



PACIFIC LEGAL FOUNDATION

July 24, 2014

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CLERK SUPREME COURT

Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Biron v. City of Redding*, No. S219222

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Donor-supported Pacific Legal Foundation (PLF) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, Hawaii, and the District of Columbia.

The decision below, *Biron v. City of Redding*, 225 Cal. App. 4th 1264 (2014), addresses whether a city whose storm drain system floods private property is subject to the general rule of strict liability in an inverse condemnation action, under *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263-64 (1965), or the more lenient rule of reasonableness which this Court has applied in limited circumstances, under *Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 550, 565 (1988).

Pursuant to Rule of Court 8.500(g)(1), *amicus curiae* Pacific Legal Foundation respectfully asks the Court to grant the petition for review, to ensure uniform application of this Court's decisions in *Belair* and *Bunch v. Coachella Valley Water District*, 15 Cal. 4th 432 (1997), by the lower courts when deciding inverse condemnation cases arising from water damage. Rule of Court 8.500(b)(1).

Several decisions of the courts of appeal narrowly apply the rule of reasonableness stated in *Belair* and *Bunch*, limiting these precedents to the failure of levee projects resulting in damage to properties historically subject to flooding. This line of case law applies the strict liability inverse condemnation standard of *Albers* to water damages not caused by levee failures. See, e.g., *Akins v. State of California*, 61 Cal. App. 4th 1 (1998) (strict liability, not rule of reasonableness under *Belair* and *Bunch*, applied where property flooded by levee was not previously subject to flooding). In contrast, the decision below joins other decisions reading *Belair* and *Bunch* broadly and applying them to inverse condemnation claims for water damages in significantly different factual settings, based on a confusing collection of inconsistent rationales. See, e.g., *Gutierrez v. County of San Bernardino*, 198 Cal. App. 4th 831 (2011). This line of cases applies the rule of reasonableness instead of the general rule of strict liability in inverse condemnation. Absent this Court's review of the decision below, the lower courts lack a uniform rule of law to apply when determining whether strict liability or the rule of reasonableness applies in inverse condemnation cases involving water damage.

BACKGROUND OF *BELAIR* AND *BUNCH*

"Private property may be taken or damaged for a public use and only when just compensation . . . has . . . been paid . . ." Cal. Const. art. I, § 19(a). Under this constitutional provision, public agencies are generally liable in inverse condemnation for damage to private property without regard to foreseeability. *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263-64 (1965). Strict liability is the general rule under which public agencies must compensate for damage to private property substantially caused by public improvements. *Pacific Bell Telephone Co. v. Southern California Edison Co.*, 208 Cal. App. 4th 1400, 1410 (2012); *California State Automobile Assoc., Inter-Insurance Bureau v. City of Palo Alto*, 138 Cal. App. 4th 474, 480-81 (2006).

The Court recognized a narrow exception to *Albers* with its 1988 decision in *Belair*, which addressed the failure of a levee on the San Jacinto River which flooded portions of the City of San Jacinto, including the plaintiffs' property. *Belair* 47 Cal. 3d, at 554-55. *Belair* holds that when a flood control levee fails to retain waters within its design capacity, a plaintiff property owner who suffers damage from the resultant flooding is entitled to recover on a theory of inverse condemnation, but only upon a showing that the damage was caused by unreasonable conduct on the part of the defendant public entity. *Id.* at 554. Nine years later, the Court followed with *Bunch*, in which a levee in the Coachella Valley failed and flooded plaintiff's apartment building. *Bunch*, 15 Cal. 4th at 437. *Bunch* holds that all inverse condemnation claims for damages to previously flooded lands caused by failure of levee projects are subject to the rule of reasonableness. *Id.* at 435.

Bunch cautions that it does not address whether the rule of reasonableness applies where a levee failure floods lands that were not previously subject to flooding. *Id.* at 436 n.1.

Aside from the factual settings of levee projects, and the rather unique facts of *Locklin v. City of Lafayette*, 7 Cal. 4th 327 (1994)¹, this Court has not extended the rule of reasonableness to other inverse condemnation claims, where strict liability remains the general rule.

SUMMARY OF DECISION BELOW

Biron v. City of Redding, 225 Cal. App. 4th 1264 (2014), rejects strict liability and extends the rule of reasonableness announced in *Belair* to water damages caused by municipal storm drains. *Biron*, at 225 Cal. App. 4th 1268, 1276. In a key portion of its analysis, the court below concluded that *Bunch* applies not just to properties subject to historical flooding, but to properties potentially subject to future flooding. *Biron*, 225 Cal. App. 4th at 1275.

THE DECISION BELOW CONFLICTS WITH A MAJORITY OF CASES THAT APPLY *BELAIR* AND *BUNCH* NARROWLY AND RETAIN STRICT LIABILITY FOR WATER DAMAGES CAUSED BY PUBLIC IMPROVEMENTS

In conflict with the expansive reading in the decision below, five appellate decisions identify important limitations on *Belair*, *Locklin*, and *Bunch*, and hold that strict liability remains the rule of law for inverse condemnation outside of the factual settings of those cases.

Akins was decided in 1998, on remand from this Court with instructions to apply the principles in *Bunch*. *Akins*, 61 Cal. App. 4th at 23. *Akins* holds that *Belair* and *Bunch* do not apply to cases where levees cause damage to lands not previously subject to flooding. *Id.* at 30. *Pacific Bell v. City of San Diego*, 81 Cal. App. 4th 596 (2000), held that the rule of reasonableness did not apply outside of the flood control context, and declined to apply the rule where a water supply pipe had burst and damaged plaintiff's property. 81 Cal. App. 4th at 610, 614-15. In 2002, the court of appeal held in *Arreola v. County of*

¹ Between its decisions in *Belair* and *Bunch*, the Court also decided the riparian property damage case of *Locklin v. City of Lafayette*, 7 Cal. 4th 327 (1994), which applied the rule of reasonableness to cases where upper landowners had previously enjoyed the qualified privilege of harming their downstream neighbors with limited immunity under the principles of riparian property law. *Locklin*, 7 Cal. 4th at 337-38.

Monterey, 99 Cal. App. 4th 722 (2002), that *Belair* and *Bunch* do not suggest a trend toward the rule of reasonableness in all inverse condemnation cases, and followed *Akins* in applying strict liability where land not historically subject to flooding had been flooded by Highway 1. *Arreola*, 99 Cal. App. 4th at 752-53. See also *California State Automobile Assoc. v. City of Palo Alto*, 138 Cal. App. 4th 474, 480-81 (2006), (applying the substantial causation test from *Belair* to damage caused by blocked sewer lines, without applying the rule of reasonableness); *Pacific Bell Telephone Co. v. Southern California Edison Co.*, 208 Cal. App. 4th 1400, 1410 (2012) (following *Pacific Bell v. City of San Diego*). These decisions hold that *Belair* and *Bunch* do not reflect a general movement away from strict liability under *Albers* in inverse condemnation cases involving water damage or even levee projects.

Consistent with these appellate decisions, the decision of the U.S. District Court sitting in diversity jurisdiction in *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036 (N.D. Cal. 2007), holds that strict liability in inverse condemnation, not the rule of reasonableness, is the standard for damages caused by municipal storm drain systems. *Id.* at 1092-93. In *Yamagiwa*, the federal district court carefully considered and rejected the rule of reasonableness, on the basis that the municipal storm drains that damaged the plaintiff in that case were not flood control projects within the ambit of *Belair* and *Bunch*. *Id.* at 1092-93 (“The . . . project is not a ‘flood control project’ at all—it is an ordinary subdivision storm drain system.”); *Id.* at 1093 (distinguishing municipal storm drains from “flood control projects” and rejecting argument that the rule of reasonableness applies).

This line of case law rejects the arguments that *Belair* and *Bunch* apply beyond levee failures that damage lands previously subject to flooding, and that the cases are the start of a “trend” away from strict liability in inverse condemnation. Under these cases, strict liability remains the standard for inverse condemnation cases involving water damages unless *Locklin* or *Bunch* directly apply.

THE DECISION BELOW JOINS A GROWING MINORITY OF CASES APPLYING *BELAIR* AND *BUNCH* BROADLY

The decision below does not follow or even cite these six decisions in its discussion of how broadly *Belair* and *Bunch* apply. *Biron*, 225 Cal. App. 4th at 1275-76². *Biron* provides no

² *Biron* briefly refers to *Arreola* before addressing whether the trial court properly applied the rule of reasonableness, and *Akins* when discussing the issue of substantial causation. *Biron*, 225 Cal. App. 4th at 1276, 1280. But the court below did not cite or analyze these cases in its discussion of whether the rule of reasonableness applies in the first place.

basis for distinguishing the facts or the reasoning of those cases, and forces lower courts to simply choose between two inconsistent bodies of case law on whether strict liability or the rule of reasonableness apply beyond levee projects that harm previously flooded lands.

In doing so, the court below largely threw its lot in with the recent appellate decisions in *Skoumbas v. City of Orinda*, 165 Cal. App. 4th 783 (2008), and *Gutierrez v. County of San Bernardino*, 198 Cal. App. 4th 831, in reading *Belair*, and *Bunch* broadly and applying them to municipal storm drain damages. See *Biron*, at 1276-77 (citing *Skoumbas* and *Gutierrez*).

Skoumbas addressed damage to a downhill property caused by a storm drain system installed in an uphill subdivision, in which the court of appeal applied the rule of reasonableness instead of strict liability. *Skoumbas*, 165 Cal. App. 4th at 787-90, 794. *Skoumbas* cites *Locklin v. City of Lafayette* (as opposed to *Belair* or *Bunch*) as the basis for the City of Orinda's potential liability on remand. *Skoumbas*, 165 Cal. App. 4th at 794. *Skoumbas* does not define a municipal storm drain as a "flood control project" as the term is used in *Belair* and *Bunch*.

In *Gutierrez*, a heavy storm caused a creek to jump its bank and flood homes which the court found were not historically subject to flooding. The county made an effort to mitigate potential further flooding by placing K rails along the sides of the flooded street to keep the flood waters in the street and away from the homes. 198 Cal. App. 4th at 836. The K rails failed in a subsequent flood and the homes were damaged. *Id.* at 836. *Gutierrez* relies on both *Belair* and *Locklin* to apply the rule of reasonableness rather than strict liability in the case. *Id.* at 840, 848. In another similarity with the decision below, the court in *Gutierrez* found that the damaged property had not been historically subject to flooding, but applied *Belair* nonetheless. *Id.* at 848-49.

Gutierrez shares *Skoumbas*' ambiguous rationale for using the rule of reasonableness rather than strict liability. *Gutierrez* cites both *Belair* and *Locklin*, without clearly identifying which case is controlling (*i.e.*, whether the damage is caused by a public improvement). *Gutierrez*, 198 Cal. App. 4th at 848. *Gutierrez* does not discuss the rationale in *Akins* and *Arreola* (which are expressly applicable to lands not previously subject to flooding), and as such conflicts with those cases. *Gutierrez* also concludes that *Belair* and *Locklin* supersede all earlier authorities on strict liability for storm water damage, without addressing the above discussed post-*Bunch* authorities, including *Pacific Bell v. City of San Diego*, *CSAA*, and *Yamagiwa*, that all reject an expansive reading of *Belair* and *Bunch* in water damage cases.

The decision below joins a growing line of case law holding that *Belair* and *Bunch* apply beyond levee failures, thus creating a “trend” away from strict liability in inverse condemnation. Under these cases, the rule of reasonableness, not strict liability, stands as the general rule for inverse condemnation cases involving water damage.

**THE COURT SHOULD GRANT REVIEW TO RESOLVE THE SCOPE OF THE
BELAIR/BUNCH EXCEPTION TO STRICT LIABILITY**

A policy uniquely applicable to levee projects underpins *Belair* and *Bunch*. In deciding to apply the rule of reasonableness, rather than either immunity or strict liability, this Court noted that it was important to balance the constitutional prohibition against uncompensated property damage with avoiding making a flood control district the guarantor of the value of property which would be regularly flooded absent the levee project. *Belair*, 47 Cal. App. 4th at 565; *Bunch*, 47 Cal. 3d at 443.

The “plaintiff behind the levee” would have little or no valuable property without the levees in question; that foundational benefit serves in effect as a discount on any harm caused by the levees when they fail. This Court struck this balance by requiring a showing that the levee project builder or operator acted unreasonably. This clarifies that the limitation of *Belair* and *Bunch* to levee failures that flood property *previously subject to periodic flooding* is not simply a prudent or conservative “sideboard” to liability. It is integral to the rule. These properties would be regularly flooded without the levee project. The importance of this aspect of the rule of reasonableness was expressly observed and applied in *Akins*, in which the court of appeal stated that the “importance of flood control never conferred on the government a privilege to use private property which was not historically subject to flooding as a retention basin in order to protect other property, without paying compensation. We do not read *Belair*, *Locklin*, or [*Bunch*] as compelling that result.” *Akins*, 61 Cal. App. 4th at 30.

The reality of historic flooding also explains *Belair*’s concern that imposing strict liability might inhibit the construction of levee projects. Levee projects involve significant risks of property loss if they fail; these risks are greater than would exist without the levees. Property protected by levees can be greatly improved precisely because of that protection. If a levee fails, the resulting flood damages far more property than would exist if the levee were never built. Building the levee thereby actually increases the degree of harm that is caused by a flood, even while it reduces the likelihood of such a flood, and this is true as to any property which a levee protects.

Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
July 24, 2014
Page 7

These concerns do not apply to municipal storm drains like those involved in the decision below. Although storm drains benefit subdivisions, just as do sewer and drinking water supply pipes, street lights, and paved roads, none of these improvements are *essential* to development, as can be seen by some or all of their absence from many rural residential developments. None of these public works serve the foundational role of levees, without which the entire subdivision (urban or rural) would be periodically submerged. The operator of the storm drain system is not acting as the guarantor of developed property because the storm drains do not themselves enable the development. In this respect storm drains are no different than the other basic types of development infrastructure for which public agencies are strictly liable under *Albers* when they damage private property.

By extending *Belair* and *Bunch* to storm drains, the decision below sets aside the policy basis for this Court's original decision in those cases: avoiding imposing guarantor liability on local governments that build and operate major levee projects. This Court should grant review to ensure that it, rather than the various courts of appeal, sets the policy basis on which California's inverse condemnation laws will rest.

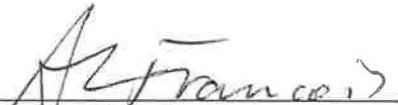
CONCLUSION

The decision below, along with *Skoumbas* and *Gutierrez*, applies *Belair* and *Bunch* loosely and expansively. These decisions directly conflict with the narrow and limited application of *Belair* and *Bunch* in *Akins*, *Pacific Bell 2000*, *Arreola*, *CSAA*, and *Pacific Bell 2012*, as well as the federal trial court decision in *Yamagiwa*. Review is necessary to resolve these conflicts and provide a uniform rule of law that the lower courts can use to decide inverse condemnation claims involving water damages outside the context of levee projects.

For all of the foregoing reasons, the Petition should be granted.

Respectfully submitted,

DAMIEN M. SCHIFF
ANTHONY L. FRANÇOIS

By 
ANTHONY L. FRANÇOIS

Counsel for Amicus Curiae
Pacific Legal Foundation

DECLARATION OF SERVICE BY MAIL

I, Kiren K. Mathews, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On July 24, 2014, true copies of PACIFIC LEGAL FOUNDATION'S AMICUS LETTER BRIEF IN SUPPORT OF PETITION FOR REVIEW were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 24th day of July, 2014, at Sacramento, California.



KIREN K. MATHEWS