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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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CITY OF OROVILLE, *Petitioner,*

v.

SUPERIOR COURT OF BUTTE COUNTY, *Respondent.*

Deputy

TIMOTHY G. WALL, D.D.S.; SIMS W. LOWRY, D.M.D.; WILLIAM
A. GILBERT, D.D.S., INDIVIDUALLY AND DOING BUSINESS AS
WGS DENTAL COMPLEX, *Real Parties in Interest.*

Court of Appeal, Third Appellate District, Case No. C077181
Butte County Superior Court Case No. 152036
(Consolidated with Case No. 153408)
The Honorable Sandra L. McLean, Judge
Civil Division – (530) 532-7009

ANSWER BRIEF ON THE MERITS

AFTER A DECISION BY THE COURT OF APPEAL
THIRD DISTRICT

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ANSWER BRIEF ON THE MERITS

I. INTRODUCTION

This answer brief on the merits by Real Parties in Interest Timothy G. Wall, D.D.S.; Sims W. Lowry, D.M.D.; William A. Gilbert, D.D.S., individually and doing business as WGS Dental Complex responds to the City of Oroville's Opening Brief on the Merits.

A public entity is liable when a public improvement, as deliberately designed, implemented, or maintained, caused the taking, destruction, or damage of private property. Even when independently generated forces contribute to the injury, proximate cause is established when the public improvement constitutes a substantial concurring cause. A public

improvement is a substantial concurring cause if other forces *alone* would not have caused the damage and the public improvement failed to function as intended. Here, the City admits the sewage backup and resultant damage to Plaintiffs' property was caused by tree root incursion on the City's main line. The City claims the alleged lack of a backwater valve on Plaintiffs' private property caused Plaintiffs' damages. However, there is no way a lack of backwater valve alone could have caused Plaintiffs' damages. Without the sewage backup in the City's main line, Plaintiff would have suffered no damages. Therefore, Plaintiffs have established the City's sewer system constitutes a substantial concurring cause and the City is liable for inverse condemnation.

The City's reliance and citation to unpublished cases is prohibited by California Rules of Court Rule 8.1115(a)-(b). Moreover, the decisions in the unpublished cases are factually dependent and this case is unique in that the City's own representatives admitted in official reports and deposition testimony that the primary cause of the sewer backup into Plaintiffs' property was a blockage in the City's sewer main line.

Therefore, Plaintiffs respectfully request the Court affirm the trial court's and appellate court's rulings finding the City liability to Plaintiffs or inverse condemnation.

II. BACKGROUND

A. December 29, 2009 Sewage Backup

Plaintiffs are three dentists, Doctors William Gilbert, Sims Lowry and Timothy Wall, who are general partners of WGS Dental Complex located at 3579 Oro Dam Blvd., in Oroville, California. (Petitioner's Excerpts of Record in Support of Petition for Writ of Mandate ("PR") v. 2,

Ex. 5 at p. 357, ¶¶ 2, 4, and p. 361, Ex. A). The private sewer lateral line at 3579 Oro Dam Boulevard is connected to the City's main sewer system at the property line of 3579 Oro Dam Boulevard in 1985 between Manhole Nos. JJ-10 and JJ-11. (PR v. 2, Ex. 5 at pp. 213-214. ¶ 10, 218 ¶ 26 and p. 237, Ex. C). On December 29, 2009, the municipal sewer adjacent to the building became blocked due to tree root intrusion. (PR v. 2, Ex. 5 at p. 218, ¶ 29; PR v. 1, Ex. 4 at p. 38, ¶ 3 and p. 61, Ex. B at Special Interrogatories Nos. 7-8). A large amount of raw, untreated sewage (including feces, condoms and feminine hygiene products) was forced up the property's sewer lateral, through the sinks, toilets and drains, and into the interior spaces of the three dental suites. (PR v. 1, Ex. 4 at pp. 38, 75-78, 85-88, 131-133). The sewage damaged portions of the flooring and other building components and certain items of personal property located within the offices. (PR v. 1, Ex. 4 at pp. 38, 46-47 at Request Nos. 12, 13).

The City reviewed the plans for construction of Plaintiffs' building and inspected the construction for conformance with building/plumbing codes. (City's Opening Brief on the Merits ("COB") at pp. 12, 14-15). The City did not require the builders install a backwater valve. (Id.). The City approved the plans for construction and issued a building permit. (COB at p. 16).

B. Cause of the Sewer System Overflow

1. The City Admits a Tree Root Blockage in the City's Main Sewer Line was the Primary Cause of the Sewage Overflow in Plaintiffs' Property

The City admits it found root growth partially blocking flow through the City's sewer main between manholes J-10 and J-11. (COB at p. 17). In official City and State forms and deposition testimony, City employees

identified the primary cause of the overflow as root blockage in the City's main sewer line.

Cody Nissen, operator for the sewer division of the City of Oroville Public Works Department, was one of the first to respond to the sewage spill at 3579 Oro Dam Boulevard on December 29, 2009. Upon arrival at the scene, Mr. Nissen assisted with locating and clearing the blockage in the City main. On December 30, 2009, Mr. Nissen prepared a sewer report on the City's standard "sewer report form," as well as a typed letter to attach to the standard form. Under the "primary cause" of the overflow portion of the report, Mr. Nissen marked the boxes for roots and grease. Further, in his letter, Mr. Nissen indicates "it was determined that the blockage was between manholes J-10 and J-11." (PR v. 1, Ex. 4 at pp. 121:15-20, 122-125, 126-128:13, 142-144); (Rojas Decl. ¶ 5, Ex. D, Deposition of Cody Nissen at pp.18:15-20, 19-22, 25-27:13, Ex. 277 thereto at BW-CO 000083-000085). Cody Nissen testified regarding responsibility of the City for the sewer system overflow:

Q. Back in 2009 was the public works department responsible for determining who was responsible for the sewage spill?

A. Yes.

Q. With respect to the incident at 3579 Oro Dam Boulevard, do you know whether a determination was made as to who was responsible for the sewage spill?

A. Yes.

Q. How was that determination made?

A. Clearly there was a blockage in the line that was cleared, and -- which stopped the overflow of sewage into the building and into the parking lot. So, in my training and experience, that would indicate that the City's sewer main was backed up..."

(PR v. 1, Ex. 4 at pp. 129:16-130:4, 142-144); (Rojas Decl. ¶ 5, Ex. D, Deposition of Cody Nissen at pp.70:16-71:4, Ex. 277 thereto at BW-CO 000083-000085).

Richard Walls was the City of Oroville's Senior Civil Engineer from October 2005 to February 2010, as well as the Interim Director of Community Development and Public Works from February 2010 to September 2010. (PR v. 1, Ex. 4 at pp. 149:6-150:8, 153-157); (Rojas Decl. ¶ 6, Ex. E, Deposition of Richard Walls, Volume I, at pp. 26:6-27:8, Ex. 32 thereto). The City has identified Mr. Walls as its Person Most Knowledgeable regarding all sanitary sewer overflow events reported to the State of California by the City of Oroville between March 6, 2008 and June 30, 2010, including documents related to the cause of the sewage discharge and the protocols, procedures and contractors employed to decontaminate, mitigate, or repair any resulting damage to personal property, structures, and/or land following said sanitary sewer overflow event. (PR v. 1, Ex. 4 at pp. 159:13-160:22, 162-163); (Rojas Decl. ¶ 6, Ex. E, Deposition of Richard Walls, Volume III at pp. 229:13-230:22, Ex. 319 thereto). Additionally, the City disclosed Mr. Walls as its non-retained expert regarding the maintenance and operations of the Oroville Sanitary Sewer System. (PR v. 1, Ex. 4 at pp. 194:11-195:3); (Rojas Decl. ¶ 6, Ex. E, Deposition of Richard Walls, Volume IV, p. 295:11-296:3). On January 7, 2010, Mr. Walls submitted a Certified Sanitary Sewer Overflow ("SSO") Event report to the California Integrated Water Quality System to report the sewage spill located at 3579 Oro Dam Boulevard. The SSO Event Report for the December 29, 2009 sewage spill at 3579 Oro Dam Boulevard lists the SSO Event ID as 748200. In that report, Mr. Walls stated the failure occurred in the main. Further, the report states the cause of the spill was

from debris. Mr. Walls testified that “the primary cause [of the blockage] is as was put in this report.” (PR v. 1, Ex. 4 at pp. 188:3-193:13, 196:24-197:11, 199-201); (Rojas Decl. ¶ 6, Ex. E, Deposition of Richard Walls, Volume IV at pp. 288:3-293:13, 297:24-298:11, Ex. 409 thereto).

In a response to the State Water Resources Control Board (SWRCB) sanitary sewer collection system audit report dated June 10, 2011, Richard Walls prepared a letter dated August 30, 2011. The letter addressed in part the SWRCB’s request for a technical report from the City regarding SSO Event ID 748200 (the December 29, 2009 sewage spill located at 3579 Oro Dam Boulevard). The SWRCB requires the SSO reports be certified and contain the following certification statement: “I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of that person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.” (PR v. 1, Ex. 4 at pp. 185:13-187:8, 199-201); (Rojas Decl. ¶ 6, Ex. E, Deposition of Richard Walls, Volume IV, at pp.285:13-287:8, Ex. 409 thereto).

In this letter, Mr. Walls describes the cause of the SSO as “root intrusion located between manholes JJ-10 and JJ-11.” Mr. Walls testified that he in fact certified the SSO report for the spill at 3579 Oro Dam Boulevard and confirms his conclusion that the cause of the SSO was a root intrusion in the City’s main:

Q. That's what that certification says, correct?

A. That's what it says.

Q. All right. And so, in doing so, you took your responsibility to provide accurate responses to the state seriously, true?

A. Quite true.

Q. All right. And in respect to the sewage overflow of December 29th, 2009, you had to evaluate, based upon all the information available to you, what the cause of that sewage overflow was, true?

MR. HABIB: Lacks foundation. Calls for speculation. Presents an incomplete hypothetical.

Q. All right. If you look at Page 3, Item 1.d, you were required to respond as to what the cause of the sewage overflow was, true?

A. True.

Q. And your response was the cause of the SSO, or sanitary sewage overflow, was root intrusion located between manholes JJ-10 and JJ-11. That was your belief at that time, correct?

A. Correct.

...

Q. Yes. You believe, as you did on August 30th, 2011, that the cause of the sewage overflow at the dentists' offices was root intrusion located between manholes JJ-10 and JJ-11, correct?

A. Correct.

MR. HABIB: Same Objections.

Q. That area, that is the location between manholes JJ-10 and JJ-11, is part of the mainline owned by the City of Oroville?

A. True.

(PR v. 1, Ex. 4 at pp. 186:18-187:22, 199-201);
(Rojas Decl. ¶ 6, Ex. E, Deposition of Richard Walls,

Volume IV, p. 286:18-287:22, Ex. 409 thereto).

Plaintiffs' designated plumbing expert, Mark Hunter, opined "the diversion of flow from the City's sewer main was the root cause of this incident." (PR v. 1, Ex. 4 at pp. 204:8-205:11); (Rojas Decl. ¶ 7, Ex. F, Deposition of Mark Hunter at pp. 95:8-96:11).

2. Even if a Backflow Preventer Existed on the Private Lateral, the Sewage Spill Still Could Have Occurred.

The City's own experts, David Purvis and Marvin Root, admit that even if there was a properly installed and properly maintained backflow preventer in place at the time of the incident, it is possible that the device would have failed and not prevented the sewage overflow on Plaintiffs' property. (PR v. 4, Ex. 19 at pp. 847:9-12, 851:24-852:3); (Rojas Decl. in Support of Plaintiffs' Reply ¶ 3, Ex. 2, Deposition of Marvin Root at p. 49:9-12 and ¶ 4, Ex. 3, Deposition of Davis Purvis at p. 53:24-54:3). Moreover, Plaintiffs' plumbing expert, Mark Hunter testified that backwater valves that utilize the check-valve type of technology (which is the case here) are "problematic at best and borderline nuisance." (PR v. 4, Ex. 19 at p. 841:20-22); (Rojas Decl. in Support of Plaintiffs' Reply ¶ 2, Ex. 1, Deposition of Mark Hunter at p.95:20-22). Mr. Hunter testified it is highly likely that the backflow preventer in this scenario would have malfunctioned anyway, still allowing sewage to enter the complex. Mr. Hunter stated, "in my experience the installation of a check valve type backflow preventer on a sewer line is about 50-50 chance that it will work correctly when needed." (PR v. 4, Ex. 19 at p. 842:7-11); (Rojas Decl. in Support of Plaintiffs' Reply ¶ 2, Ex. 1, Deposition of Mark Hunter at p. 96:7-11).

C. Procedural History

1. The Trial Court Proceedings

On June 4, 2014, Plaintiffs filed a motion for judicial determination of the City's liability for inverse condemnation pursuant to California Code of Civil Procedure Section 1260.040. The Butte County Superior Court heard Plaintiff's motion for judicial determination of liability on July 23, 2014 and issued an order on July 25, 2014 finding:

Plaintiff's evidence is sufficient to establish the basic underlying facts; i.e., that there was a blockage in the City owned sewer main, the blockage most likely was caused by roots, the blockage resulted in sewage backup in the plaintiffs' offices, and the backup caused damage to plaintiffs' property.

(City's Petition for Review, Ex. B at p. 6:5-9).

The trial court held:

A sewer blockage such as occurred in the present case exhibits a failure of the project to operate as intended. Even though the failure of the property owner to have backflow preventer may have been a contributing cause, the damage would not have occurred absent the failure of the sewer to operate as intended, and therefore the City is liable in inverse condemnation.

(*Id.* at p. 8:4-10).

The trial court went on to find:

Even though the facts of the case show that the failure of the property owners to have a legally required backflow device in place was a contributing cause of the sewage backup, the Court is constrained by case law, as set out in the *CSAA* case and other cases cited by the plaintiffs to find in favor of the plaintiffs.

(*Id.* at p. 12:17-21).

The trial court also found "the root intrusion is the primary cause of the blockage." (*Id.* at p. 13:21-22). Contrary to the City's statement in its Opening Brief on page 17, the trial court did not find the City's sewer

design was defeated by the absence of a backwater valve.

2. The Appellate Court Proceedings

On August 25, 2014, the City filed a Petition for Writ of Mandamus in the Third District Court of Appeal. The appellate court issued an alternative writ and the matter was fully briefed by November 14, 2014. The appellate court heard oral argument on May 26, 2017 and issued its unpublished decision on June 13, 2017. The appellate court concluded the trial court properly found the City liable in inverse condemnation. (City's Petition for Review, Ex. A at p. 19). The appellate court stated the "City's argument is premised on its mistaken view that the 'only reason' sewage backed up onto private property is that the private owner defeated, even 'sabotaged,' the design of the sewer system by failing to install a backwater valve on the private sewer lateral as mandated by city ordinances and the state plumbing codes." (*Id.* at p. 2). The appellate court noted the City inspected the construction and issued a "Certificate of Occupancies" to the individual dentists and "offered no explanation as to why a City inspector signed off on a building that failed to comply with the backup valve requirement..." (*Id.* at p. 5).

III. LEGAL ARGUMENT

A. Standard of Review

Plaintiffs moved for a ruling on liability for inverse condemnation under *Code of Civil Procedure* Section 1260.040. Pursuant to Section 1260.040, the court has the power to weigh the evidence presented and make a ruling on liability. *Code Civ. Proc.* 1260.040; *Dina v. People ex. Rel. Dept of Transportation* (2007) 151 Cal.App.4th 1029, 1034. The trial

court weighed the evidence and made certain findings of fact.

B. The Elements and Standards for Inverse Condemnation Liability are Well Settled by this Court and Subsequent Case Law

1. A Public Entity is Liable in Inverse Condemnation when the Public Improvement Constitutes a Substantial Concurring Cause of the Injury

The elements and standards in inverse condemnation liability are well settled by this Court. A public entity is liable when a public improvement, as deliberately designed, implemented, or maintained, caused the taking, destruction, or damage of private property. *Albers v. Los Angeles County* (1965) 62 Cal.2d 250, 263-264; Cal. Const. Art. I, § 19. The standard for proximate cause has been consistently applied throughout this Court and the lower Courts not only in flood control cases, but also in all other types of inverse condemnation cases. See e.g., *Albers, supra*, 62 Cal.2d at 263-264; *Holtz v. Superior Court of the City and County of San Francisco* (1970) 3 Cal.3d 296, 302. Flood control cases are distinct from other types of inverse condemnation cases. However, contrary to the City's characterization, the difference between flood control and other inverse condemnation cases does not lie in the standard applied to determine proximate cause but rather lies in whether a "reasonableness" standard applies to the parties' conduct. See *Belair, supra*, 47 Cal.3d at 550-563/

This Court clarified the standard for proximate cause in inverse condemnation cases in *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 559-560. The Court held in inverse condemnation cases, when independently generated forces contribute to the injury, proximate cause is established when "the public improvement constitutes a substantial concurring cause of the injury, i.e. where the injury occurred in

substantial part because the improvement failed to function as intended. *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal. 3d 550, 559. “A public improvement is a ‘substantial concurring cause’ if other forces alone would not have caused the damage and the public improvement failed to function as intended.” *Id.*

Relying on *Belair*, the Sixth Appellate District in *California State Auto. Ass’n Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 479 (“CSAA”), held Plaintiff met the element of causation when it was established a sewage blockage occurred in the city’s main sewer line. The Court found as a result, the public work failed to function as intended and a showing of how or why the blockage occurred was not required. *Id.* at 483. The Court specifically stated the decision “should not be taken as converting an inverse condemnation claim into a solely strict liability concept. The homeowner here had the duty to demonstrate the actual cause of the damage to him.” *Id.* at 510.

The element of proximate causation for inverse condemnation is established if a plaintiff can prove a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury. Even where an independent force contributes to the injury, the public improvement remains a substantial concurrent cause if the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement is a substantial cause unless the damage would have occurred even if the project had operated perfectly. A public improvement is a substantial concurring cause if other forces alone would not have caused the damage and the public improvement failed to function as intended. *Id.* at 481.

The Second and Fourth Appellate Districts have made similar findings with regard to causation in inverse condemnation. Inverse condemnation does not require any breach of a standard of care nor foreseeability of the harm. *Aetna Life & Cas. Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865. Thus, “any actual physical injury to real property proximately caused by a public improvement as deliberately designed or constructed is compensable under Cal. Const. art I, §19, whether or not the injury was foreseeable.” *Id.* at 873-74. The deliberateness requirement is met by a public “improvement that as designed and constructed presents inherent risks of damage to private property, and the inherent risks materialize and cause damage.” *Pacific Bell v. City of San Diego* (2000) 81 Cal. App. 4th 596, 607.

Here, the cause of the sewage backup is known and undisputed. The backup was caused by a tree root blockage in the sewer main line owned by the City. The City admits the cause of the backup in its Petition for Review at section IV(C), page 11 and its Opening Brief on the Merits at p. 17 was blockage in the City’s main line. Plaintiffs’ private property was damaged by a sewage backup from the City sewer mainline. The evidence establishes, and the City admits in mandatory reports to State agencies, deposition testimony, its Petition for Review and Opening Brief that roots had invaded the City’s sewer mainline, creating a blockage which backed up sewage into Plaintiffs’ property. Other forces alone could not have caused the sewage backup damaging Plaintiffs’ property. The City acted deliberately with respect to the design, construction, operation, and maintenance of its own sewer system. An inherent risk of a sewer system is blockage caused by roots or other foreign material in the sewer main. Because of the roots, the City’s sewer system did not function as intended –

it did not take and dispose of waste material but, instead, caused the waste to back up and enter onto Plaintiffs' property. The City sewer main failed to function as intended. Thus, the blockage in the City's mainline is a substantial or proximate cause of the sewage spill. Whether or not the root blockage was foreseeable and whether the City acted reasonably in the operation of its sewer system is irrelevant for the purposes of determining proximate cause in an inverse condemnation action. Thus, under the rationale of *Belair* and CSAA, as the trial court found and appellate court affirmed, the City is liable under inverse condemnation.

Although the trial judge stated the ruling was based on undisputed facts, the trial judge, in fact, made factual determinations as to causation and determined "root intrusion is the primary cause of the blockage". (City's Petition for Review, Ex. B at p. 13:21-22). In ruling on a motion for judicial determination of liability for inverse condemnation pursuant to Code of Civil Procedure Section 1260.040, the court has the right to weigh evidence to make factual determinations and adjudicate the issues. *Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029, 1040, 1044.

2. The Absence of a Backflow Preventer Valve was Not the Sole Cause of the Sewage Spill.

Throughout this litigation, the City has contended that if Plaintiffs' privately owned sewer lateral had been equipped with a backflow prevention device as required by City Ordinance, the sewage intrusion would have not occurred. The City simply ignores inverse condemnation case law. To plead a valid claim for inverse condemnation, the Plaintiffs need only prove that other forces alone did not cause the damage. *Belair v. Riverside, supra*, 47 Cal. 3d at 559. "Even if there were several concurrent causes, the public improvement need only be one substantial cause of the

damage in order for liability to attach.” *Id.* Moreover, “when more than one substantial factor or cause has operated to produce the damage, each important causal element may produce legal liability, notwithstanding the contribution of others.” *Yue v. City of Auburn* (3d Dist. 1992) 3 Cal. App. 4th 751; *Souza v. Silver Development Co.* (1st Dist. 1985) 164 Cal. App. 3d 165; *Blau v. City of Los Angeles* (2d Dist. 1973) 32 Cal. App. 3d 77, 107.

The element of proximate cause is established if plaintiff can prove a substantial cause and effect relationship excluding the probability that other forces alone produce the injury. (*CSAA, supra*, 138 Cal.App.4th at 481). To the extent the lack of a backflow preventer constituted an additional cause, it is not possible the lack of a back flow preventer, by itself would have caused the sewer overflow. To the contrary, the damage would not have occurred if the City’s sewer system had not failed. If the sewer system was functioning as intended – i.e., transporting waste away from structures – there would have been no need for preventive devices, such as a backflow preventer. The system failure was a substantial cause of the damage. Even assuming there is no backflow preventer, the backflow preventer alone could not have caused the sewage overflow or damage; the City is liable as the City’s deliberately constructed, operated, and maintained improvement failed to function as intended. *Belair supra*, 47 Cal.3d at 559-60.

C. The Unambiguous Law On Inverse Condemnation Does Not Require Plaintiffs to Establish a Deficient Plan of Maintenance or Independent Contributing Fore.

The fundamental policy underlying the concept of inverse condemnation is that the costs of a public improvement benefitting the community should be spread among those benefited rather than allocated to

a single member of the community. *Belair, supra*, 47 Cal.3d at 558; *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607. A public entity is generally strictly liable for any damage to private property caused by a public improvement as that improvement was deliberately designed, constructed or maintained. *Pacific Bell, supra*, 81 Cal.App.4th at 614-615; *Mercury Casualty Co. v. City of Pasadena* (2017) 14 Cal.App.5th 917. Courts have only applied a test of reasonableness in the unique area of flood control cases. *Pacific Bell, supra*, 81 Cal.App.4th at 614-615. There are no published cases applying a test of reasonableness outside of flood control cases. *Id.*

Contrary to the City's characterization at pages 26-27 of the City's Opening Brief, Plaintiffs are not required to provide evidence of deficient design or maintenance to establish liability for inverse condemnation. The deliberateness requirement is met by a public "improvement that as designed and constructed presents inherent risks of damage to private property, and the inherent risks materialize and cause damage." *Pacific Bell v. City of San Diego* (2000) 81 Cal. App. 4th 596, 607.

CSAA is unambiguous and did not create a new standard of proximate causation. The Court in *CSAA* merely applied the standard established by this Court that "[a] public improvement is a 'substantial concurring cause' if other forces alone would not have caused the damage and the public improvement failed to function as intended." *Belair, supra*, 47 Cal.3d at 559. Applying the proximate cause rationale enunciated in *Belair*, the Court in *CSAA* found the element of proximate causation for inverse condemnation is established if a plaintiff can prove a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury. Even where an independent force contributes to

the injury, the public improvement remains a substantial concurrent cause if the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement is a substantial cause unless the damage would have occurred even if the project had operated perfectly. A public improvement is a substantial concurring cause if other forces alone would not have caused the damage and the public improvement failed to function as intended. *CSAA, supra*, 138 Cal.App.4th at 481.

Despite the City's attempts to obfuscate the findings in the relevant case law, the law is clear as held by this Court and lower courts, a public entity is liable for inverse condemnation when a public improvement as deliberately designed and constructed causes damage to private property. In all inverse condemnation actions, "[a] public improvement is a 'substantial concurring cause' if other forces alone would not have caused the damage and the public improvement failed to function as intended." *Belair, supra*, 47 Cal.3d at 669.

Contrary to the City's argument at pages 28-29 of its Opening Brief, application of the standard for proximate cause does not require a showing of an "independent force" contributing to the injury or a showing of unreasonableness of the City's conduct. Courts have applied the standard for proximate cause in cases that do not involve an "independent force" contributing to the plaintiff's injuries no published cases have applied a reasonableness test to inverse condemnation liability outside of flood control cases. See, e.g., *Albers, supra*, 62 Cal.2d 250; *Pacific Bell Telephone v. Southern California Edison* (2012) 208 Cal.App.4th 1400; *CSAA, supra*, 138 Cal.App.4th 474; *Pacific Bell, supra*, 81 Cal.App.4th 596; *Holtz, supra*, 3 Cal.3d 296.

As discussed above, the alleged lack of a backwater valve on Plaintiffs' property could not have alone caused the sewage backup and resulting damage. In fact, City employees and consultants admitted and the trial court found that the primary cause of the sewer backup and damage was a tree root incursion in the City's main sewer line. Therefore, the City's sewer system proximately caused damages to Plaintiffs' property and the City is liable in inverse condemnation.

D. The City's Sewer System Caused Plaintiffs' Injuries as Deliberately Designed and Constructed

Inverse condemnation liability attaches when injury is caused by a public improvement as deliberately designed and constructed. There is no requirement that Plaintiffs must demonstrate a deliberately deficient maintenance plan of the City. "Any actual physical injury to real property proximately caused by a public improvement as deliberately designed or constructed is compensable under Cal. Const. art I, §19, whether or not the injury was foreseeable." *Id.* at 873-74. The deliberateness requirement is met by a public "improvement that as designed and constructed presents inherent risks of damage to private property, and the inherent risks materialize and cause damage." *Pacific Bell v. City of San Diego* (2000) 81 Cal. App. 4th 596, 607.

In *Bauer v. County of Ventura* (1955) 45 Cal.2d 276, Plaintiffs alleged damages from water overflow as a result of the county raising a ditch and the collection of debris and stumps in the ditch. Contrary to the City's characterization of the case, the Court found both raising the ditch and collection of debris and stumps in the ditch gave rise to inverse condemnation liability. The Court reasoned the raising of a ditch is a

deliberate act not an accident or resulting from immediate carelessness. *Id.* at 286. With respect to the collection of debris and stumps, the Court reasoned if this was due to the mere negligent operation of the ditch system, it is not within the scope of inverse condemnation liability “If, on the other hand, the obstruction of the ditch was in some way part of the plan of maintenance or construction, then liability would attach because the means of carrying out the plan of construction and maintenance are immaterial.” The Court found the presence of debris and stumps were within the scope of liability as plaintiffs alleged the collection of debris and stumps was part of the construction and that the taking was for a public use.

Plaintiffs acknowledge inverse condemnation liability does not arise from mere negligence or general tort theories. Plaintiff’s alleges the City’s sewer system as deliberately designed, constructed and maintained caused damages to Plaintiffs’ property. The City’s sewer system was designed and constructed to carry sewage away from private properties and to periodically be affected by tree root incursion. An inherent risk in the City’s sewer system is that it will be affected by tree roots and backup onto private property. Thus, Plaintiff met the deliberateness requirement and the City is liable for inverse condemnation.

E. The Reasonableness Test Applies Only to Flood Control Cases

In *Albers*, this Court enunciated a general rule of strict liability in inverse condemnation cases, holding a public entity is liable for injury caused by a public improvement as deliberately designed and constructed whether foreseeable or not. The purpose of inverse condemnation liability is to spread the risk of public improvement projects so that an individual does not bear the sole burden of harm from a project benefitting the

community. *Albers, supra*, 62 Cal.2d 250. The Court recognized exceptions to the generalized strict liability rule related to flood control and water course cases based on the overriding public policy to not discourage public entities from engaging in public works to control flood waters. *Belair, supra*, 138 Cal.App.3d at 563-564.

The rationale for excepting flood control and water course cases from the general rule of inverse condemnation strict liability does not apply to this case. Rather, Plaintiffs were damaged by the City's public improvement failing to function as intended to carry sewage away from private property. Plaintiffs should not bear the costs for the damage caused by the public improvement. The risk should be spread among the community that benefits from the public improvement. The City is not discouraged from constructing and maintaining the necessary sewer system by imposition of inverse condemnation liability without regard to fault.

F. The City's Citation and Reliance on Unpublished Cases Violates the Rules of Court. Plaintiffs' Case is Unique and Distinguishable from each of the Unpublished Cases.

The City cites to and relies on three unpublished appellate opinions in its Petition for Review. California Rules of Court, Rule 8.1115(a)-(b), prohibits a party or court from citing or relying on an unpublished opinion in any other action. The City has previously cited these cases in the trial court on two occasions – in its failed motion for summary judgment proceedings and in Plaintiffs' motion for judicial determination on inverse condemnation liability proceedings.

The City is prohibited from relying on these cases. Moreover, each of the cases is factually dependent and distinguishable from Plaintiffs' case. Here, the City has admitted and the trial court found that a blockage in the

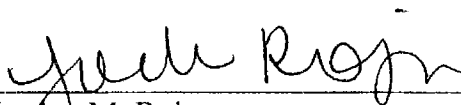
City's main sewer line was the primary cause of the sewage backup causing damage to Plaintiffs' property. The City employees submitted reports and testified in deposition the primary cause of the sewer backup was a blockage in the City's sewer main line. None of the unpublished decisions involved facts similar to this case. The published case law is clear – when a public improvement is a substantial concurring cause of damage to a private owner's property, the public entity is liable in inverse condemnation.

IV. CONCLUSION

The trial court correctly found and the Third Appellate District in a well-reasoned opinion affirmed the City is liable for inverse condemnation. Based on the foregoing, Plaintiffs' respectfully request the Court affirm the decisions.

Respectfully Submitted,

Dated: November 29, 2017



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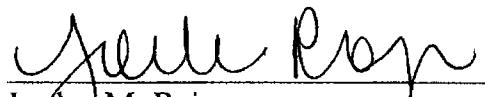
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1))

The text of this brief consists of 5,681 words (excluding the table of contents and table of authorities) as counted by Microsoft Word 2010 word-processing program used to generate this brief.

Respectfully Submitted,

Dated: November 29, 2017



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PROOF OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and am not a party to this action. My address is 2175 North California Boulevard, Suite 500, Walnut Creek, California 94596.

I served the attached:

TIMOTHY G. WALL, D.D.S.; SIMS W. LOWRY, D.M.D.; WILLIAM A. GILBERT, D.D.S., INDIVIDUALLY AND DOING BUSINESS AS WGS DENTAL COMPLEX'S ANSWER BRIEF ON THE MERITS

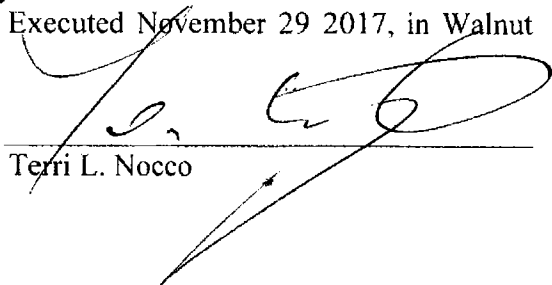
on the party(ies) listed below, addressed as follows:

SEE ATTACHED SERVICE LIST

By Electronic Service (TRUE FILING). The above document was served electronically on the parties appearing on the attached service list associated with this case. A copy of the electronic mail transmission[s] will be maintained with the proof of service document.

By First Class Mail/Ordinary Business Practices [C.C.P. §§ 1013, 1013a]. By causing a true copy thereof to be enclosed in a sealed envelope or package, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of envelopes and packages for mailing with the United States Postal Service. Under the firm's practice, mail is deposited in the ordinary course of business with the United States Postal Service at Walnut Creek, California, that same day, with postage thereon fully prepaid. I am aware that upon motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after the date of deposit for mailing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed November 29 2017, in Walnut Creek, California.



Terri L. Nocco

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