McChesney's daughter, who helped manage and market the rental properties, lived in the older, single-story house.

In 2010, Caltrans began work on a project to add a high-occupancy vehicle (HOV) lane in each direction on a 12.7 mile segment of Interstate 5 that included the part of the freeway adjacent to plaintiffs' properties. The work included the demolition of the existing sound wall and the construction of a new sound wall, still on Caltrans's property, 20 feet closer to the plaintiffs' properties. Caltrans also removed the trees on its property and planted younger, smaller trees. When the project was completed in 2013, the portion of the freeway adjacent to the plaintiffs' properties

had five lanes, including an HOV lane, in each direction. The lane closest to the plaintiffs' properties is used by vehicles merging onto the freeway from an on-ramp north of plaintiffs' properties and by vehicles preparing to exit the freeway via an offramp south of the properties.

Prior to the freeway construction, plaintiffs' tenants did not complain about noise, vibration, or other incidents of living near a freeway. After the construction was complete, tenants complained about vibrations, dust, the existence of the sound wall, the loss of the trees, and increased noise, such as "horns blowing, tires squealing, [and] jake braking from big rig trucks." In 2016, three years after the construction was complete, two of the plaintiffs' tenants stopped renting the properties due to the freeway-related noise, dust, and vibrations. After those tenants left, one of the properties remained vacant for four months and the other was vacant for eight months.

Immediately prior to the freeway construction, plaintiffs charged rents for the two-story homes ranging from $2,250 to $2,775 per month. Since the completion of the construction, plaintiffs have been renting the two-story homes for approximately $2,500 per month. Although this was about what plaintiffs had charged prior to the start of the HOV project, it is less than what they understood to be the "fair market rent" of $3,500 per month.

Sound recordings made at two of the plaintiffs' properties during a three-week period in 2017 showed decibel levels that, according to plaintiffs' expert, were "persistently above the mitigation or abatement level criteria" and vibration levels that ranged from "persistently perceivable to strongly perceivable." No sound or vibration studies had been done at the properties prior to the HOV project construction, and plaintiffs did not offer evidence

of sound, vibrations, or other impacts from the construction at other locations.

Plaintiffs' real estate appraiser opined that because of the freeway-related noise and vibration, the properties were unmarketable for sale as single-family residences and could not be rented at market rates.[2] Market rental rates for the properties, the appraiser testified, "should have been in the neighborhood of $3,500 a month."

In May 2018, the trial court ruled in favor of plaintiffs on the issue of liability. In a statement of decision, the court found that plaintiffs established they suffered " 'a measurable reduction in market value' on account of the diminished use and enjoyment brought upon by the post-[p]roject noise and vibration at the [s]ubject [p]roperties."

The issue of compensation was tried to a jury in October 2018. The jury determined that plaintiffs were entitled to $1,211,859, based upon the difference between the fair market value of the plaintiffs' properties "without the project" and the fair market value "after the project."

Caltrans filed a motion for new trial, which the court denied in January 2019. Caltrans filed a notice of appeal from the judgment and the order denying the motion for new trial on February 20, 2019.

Upon the plaintiffs' motion, the court awarded them $818,544 as reasonable attorney fees pursuant to Code of Civil Procedure

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[2] When asked about the possibility of selling the homes, McChesney testified that he "would have a difficult time with selling these homes. I can sell them. I just can't sell them for what they should be worth."

section 1036. Caltrans filed a notice of appeal from this order on April 9, 2019. We consolidated the two appeals for all purposes.

DISCUSSION

A. *Timeliness of the Appeal*

Plaintiffs asserted in a motion to dismiss and in their respondent's brief that defendant's notice of appeal is untimely and that this court therefore lacks jurisdiction to hear the appeal.[3] We reject the contention.

The following additional facts are relevant. Judgment was entered on November 16, 2018. On November 20, 2018, the trial court entered a minute order reflecting the entry of judgment and stating: "A copy of this minute order and [f]inal [j]udgment mailed to counsel." The minute order is accompanied by a certificate of mailing by the court clerk stating that "the [m]inute [o]rder, [f]inal [j]udgment" was served on counsel for the parties on November 20, 2018. It does not appear from our record that the clerk mailed a copy of the judgment itself to counsel.

On November 30, 2018, plaintiffs served a document titled, "Plaintiffs' Notice of Clerk's Entry Final Judgment on November 20, 2018 with Minute Order and Clerk['s] Certificate of Mailing Attached" ("notice of entry"). (Capitalization omitted.) The court's

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[3] Prior to the filing of briefs and the record, plaintiffs filed a motion to dismiss the appeal on the ground that the appeal is untimely. Caltrans opposed the motion. This court deferred decision on the motion pending assignment of the case to a panel. The parties' briefs on the merits address the issues raised by the motion. We have considered the papers relating to the motion as well as the briefs on appeal.

November 20, 2018 minute order, the November 16, 2018 final judgment, and the clerk's November 20, 2018 certificate of mailing are attached to the notice of entry.

On December 10, 2018, Caltrans filed a notice of motion for new trial. This date is 10 days after the plaintiffs served their notice of entry and 20 days after the court clerk served a copy of the November 20 minute order.

On January 11, 2019, the trial court denied Caltrans's new trial motion and ordered plaintiffs to give notice.

On January 25, 2019, plaintiffs served notice of the court's ruling denying Caltrans's motion for new trial.

On February 20, 2019, Caltrans filed its notice of appeal from the judgment and the order denying its motion for new trial.

Under California Rules of Court, rule 8.104, the time to appeal is generally the earliest of: (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "[n]otice of [e]ntry" of judgment or a filed-endorsed copy of the judgment, showing the date either was served; (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "[n]otice of [e]ntry" of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or (C) 180 days after entry of judgment.

Under California Rules of Court, rule 8.108, these deadlines are modified when a "party serves and files a valid notice of intention to move for a new trial." (Cal. Rules of Court, rule 8.108(b).) In that case and, as here, if the court denies the motion for new trial, "the time to appeal from the judgment is extended for all parties until the earliest of: [¶] (A) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (B) 30 days after

denial of the motion by operation of law; or [¶] (C) 180 days after entry of judgment. (Cal. Rules of Court, rule 8.108(b)(1)(A)–(C).)

If Caltrans served and filed a "valid notice" of motion for new trial, the applicable deadline is the first of the deadlines specified in California Rules of Court, rule 8.108; i.e., "30 days after . . . a party serves an order denying the motion or a notice of entry of that order." (Cal. Rules of Court, rule 8.108(b).) On January 25, 2019, McChesney served the order denying the motion for new trial. Caltrans filed its notice of appeal less than 30 days later on February 20, 2019.

If, however, Caltrans did not serve and file a valid notice of intention to move for new trial, the extensions provided by California Rules of Court, rule 8.108 do not apply and the deadlines under rule 8.104 apply. In that case, Caltrans's notice of appeal would be untimely because it was filed more than 60 days after plaintiffs served their notice of entry on November 30, 2018. (See Cal. Rules of Court, rule 8.104(a)(1)(A) & (B).)

The resolution of plaintiffs' jurisdictional challenge, therefore, depends upon whether Caltrans served and filed a valid notice of motion for new trial within the meaning of California Rules of Court, rule 8.108(b).

Plaintiffs argue that Caltrans's notice of its new trial motion was not a valid notice because Caltrans did not timely file that motion. Indeed, an *untimely* notice of motion for new trial is not a *valid* notice of motion for new trial. (*In re Marriage of Patscheck* (1986) 180 Cal.App.3d 800, 802; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 3:70, p. 3-36.) We must therefore determine whether the notice of motion for new trial was timely.

A motion for new trial must be filed within the earliest of: (1) "15 days of the date of mailing notice of entry of judgment by the clerk of the court pursuant to [Code of Civil Procedure] [s]ection 664.5"; (2) within 15 days of "service upon [the party moving for new trial] by any party of written notice of entry of judgment"; or (3) "within 180 days after the entry of judgment." (Code Civ. Proc., § 659, subd. (a)(2); *Palmer v. GET California, Inc.* (2003) 30 Cal.4th 1265, 1271.) The 180-day option is not applicable here.

Caltrans's motion for new trial, filed on December 10, 2018, was filed more than 15 days after the clerk served the November 20 minute order, but within 15 days of the plaintiffs' service of their notice of entry. The motion for new trial was therefore untimely if, and only if, the clerk's mailing of the November 20 minute order constitutes "notice of entry of judgment by the clerk of the court pursuant to [Code of Civil Procedure] [s]ection 664.5." (Code Civ. Proc., § 659, subd. (a)(2).)

The pertinent part of Code of Civil Procedure, section 664.5 provides: "Upon order of the court in any action or special proceeding, the clerk shall serve notice of entry of any judgment or ruling, whether or not appealable." (Code Civ. Proc., § 664.5, subd. (d).) A clerk's service of notice of entry of judgment is "pursuant to" this provision, therefore, if it was served "[u]pon order of the court." (Code Civ. Proc., §§ 659, 664.5.) In *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51 (*Van Beurden*), our Supreme Court interpreted this language to mean that a notice of entry of judgment served by the court clerk is served upon order of the court "only when the order itself indicates that the court directed the clerk to mail 'notice of entry' of judgment." (*Id.* at p. 64.) The

court construed the statute in this way "[t]o avoid uncertainty": "Neither parties nor appellate courts should be required to speculate about jurisdictional time limits. There must be some indication in the record that an order by the court was, in fact, made. . . . [A] statement on the copy of the judgment mailed by the clerk that 'the notice is given under section 664.5' would be effective to shorten the time for ruling on a motion for a new trial, as would a notation that the copy of the judgment was mailed 'upon order by the court.' " (*Van Beurden*, *supra*, at p. 64.)

Therefore, the Supreme Court concluded, "to qualify as a notice of entry of judgment under Code of Civil Procedure section 664.5, the clerk's mailed notice must affirmatively state that it was given 'upon order by the court' or 'under [Code of Civil Procedure] section 664.5'. . . . In this way, an appellate court may readily determine whether an appeal was timely." (*Van Beurden*, *supra*, 15 Cal.4th at pp. 64–65; see also *Maroney v. Iacobsohn* (2015) 237 Cal.App.4th 473, 484 [*Van Beurden* reflects the "modern view" that "eschews jurisdictional forfeitures, even where, as a practical matter, the party moving for new trial indisputably had notice of entry of judgment"].)

Plaintiffs rely on *Younesi v. Lane* (1991) 228 Cal.App.3d 967 and *Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd.* (1983) 148 Cal.App.3d 223 for their assertion that we may presume that the clerk's mailing of the minute order was pursuant to the trial court's order and that any written notice conveying to the losing party that judgment has been entered is sufficient. In *Van Beurden*, however, the Supreme Court disapproved of these cases on precisely the points for which plaintiffs rely on them. (See *Van Beurden*, *supra*, 15 Cal.4th at pp. 61–64.) We are bound, of

course, by *Van Beurden*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Here, neither the court's November 20, 2018 minute order nor the clerk's certificate of mailing indicate that the court clerk served the November 20, 2018 minute order upon order of the court or under Code of Civil Procedure section 664.5. The service of that minute order, therefore, did not commence the time for Caltrans to file a motion for new trial; that time began when plaintiffs served their notice of entry on November 30, 2019. Because Caltrans filed its motion for new trial less than 15 days later, the motion was timely and "valid" for purposes of California Rules of Court, rule 8.108(b). Caltrans therefore had 60 days following plaintiffs' service of the order denying its motion for new trial—which was served on January 25, 2019—to file its notice of appeal. Caltrans filed the notice of appeal within that time on February 20, 2019. The appeal from the judgment is therefore timely.

B. *Sufficiency of the Evidence of Inverse Condemnation*

A cause of action for inverse condemnation is based upon the constitutional requirement that the state must pay "just compensation" when it takes or damages private property for a public use. (Cal. Const., art. I, § 19; see *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 939.) " 'Property is "taken or damaged". . . so as to give rise to a claim for inverse condemnation, when: (1) the property has been physically invaded in a tangible manner; (2) no physical *invasion* has occurred, but the property has been physically *damaged;* or (3) an intangible intrusion onto the property has occurred which has caused no damage to the property but places a *burden* on the property that is direct, substantial, and peculiar to the property itself.' " (*Dina*

v. People ex rel. Dept. of Transportation (2007) 151 Cal.App.4th 1029, 1048 (*Dina*).) Here, plaintiffs did not assert, and the trial court did not find, that the HOV project caused a physical invasion or damage to plaintiffs' property. The basis for the trial court's ruling is that the HOV project caused intangible intrusions in the nature of "post-[p]roject noise and vibration," which "caused measurable damage" to the properties by reducing their market value.

Caltrans contends that the court's inverse condemnation finding is not supported by substantial evidence and that it is entitled to judgment as a matter of law. We agree.

In *People v. Symons* (1960) 54 Cal.2d 855 (*Symons*), our Supreme Court stated: "It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, [and] change of view, . . . there can be no recovery where there has been no actual taking or severance of the claimant's property." (*Id.* at p. 860.) "Modern transportation requirements," the court explained in another case, "necessitate continual improvements of streets and relocation of traffic. The property owner has no constitutional right to compensation simply because the streets upon which his property abuts are improved so as to affect the traffic flow on such streets. If loss of business or of value of the property results, that is noncompensable. It is simply a risk the property owner assumes when he lives in modern society under modern traffic conditions." (*People v. Ayon* (1960) 54 Cal.2d 217, 223–224.)

Following *Symons*, Courts of Appeal have rejected compensation claims based upon increased noise, dust, and vibrations resulting from construction on adjacent streets and

freeways in the absence of a physical taking or physical damage. In *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 Cal.App.2d 599, 602–605 (*Lombardy*), disapproved on another point in *Southern Cal. Edison Co. v. Bourgerie* (1973) 9 Cal.3d 169, 175), for example, the plaintiffs, who owned property adjoining the San Gabriel River Freeway, sued the state for inverse condemnation alleging that in " 'the process of construction and operation of the . . . freeway and as a proximate, direct and necessary result of the plan, design, execution, construction, maintenance and operation thereof,' " plaintiffs and their property had "been subjected to noxious fumes, loud noise, dust-laden air, shocks and vibrations, imminent hazards from foreseeable accidents and collisions on the freeway, and mental, physical and emotional distress resulting therefrom." (*Id.* at p. 602.) The trial court sustained the state's demurrer without leave to amend and the Court of Appeal affirmed. "There was no allegation," the court explained, that plaintiffs' land "had sunk or shifted, the foundations of the houses had sunk, that walls had been cracked, windows broken or that the buildings had sustained any other type of injury or damage," and the "mental, physical and emotional distress allegedly suffered by plaintiffs by reason of the fumes, noise, dust, shocks and vibrations incident to the construction and operation of the freeway does not constitute the deprivation of or damage to the property or property rights of plaintiffs for which they are entitled to be compensated." (*Id.* at pp. 602–603; see also *City of Berkeley v. Von Adelung* (1963) 214 Cal.App.2d 791, 793 (*Von Adelung*) [property owner could not recover compensation where street improvement project would allegedly triple the amount of traffic passing the owner's lot "with resultant increase in fumes and traffic noises"]; *People ex rel. Dept. of Pub. Wks. v. Presley* (1966) 239 Cal.App.2d 309, 311, 317 (*Presley*)

[owner of land adjoining new freeway could not recover for "noise, fumes and annoyance which would result from the more heavily trafficked freeway"].)

In *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285 (*Varjabedian*), the Supreme Court recognized a theory for the recovery of compensation for inverse condemnation despite the absence of a physical taking or physical damage. In that case, the defendant city operated a sewage plant upwind from the plaintiffs' vineyard. The plaintiffs sued the city for nuisance and inverse condemnation. The trial court granted nonsuit on the inverse condemnation claim, and the Supreme Court reversed. "[P]hysical damage to property is not invariably a prerequisite to compensation" (*id.* at p. 296), the Court stated, and explained that the plaintiffs could recover if their property had "been peculiarly burdened by the odors so as to bring the case within the doctrine of *Richards v. Washington Terminal Co.* (1914) 233 U.S. 546 [(*Richards*)]." (*Varjabedian, supra,* 20 Cal.3d at p. 297.) As the *Varjabedian* Court described *Richards,* the plaintiff in that case "complained of 'inconvenience . . . in the occupation of his property' caused by 'gases and smoke' emanating from a nearby railroad." (*Id.* at p. 297.) Although "the plaintiff could not recover for 'those consequential damages that are necessarily incident to proximity to the railroad,' " the plaintiff "was entitled to compensation for 'gases and smoke emitted from locomotive engines while in [a] tunnel, and forced out of it by means of [a] fanning system through a portal located so near to plaintiff's property that these gases and smoke materially contribute to injure the furniture and to render the house less habitable than otherwise.' " (*Id.* at pp. 297–298.) The *Richards* Court concluded that a plaintiff could recover for " 'so direct and peculiar and substantial a burden upon plaintiff's

property.' " (*Id.* at p. 298, quoting *Richards, supra,* 233 U.S. at p. 557.)

Applying *Richards* to the facts before it, the *Varjabedian* Court held that if the "plaintiff can establish that his property has suffered a 'direct and peculiar and substantial' burden as a result of recurring odors produced by a sewage facility—that he has, as in *Richards*, been in effect 'singled out' to suffer the detrimental environmental effects of the enterprise," and "the necessity of breathing noxious sewage fumes may be a burden unfairly and unconstitutionally imposed on the individual landowner." (*Varjabedian, supra,* 20 Cal.3d at pp. 298–299.) The *Varjabedian* Court did not overrule *Symons* or disapprove of *Lombardy,* but distinguished them, stating that the landowners in those cases did not "reveal the possibility of 'direct and peculiar and substantial' damage from fumes within the meaning of *Richards*." (*Id.* at p. 298, fn. 13.) In the case before it, by contrast, there was evidence that "tended to show that the stench of which the Varjabedians complain did not affect other surrounding properties." (*Id.* at p. 299, fn. 14.)

The alternative to the physical taking or damage requirement that *Varjabedian* established has been successfully applied rarely. Indeed, plaintiffs refer us to only one case—*Harding v. State of California ex rel. Dept. of Transportation* (1984) 159 Cal.App.3d 359 (*Harding*)—in which a plaintiff was permitted to proceed to trial under that theory in a case involving the construction of street or highway improvements. In *Harding,* the plaintiff owned a parcel of land adjoining property over which the state had a right-of-way for a highway. (*Id.* at p. 362.) In connection with a project to construct Interstate 15, Caltrans created a 23-foot "dirt embankment directly in front of plaintiffs' property." (*Id.* at p. 365.)

The plaintiffs sued for inverse condemnation on the theory that the embankment "directly, substantially, and peculiarly burdens plaintiff to his detriment." (*Id.* at pp. 364–365.) According to the plaintiffs, "the prevailing winds collect all of the flotsam of the freeway and deposit it on plaintiffs' property, this being the first open area along the easterly side of the embankment." (*Id.* at p. 365.) As a result, the "plaintiffs are subjected to dirt, dust, debris and noise, and have lost their access to air and light and view, all making their property virtually untenable." (*Ibid.*) Relying on *Varjabedian*, the Court of Appeal reversed the trial court's grant of summary judgment for Caltrans, concluding that the plaintiffs "should be allowed to establish that they suffered a peculiar and substantial burden as a result of their proximity to the highway." (*Id.* at p. 367.)

Although it is not clear from the *Harding* opinion what is meant by the "first open area along the easterly side of the embankment" (*Harding*, *supra*, 159 Cal.App.3d at p. 365), or how that situation caused flotsam to collect and drop on plaintiff's property, the circumstances appear to be analogous to the fanning system within the train tunnel in *Richards*—which caused gases and smoke to be forced out of the tunnel onto the plaintiff's property—and to the situation in *Varjabedian* where prevailing winds directed the sewage plant's odors directly and exclusively toward the plaintiffs' vineyard. (*Varjabedian*, *supra*, 20 Cal.3d at pp. 298–299 & fn. 14.)

Harding is distinguishable from the present case and the *Varjabedian* rule does not apply here.[4] There is no evidence in

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[4] *Harding*, we note, has not been cited for its inverse condemnation analysis other than to distinguish it. (See, e.g.,

our record of any circumstances analogous to the fan-driven, smoke-emitting train tunnel in *Richards*, the coincidence of the sewage plant, vineyard, and prevailing winds in *Varjabedian*, or the flotsam-depositing embankment in *Harding*. The plaintiffs offered no substantial evidence of how the impact of the HOV project on their property, even if " 'direct' " and " 'substantial,' " was " 'peculiar' " to them "within the meaning of *Richards*." (*Varjabedian*, *supra*, 20 Cal.3d at p. 298, fn. 13.) There is nothing, in short, to indicate that the plaintiffs were "singled out" by the HOV project or were subjected to any more noise, dust, and vibrations than others residing next to the freeway. Their situation was thus comparable to the plaintiffs in *Lombardy*, who were denied compensation despite being "subjected to noxious fumes, loud noise, dust-laden air, shocks and vibrations" from the adjacent San Gabriel Freeway. (*Lombardy*, *supra*, 266 Cal.App.2d at p. 602; see also *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 167 [property owners who alleged that the expansion of an adjacent street exposed them to noxious fumes and soot, increased noise, and excessive litter from passing cars failed to allege "unique, special or peculiar damages, that is, 'not such as is common to all property in the neighborhood' "].)

In an effort to bring this case within the *Varjabedian* rule, McChesney testified that after the HOV project was complete, he "observed that we've got four lanes merging into one and culminating pretty much at the front of my properties." The testimony is accompanied by his discussion of a demonstrative exhibit of what appears to be an aerial photograph of the freeway

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Oliver v. AT&T Wireless Services (1999) 76 Cal.App.4th 521, 531; *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 686.)

prior to the completion of the HOV project with different colored arrows and lines superimposed upon it to show ostensible merging patterns resulting from the project. The exhibit does not show how and where the lanes closest to the plaintiffs' properties were ultimately marked. The evidence was offered to show that the lane configuration caused increased merging activity adjacent to the plaintiffs' properties, which increased the sounds of horns blowing, vehicles braking, and tires squealing. The testimony and the exhibit, however, is belied by aerial photographic and video evidence of the finished freeway adjacent to plaintiffs' properties showing five non-merging lanes. We agree with Caltrans that plaintiffs' proffered evidence of four lanes merging into one is demonstrably false and does not constitute substantial evidence of that fact. (See *Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [substantial evidence does not mean " 'any' evidence. It must be reasonable in nature, credible, and of solid value"].) Moreover, Caltrans presented uncontradicted testimony that the nearest on-ramp lane north of the plaintiffs' properties merges onto the freeway in a "typical[ ]" way, and there were "many locations" with similar lane configurations. Plaintiffs offered no evidence that the lane configuration near their properties was different from that faced by others along the HOV project's path. In short, the evidence of the lane configuration adjacent to the plaintiffs' properties does not support the existence of a direct, substantial, and peculiar burden on plaintiffs' properties within the meaning of *Richards* and *Varjabedian*.

More apt than *Harding* is *Dina, supra,* 151 Cal.App.4th 1029 (*Dina*). In *Dina,* the plaintiffs lived on properties that were impacted by an extension of Interstate 210. Among other consequences, the extension resulted in "noise exceeding acceptable

levels set by state and federal law, audible vibrations . . . , and increased levels of air pollution." (*Id.* at pp. 1034–1035.) The plaintiffs submitted evidence of the effects of noise and pollution on their homes and the opinion of a real estate broker that the freeway extension negatively affected the value and salability of homes next to the freeway. (*Id.* at pp. 1038, 1050.) The trial court denied the plaintiffs' claim, finding that the plaintiffs failed to prove that " 'their properties suffered from "peculiar and substantial damage" from the 210 freeway,' " and the Court of Appeal affirmed. (*Id.* at p. 1039.) The noise and pollution reports, the court explained, did not demonstrate that such noise or pollution caused "any type of substantial and peculiar burden that was not suffered by anyone living adjacent to a freeway." (*Id.* at p. 1051; see also *Lombardy, supra*, 266 Cal.App.2d at p. 605 [all "householders who live in the vicinity of crowded freeways, highways and city streets suffer in like manner and in varying degrees"].)

The *Dina* court also rejected the plaintiffs' reliance on evidence that the freeway had negatively affected the value and salability of the plaintiffs' homes. A " 'diminution in property value is not a "taking or damaging" of the property, but an element of the measure of just compensation when such taking or damaging is otherwise proved.' Thus, evidence of a negative effect on the value of [the plaintiffs'] property resulting from the construction of the freeway, by itself, was insufficient to support a claim for inverse condemnation." (*Dina, supra*, 151 Cal.App.4th at p. 1051, quoting *San Diego Gas & Electric Co. v. Superior Court, supra,* 13 Cal.4th at p. 942; accord, *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 516; *Boxer v. City of Beverly Hills* (2016) 246 Cal.App.4th 1212, 1218.) Here, the only evidence

of alleged damage to the plaintiffs' properties was the testimony that the expansion of the freeway negatively affected the value of the properties. As in *Dina*, such evidence does not establish the requisite taking or damage.

Plaintiffs also rely on *People ex rel. Dept. Pub. Wks. v. Volunteers of America* (1971) 21 Cal.App.3d 111 (*Volunteers*). In that case, the Court of Appeal held that when the state has physically taken a portion of plaintiff's property for construction of a new freeway, the plaintiff may recover damages for the diminution of value of the portion not taken. (*Id.* at p. 120.) The court, however, expressly distinguished cases such as *Lombardy*, *Von Adelung*, and *Presley*, which we have cited above, on the grounds that, as in *Lombardy*, "no property was taken," or, as in *Von Adelung* and *Presley*, there "was only the enlargement of an existing public use which occasioned the factors which allegedly resulted in the diminution of the value of the property." (*Id.* at pp. 126–127.) Regarding the second distinction, the court explained that property owners "may have to anticipate growth and increased use of existing facilities which necessitate their improvement, or the substitution of new thoroughfares." (*Id.* at p. 127.) The freeway in *Volunteers*, by contrast, was "carved anew through established neighborhoods." (*Ibid.*) *Volunteers* does not help plaintiffs in the instant case because no portion of their property was physically taken and the HOV project merely enlarged the existing public use of Interstate 5. The facts are thus more analogous to the facts in *Lombardy*, *Von Adelung*, and *Presley* than to the situation in *Volunteers*.

Plaintiffs and the trial court also relied on *Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471 (*Aaron*), which involved inverse condemnation claims by residents near the Los Angeles

International Airport based upon the noise of jet aircrafts. The *Aaron* court, however, distinguished itself from *Symons* and cases involving freeway noise (*id.* at pp. 482–443), and relied in part on Code of Civil Procedure former section 1239.3, which provided for the government's acquisition of an " 'air easement . . . if such taking is necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport and any reduction in the market value of real property by reason thereof will occur through the operation of aircraft to and from the airport.' " (*Aaron*, *supra*, 40 Cal.App.3d at p. 482.)[5] There is no comparable statute concerning freeway construction, and we decline to extend *Aaron*'s holding, which was expressly limited to the "municipal owner and operator of an airport" (*id.* at pp. 483–484), to the facts in this case.

For the foregoing reasons, we conclude that the evidence is insufficient to establish that the plaintiffs' properties suffered direct, substantial, and peculiar damage as a result of the HOV project. Caltrans is therefore entitled to judgment on plaintiffs' inverse condemnation cause of action. Because the court's order awarding attorney fees was based upon the judgment in plaintiffs' favor, that order is also reversed.

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[5] Code of Civil Procedure section 1239.3 was repealed in 1975 and its substance codified in Public Utilities Code section 21652, subdivision (a)(2). (Stats. 1975, ch. 1240, § 72, p. 3181; Stats. 1975, ch. 1275, § 1, p. 3409.)

DISPOSITION

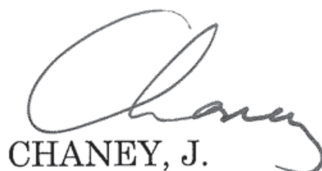
The judgment and the order awarding plaintiffs their attorney fees and costs are reversed. The trial court is directed to enter judgment in defendant's favor.

Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.



CHANEY, J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.