

**S243247**

**IN THE  
SUPREME COURT OF THE STATE OF CALIFORNIA**

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**CITY OF OROVILLE, *Petitioner,***

**v.**

**SUPERIOR COURT OF BUTTE COUNTY, *Respondent.***

**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.***

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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

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**ANSWER TO CITY OF OROVILLE'S PETITION FOR REVIEW**

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**AFTER A DECISION BY THE COURT OF APPEAL  
THIRD DISTRICT**

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**I. INTRODUCTION**

This answer brief 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 addresses the Petition for Review filed by Petitioner City of Oroville. This case, like most, is important to the litigating parties but only to them, and not to everyone else. The applicable law is well settled. The case presents no issue of statewide importance or conflict in the published case law of this state.

The law is settled by this Court that inverse condemnation liability attaches when property damages are proximately caused by a public improvement as deliberately designed and constructed. This Court has held even when independently generated forces contribute to the injury, proximate cause is established when the public improvement constitutes a substantial concurring cause of the injury and other forces *alone* would not have caused damage. *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550.

The trial court correctly determined and the Third District Appellate Court affirmed the City of Oroville (“City”) is liable to Plaintiffs and 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 (“Plaintiffs”) for inverse condemnation. Here, the City’s own representatives admit and the trial court found the root intrusion on the City-owned main sewer line was the primary cause of the sewage backup into Plaintiffs’ property. To the extent a lack of a backwater valve constituted an additional cause, there is no possibility that the lack of a backwater valve *alone* would have caused the blockage. Without the blockage of roots in the City’s main sewer line, the sewage backup in Plaintiffs’ property would have never occurred. 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. The City admits, the evidence proves, the trial court found and the Third Appellate District affirmed the City’s sewer system is a substantial cause of the damage. Thus, the City is liable to Plaintiffs 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 deny the City's Petition for Review.

## **II. BACKGROUND**

### **A. December 29, 2009 Sewage Backup**

Plaintiffs are three dentists, Doctors William Gilbert, Sims Lowry and Timothy Wall, who are the three general partners of WGS Dental Complex located at 3579 Oro Dam Blvd., in Oroville, California. 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. On December 29, 2009, the municipal sewer adjacent to the building became blocked due to tree root intrusion. 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. The sewage damaged portions of the flooring and other building components and certain items of personal property located within the offices.

### **B. Cause of the Sewer System Overflow.**

The City admits it found root growth partially blocking flow through the City's sewer main. (City's Petition for Review at p. 11, § C). As

detailed in the underlying papers, 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.

### **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).

## **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. Supreme Court Review is Unnecessary to Secure Uniformity of Decision or to Settle an Important Question of Law**

#### **1. The Law is Settled a Public Entity is Liable in Inverse Condemnation when the Public Improvement Constitutes a Substantial Concurring Cause of the Injury**



The elements of inverse condemnation law are well settled by this Court, namely, that a public improvement, as deliberately designed, implemented, or maintained, caused the taking, destruction, or damage of private property. *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893 and *Cal. Const. Art. I, § 19*. In *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 559-560, this 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.4<sup>th</sup> 474, 479, 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 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. 4<sup>th</sup> 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 acknowledges the cause of the backup in its Petition for Review at section IV(C), page 11. 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 and its Petition for Review that roots had invaded the City’s sewer mainline, creating a blockage which backed up sewage into 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 take and dispose of waste material as it should have 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.4<sup>th</sup> 1029, 1040, 1044.

**2. The Absence of a Backflow Preventer Alone 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 never 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 County Flood Control Dist.* (1988) 47 Cal. 3d 550, 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.**” *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 559. 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.

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 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 and the City is still liable as the City's deliberately constructed, operated, and maintained improvement failed to function as intended. *Belair supra*, 47 Cal.3d at 559-60.

**3. 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.

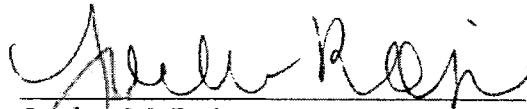
The City is prohibited from relying on these cases. Moreover, each of the cases is factually dependent and distinguishable from Plaintiffs' case. Here, the City has admitted and the trial court found that a blockage in the City's main sewer line was the primary cause of the sewage backup causing damage 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

There are no grounds for review in this matter as the well-settled published case law is clear on liability for inverse condemnation. 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 deny the City's Petition for Review.

Respectfully Submitted,

Dated: August 8, 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 2,515 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: August 8, 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:

### **ANSWER TO CITY OF OROVILLE'S PETITION FOR REVIEW**

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 August 8, 2017, in Walnut Creek, California.

  
\_\_\_\_\_  
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