

CITY OF OROVILLE, Petitioner, v. THE SUPERIOR..., Not Reported in...

2017 WL 2554447
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
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NOT TO BE PUBLISHED

Court of Appeal,
Third District, California.

CITY OF OROVILLE, Petitioner,

v.

THE SUPERIOR COURT OF
BUTTE COUNTY, Respondent;
CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY
et al., Real Parties in Interest.

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Filed 6/13/2017

(Super. Ct. No. 152036)

Opinion

HULL, Acting P.J.

*1 Blockage in a city sewer main resulted in raw sewage backing up into a dental office building owned by three dentists doing business as WGS Dental Complex (WGS). An inverse condemnation action (Cal. Const., art. I, § 19) against City of Oroville was filed by Timothy G. Wall, D.D.S., Sims W. Lowry, D.M.D., and William A. Gilbert, D.D.S., individually and doing business as WGS (real parties in interest), and by intervener The Dentist Insurance Company (TDIC). On the bifurcated issue of liability (Code Civ. Proc., § 1260.040, hereafter § 1260.040), the trial court found City liable despite its claim that the sole reason the sewage entered the building was WGS's failure to install on its property a backwater valve mandated by city ordinance adopting the Uniform Plumbing Code.

City petitions this court for a peremptory writ of mandate. Over opposition by real parties in interest, we issued an alternative writ and stayed trial court proceedings on damages.

TDIC assigned its intervention rights to California Joint Powers Risk Management Authority (CJPRMA). CJPRMA's separate return to the alternative writ states that, while recovery for inverse condemnation in this case would be in CJPRMA's financial interests, CJPRMA -- on behalf of its self-insured and municipal members like City of Oroville -- aligns itself with City's position that inverse condemnation should not be available when sewage overflows onto private property because the landowner failed to have a backwater valve required by local ordinances and plumbing codes. City and CJPRMA hope we will publish an opinion to that effect.

City's argument is premised on its mistaken view that "the only reason" sewage backed up onto private property is that the private property 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. However, the trial court found there were two concurrent causes for the sewage in the building: (1) Blockage in the City's sewer main from tree root intrusion was the primary cause; and (2) the property owner's failure to install a backup valve was a "significant secondary cause." City also argues that, regardless of the valve issue, City is not liable because there was no showing that the damage was caused by a "deliberately deficient" maintenance plan by City.

We conclude City fails to show grounds for reversal. We will affirm the trial court's order finding the City liable in inverse condemnation, discharge the alternative writ, and lift the stay previously imposed on the bifurcated issue of damages. We express no view on the outstanding nuisance claims.

FACTS AND PROCEEDINGS

Late during the night of December 29, 2009, a large amount of raw, untreated sewage backed up from City's

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sewer main, through the private sewer lateral of the office building, through sinks, toilets, and drains, and into the interior spaces of the building. City dispatched technicians to clear a blockage from the municipal sewer main. The building was uninhabitable during decontamination, and the dentists had to relocate their practices for the duration.

*2 WGS filed a complaint for inverse condemnation and nuisance, and TDIC filed a complaint in intervention. The operative pleadings alleged (1) the City's sewer lines were deliberately designed and maintained to divert sewage from the building, and were being used for their intended purpose at the time of this incident, and (2) City failed to maintain the sewer main free of blockages.

Though not directly at issue in this court, City moved for summary judgment or adjudication of the original complaints on the ground the backup was the property owner's fault for failure to have a backwater valve. WGS opposed the motion, asserting it had no role in constructing the building and was unaware of any issue about a backwater valve until after the backup occurred. WGS submitted declarations asserting inadequate maintenance by City, which were challenged in City's reply papers. The trial court denied the motion for summary judgment or adjudication, stating, "[I]t appears that either prevention of the blockage or installation of the backflow prevention device could have prevented the damage. The relative importance of these two factors in causing the damage will be something for the trier of fact to decide. The motion, insofar as it is based on lack of causation, is denied." The court also stated: "Defendant contends that the problem was caused by the plaintiff's omission to put in a backflow preventer rather than defendant's omission to properly maintain the sewer. This will be a question of fact." In this court, City incorrectly claims the trial court made "findings" that absence of a backwater valve was the only cause of the backup, but City merely cites the trial court's overruling of certain evidentiary objections to the engineer's declaration.

WGS and TDIC then filed motions under section 1260.040 for the trial court to determine the legal issue of inverse condemnation liability, deferring the matter of damages. City opposed the motions, arguing it did not cause the damage, had no duty to protect against defects on the private property, and had design immunity.

The parties reiterated their positions from the summary judgment motion, and the trial court took judicial notice of most of the documents submitted in the summary judgment proceedings.

We need not detail all the evidence because, even assuming for the sake of argument that City was not negligent in the design or maintenance of the sewer system, City remains liable in inverse condemnation.

WGS submitted evidence that the City's sewer main was backed up, and the cause of the sanitary sewer overflow (SSO) was root intrusion between manholes JJ-10 and JJ-11, and "roots were cut out of the subject sewer line subsequent to the incident that occurred in December of 2009. Maintenance and repair work involved putting a camera in the sewer line and determining that there was root blockage, and then cutting out the roots to eliminate the root blockage, which work took place during the early months of 2010."

City submitted documents and a declaration from Rick Walls, a senior civil engineer and former interim director and director of public works for City, that City Ordinance No. 1450, adopted in 1984, adopted the 1982 edition of the Uniform Plumbing Code (UPC), which in section 409 requires property owners to install a backwater valve on their private sewer lateral, where flood level rims of fixtures on the property are located below the elevation of the next upstream manhole cover of the public sewer. A 2005 City Ordinance No. 1719 makes it a public nuisance for a property owner to violate city building regulations. Walls attested the ordinances and UPC required installation of a backwater valve on the private property at issue in this case. Walls stated City "found evidence of a partial stoppage or blockage in the CITY main sewer line between Manholes JJ-10 and JJ-11 on December 29, 2009." Walls opined the "root condition" found in that sewer main did not cause the backup of sewage into WGS's building, because if a backwater valve had been installed on the private property, the sewage would not have entered the building but instead would have exited at the next upstream manhole cover.

*3 City submitted evidence that WGS acquired the subject building in 1985 when it was under construction pursuant to a building permit. In 1986, City inspected the

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construction and issued a "Certificate of Occupancies" to the individual dentists. City offered no explanation as to why a City inspector signed off on a building that failed to comply with the backup valve requirement, other than Walls's declaration that city inspectors "do not survey elevations or investigate ground or sewer main elevations to determine if backflow prevention devices are required on buildings" but instead rely on owners and their architects and engineers. City submitted no evidence that any owner of this property falsified the data in this case.

WGS's expert, Mark Hunter, testified in deposition that the incident could have been averted if there was a functioning backwater valve on the private property, but the backwater valves at issue here are problematic, are easily damaged during routine sewer cleaning operations, and there is only about a 50-50 chance that they will work correctly when needed. In this court, City claims the trial court disregarded this evidence because it was submitted for the first time in WGS's reply papers. However, the same evidence was submitted with WGS's motion. What the trial court disregarded was new evidence of negligence by the City, which the trial court said was unnecessary.

The trial court granted the motions of WGS and TDIC, finding City liable for inverse condemnation. In ruling on the motions, the trial court declined City's request for a statement of decision, stating the court's determination was a question of law rather than fact. Nevertheless, the trial court issued detailed written rulings. The court reviewed the evidence and said, "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." The court said these basic facts were not in dispute, and the only real dispute was as to legal responsibility for the resulting damage.

The court said, "To the extent the lack of a backflow preventer [valve] constituted an additional cause, this alone would not have caused the backup. Plaintiffs' position is that, 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 court continued: "Even though the failure of the property owner to have a 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."

The trial court indicated liability was a question of law to be resolved by the court. The court noted that City submitted documents that "tend to show that the plaintiffs violated the City Code in failing to install an appropriate and required backflow valve, which probably would have prevented the sewage backup that occurred. Like the Plaintiffs' facts, these facts are fundamentally undisputed. Only the legal effect of the facts is to be determined by the Court upon this motion."

The trial court stated: "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 ... to find in favor of the plaintiffs. ... [¶] In this case, root intrusion is the primary cause of the blockage. However, a significant secondary cause of the damage was the failure to install the backwater valve device. A backwater valve device was a necessary part of the sewer design and plan. Plaintiffs' failure to do so was not doing all they could to prevent the problem."

*4 The trial court felt constrained because: There was no evidence of negligence by City; some cases hold there is no inverse condemnation liability even when the public entity is negligent; yet another case held that root blockage was a natural risk inherent in sewer systems thereby making a city liable in inverse condemnation.

We explain *post* that the confusion about negligence arises from rules applicable only to flood control projects.

Proceedings on damages have been stayed pending resolution of this writ petition concerning inverse condemnation. The nuisance claims are not before us.

DISCUSSION

I

Standard of Review

City urges de novo review on the ground that legal issues are presented, and City could not find any case exactly on point. Alternatively, says City, an abuse of discretion standard should apply, but certainly not a substantial evidence standard. We agree we review legal questions de novo (*Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, 1272 (*Biron*)), but insofar as the trial court's ruling implicates factual matters about causation, it is subject to substantial evidence review. Thus, section 1260.040 permits either party in an eminent domain or inverse condemnation case to move for a ruling by the trial court, rather than a jury, on "an evidentiary or other legal issue affecting the determination of compensation," such as liability, even where liability turns on factual questions about causation. (§ 1260.040, subd. (a); *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, 1041, 1043 (*Dina*); *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 555-556 [substantial evidence review of factual questions]; *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1170 [trial court decides mixed questions of law and fact regarding liability for inverse condemnation].)

City cites *Dina, supra*, 151 Cal.App.4th at pages 1045-1047, which held section 1260.040 allowed the trial court to decide liability as a question of law in an inverse condemnation case. However, in *Dina*, the question of liability presented only a question of law. Property owners claimed freeway construction caused cracks in their homes and patio slabs, but the government submitted expert declarations that the damage was not caused by the freeway construction, and the property owners merely submitted expert declarations opining that the damage occurred recently and therefore must have been related to the freeway construction. (*Id.* at pp. 1036, 1048-1049.) The trial court ruled the declarations lacked foundation and evidentiary proof; the opinions were based on assumptions lacking evidentiary support. (*Id.* at pp. 1048-1049.)

Here, the evidence supports the trial court's finding of concurrent causation.

II

Inverse Condemnation

A. Concurrent Causes

City argues the "*only reason* [italics added] a back-up in the city's sewer main spilled onto private property is that private property owners defeated the design of the city's sewer system by failing to install and maintain a legally required back water valve on their private sewer lateral, as mandated by city ordinances and the state plumbing codes[.]" We explain that City misperceives inverse condemnation law. In order to absolve itself of liability, City would have to prove "that other forces *alone* produced the injury." (*California State Automobile Assn. v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 481, 483 (*CSAA*)). Here, City argues a backwater valve *alone* could have *prevented* the blockage in City's sewer main from entering the private property. That is not the same as saying that absence of the valve "alone produced the injury" or was the "only reason" that sewage backed up into the building.

*5 City's argument is reminiscent of a sort of contributory negligence theory from tort law, where a plaintiff's contributory negligence would preclude recovery in tort despite negligence of the defendant -- a theory which no longer applies even in tort law, having been replaced with comparative negligence. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804.) Moreover, inverse condemnation does not derive from tort law but rather on the constitutional requirement of just compensation. The fundamental policy underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those benefited rather than allocated to a single member of the community. (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 558 (*Belair*)). Contributory negligence by a plaintiff does not defeat an inverse condemnation claim for damage substantially caused by a public project. (*Blau v. City of Los Angeles* (1973) 32

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Cal.App.3d 77, 87 [city's excavation and brush removal for road construction caused landslide].)

“ ‘In order for liability in inverse condemnation to lie, a causal connection must exist between the defendant public entity's conduct and plaintiff's damages. [Citation.] The public use or improvement need not be the sole cause of the property damage. Liability in inverse condemnation may be shown where the public improvement was a substantial concurring cause of the damage. [Citation.] There must be a showing of “ ‘a substantial cause-and-effect relationship excluding the probability that other forces *alone* [orig. italics] produced the injury.’ [Citations.]” [Citation.] ” (*Dina, supra*, 151 Cal.App.4th at p. 1049; see also, *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 440 [(*Bunch*)] [public entity is liable where public improvement is a substantial cause of the damage, even though it is not the only cause].) We recently said that if a public improvement substantially causes damage, inverse condemnation liability attaches, even though the improvement was only one of several concurrent causes. (*Pacific Shores Property Owners Assn. v. Department of Fish & Wildlife* (2016) 244 Cal.App.4th 12.)

“[T]he element of proximate causation for inverse condemnation is established if the plaintiff can prove “ ‘a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury.’ ” [Citation.] 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.’ [Citation.] The public improvement is a substantial cause unless ‘the damage would have occurred even if the project had operated perfectly.’ [Citation.] 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. [Citation.]” (*CSAA, supra*, 138 Cal.App.4th at p. 481.)

In *CSAA, supra*, 138 Cal.App.4th 474, homeowners' insurer filed an inverse condemnation action against the city, as subrogee for property damage the insurer paid the homeowners as a result of a raw sewage backup into their home. It was the second backup in two months.

The first backup was caused by the homeowners; it was caused by tree root intrusion in the sewer lateral located on the homeowners' private property. (*Id.* at p. 477.) CSAA paid to replace the sewer lateral and did *not* seek subrogation from the city. (*Ibid.*) A month later, the home was again flooded with raw sewage for a second time. A video inspection obtained by CSAA found that the pipes on the private property were in perfect condition, and this time there were tree roots intruding in the city's sewer main. (*Ibid.*) CSAA paid the homeowners' damages and then sued the city in subrogation, but *only* for the *second* backup. (*Id.* at pp. 477-478.)

*6 CSAA did not establish the specific cause of the second backup, but did present evidence of three potential causes of the blockage, all in the city's sewer main: (1) there were tree roots invading the porous clay pipe of the sewer main; (2) the main was designed with an inadequate slope to effectively carry sewage away from homes; and (3) there was standing water in the main. (*Id., supra*, 138 Cal.App.4th at p. 482.)

The trial court rejected all three potential causes. (*CSAA, supra*, 138 Cal.App.4th at p. 482.) Even though tree root invasion was visible from a video inspection, the trial court found that the lack of any other sewage backups on that street, coupled with the city's hydroflushing records showing no tree root problem, indicated the blockage was not from tree roots, but was something temporary in nature and quickly dissipated. (*Ibid.*) The trial court rejected the inadequate design theory, stating CSAA's plumbing expert relied on inapplicable standards, and the slope could not be inadequate because the sewer was in place for 40 years without any backup problems. (*Ibid.*) The trial court also said CSAA failed to prove the city's maintenance and replacement program for the sewer pipes proximately caused the damages, because the city did not simply wait until something broke but instead had a regular maintenance program to clean the pipes and removed any tree roots. (*Ibid.*)

Thus, the trial court in *CSAA* ruled the city was not liable. (*CSAA, supra*, 138 Cal.App.4th at p. 478.)

The appellate court reversed, noting the trial court also specifically found that a blockage occurred in the sewer main owned and operated by the city. (*CSAA, supra*,

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138 Cal.App.4th at p. 483.) The appellate court said: “How or why the blockage occurred is irrelevant. The purpose of the sanitary sewer is to carry wastewater *away* from the residence. The [c]ity's sanitary sewer failed to carry wastewater away from the ... residence *because* of a blockage in the [c]ity's main, and therefore, failed to function as intended.” (*Ibid.*) “In addition, by requiring CSAA to show ‘how and why’ the blockage occurred, the trial court applied a higher standard of proof to its claim of inverse condemnation, requiring CSAA to prove tortious conduct on the part of the [c]ity. In citing the fact that the sewer main ... had no history of sewage backups over 40 years ... [and] that the [c]ity had a regular system of hydroflushing ... , the trial court was evaluating whether the [c]ity acted *reasonably* in the operation of its sanitary system or sewer system. However, whether or not the [c]ity acted reasonably or whether or not the ... sewage backup was foreseeable is completely irrelevant in determining if the [c]ity is liable under a theory of inverse condemnation.” (*Ibid.*)

The appellate court in *CSAA* said that because there were three substantial factors in causing the backup, the burden shifted to the city to prove “that other forces alone” produced the damage. (*Id.* 138 Cal.App.4th 483.) “Any other result would have the effect of making the proof bar so high that a homeowner could *never* prevail against a city in a case such as this. ... [¶] We do not mean to say, as CSAA argues, the [c]ity would be ‘strictly liable for all property damage resulting from the blockage ...’ But here, where the new, nonporous lateral pipe installed by the homeowner was conclusively shown *not* to be the source of the blockage, it was error for the trial court to deem the proof of causation insufficient. The blockage occurred on [c]ity land and in piping strictly under the control of the [c]ity.” (*Id.* at pp. 483-484.)

*7 *CSAA* continued: “Our discussion 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. He did that. In finding the proof of causation insufficient because of a failure to establish the ‘how and why’ of the blockage, the trial court asked for too much. In order to satisfy such a standard of proof, one would have to prove with particularity the actual mechanism of the backup. But our Constitution does not require

that. It only requires proof of a substantial cause of the damage, indeed as was said by our Supreme Court in *Belair*, ‘ “ ‘a substantial’ cause-and-effect relationship which excludes the probability that other forces *alone* produced the injury.” ’ [Citation.] In this case, there were a substantial cause and effect relationship between factors entirely within the [c]ity's control, namely, tree roots, slope and standing water in the main that contributed to the backup; there is no need to distinguish among them to specifically determine ‘how and why’ the blockage occurred.” (*CSAA, supra*, 138 Cal.App.4th at p. 484.)

CSAA declined the city's invitation to teach the insurance industry a lesson not to expect public agencies to bail them out of insurance losses every time there is a sewer backup. (*Id.* 138 Cal.App.4th at p. 484.) “What the [c]ity fails to recognize in this case is that CSAA did everything in its power to address the [homeowners'] plumbing issue, even going so far as to replace the entire lateral pipe from the ... home to the [c]ity's sewer main, including the portion *owned and operated by the [c]ity*. There was nothing more CSAA could do to protect the homeowners from sewage backup. CSAA paid the costs to repair the portion of the lateral that was under the control of the homeowner, and did not claim that such costs were attributable to the [c]ity. CSAA should not also be required to pay the costs of damages as a result of a blockage in the [c]ity's main over which CSAA had no control.” (*Ibid.*)

Here, City argues *CSAA* is distinguishable because there the design was deficient in that the slope was inadequate. However, the slope issue was not necessary to a finding of inverse condemnation liability.

City also argues *CSAA* is inapposite because it “relies upon the fact that the homeowner in that case was a faultless plaintiff that did everything possible to prevent a sewer backup” City maintains *CSAA* creates a rule that a property owner must prove its own innocence as a prerequisite to recovering inverse condemnation damages. Not so. *CSAA* said the homeowners -- who were responsible for the first blockage -- were not the source of the second blockage, i.e., the blockage did not occur only in the private sewer lateral. (*Id.* 138 Cal.App.4th at pp. 483-484.) In our case, the property owner's failure to install a backup valve did not cause the blockage in City's sewer main.

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City falsely claims the trial court “found” in the earlier summary judgment motion that the landowner's failure to have a backup valve was the “sole” cause of the damage. But the City cites only the trial court's overruling of some evidentiary objections. The City omits to mention that the trial court went on to *deny* summary judgment/adjudication based on causation, stating, “Defendant contends that the problem was caused by the plaintiff's omission to put in a backflow preventer rather than defendant's omission to properly maintain the sewer. This will be a question of fact.” Indeed, the City in connection with the section 1260.040 motion made the same misrepresentation about prior “findings,” refuted by the trial court's ruling on the section 1260.040 motion that “To the extent the lack of a backflow preventer constituted an additional cause, this alone would not have caused the backup.”

City argues it is unfair to make it pay for the private landowner's dereliction of duty. City says it cannot be true that a taking occurs if the overflow onto private property occurs because the system fails to function as intended due to the private property owner not complying with state and local building codes. City argues its sewer would have functioned as intended -- by diverting the blocked sewage up through the next uphill manhole -- had the private property owner not “sabotaged” the system. Again, City is attempting to inject into inverse condemnation law some sort of contributory negligence theory that does not even apply in tort law anymore, where it has been substituted with comparative negligence.

*8 City argues *CSAA* was wrongly decided in that it conflated the deliberate plan and proximate cause elements and improperly borrowed from a flood control case to say that a factor in inverse condemnation in a sewer case is that a public improvement failed to function as intended. However, *CSAA* conflated nothing and, although flood control cases are distinct in some respects as we discuss *post*, the principle that failure of a public improvement to function as intended is a factor in inverse condemnation is not unique to flood control projects.

We accordingly reject City's causation argument.

B. *Deliberate Design*

To prevail on an inverse condemnation claim, the landowner must show that the public improvement as deliberately designed, implemented, or maintained, caused the damage to private property. (*San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893.)

City confuses “deliberate design” with wrongdoing, arguing WGS produced no evidence of a “**DELIBERATELY DEFICIENT OR UNREASONABLE OFFICIAL ‘PLAN’**” pursuant to which City took a calculated risk of sewer backups occurring at the property. City argues that mere negligence by the public entity will not suffice. City argues it never acted deliberately with a purpose to injure or impose a particular risk of injury on the subject property.

However, City mistakenly relies on cases, including our recent opinion in *Biron*, *supra*, 225 Cal.4th 1264, discussing a special rule of reasonableness for *flood control projects*, as an exception to the rule of liability for inverse condemnation, in order to encourage public entities to engage in flood control endeavors. (E.g., *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 855, fn. 4.)

In *Biron*, we said: “Inverse condemnation cases originally were analyzed with reference to traditional tort and property law concepts under the assumption that inverse condemnation liability tracked private party liability. [Citation.] The Supreme Court changed this assumption in *Albers [v. County of Los Angeles]* (1965)] 62 Cal.2d 250, which held that a property owner may recover just compensation from a public entity for ‘any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed ... whether foreseeable or not.’ [Citation.] [¶] *Albers, supra*, 62 Cal.2d 250 [a flood case] recognized two exceptions to the rule of strict liability: (1) where the damages were inflicted in the proper exercise of the public entity's police power, and (2) where the public entity had a common law right to inflict damage, as where an upper **riparian** owner is privileged to protect against the common enemy of floodwaters. [Citation.]” (*Biron, supra*, 225 Cal.App.4th at pp. 1272-1273.)

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Given the special nature of flood control projects, in inverse condemnation claims involving flood control projects, the public entity is not strictly liable and is not liable for simple negligence, but rather is liable only if its design, construction, or maintenance poses an “unreasonable risk of harm” to private property, and the unreasonable aspect of the improvement is a substantial cause of damage. (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 739.)

Biron involved flooding after the city deferred upgrades to its storm drainage system. (*Id.* 225 Cal.App.4th at p. 1268.) We held the reasonableness standard for flood control projects, rather than strict liability, applied, and the evidence supported the finding that the city acted reasonably in not increasing the capacity of its storm drainage system, such that the city was not liable in inverse condemnation. (*Id.* at pp. 1272-1280.)

*9 Accordingly, City is wrong in demanding proof that its sewer system was “deliberately deficient.” In this non-flood-control case, “Damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered under inverse condemnation [citation] and the presence or absence of fault by the public entity ordinarily is irrelevant. [Citation.]” (*Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602 (*Pacific Bell*)). Additionally, the “deliberateness” requirement is satisfied 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.” (*Id.* at pp. 604, 607.)

The City thinks *Pacific Bell* and another case, *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683 (*McMahan's*), required more than negligence in non-flood-control contexts. Not so. Both were water diversion cases involving city water delivery systems where corroded pipes burst and caused damage to private property. The city in each case argued that when private property is damaged by water flooding from a public improvement, Supreme Court decisions (including *Bunch, supra*, 15 Cal.4th 432, and *Belair, supra*, 47 Cal.3d 550) have supplanted the ordinary rule of strict liability with a rule of unreasonableness. (*Pacific Bell, supra*, 81 Cal.App.4th at p. 610, citing

McMahan's.) Though both cases discussed evidence of possible negligent maintenance, both cases endorsed a rule of liability without fault. As explained in *Pacific Bell*, the Supreme Court cases were flood control cases inapplicable in a non-flood-control context:

“City notes that both *Bunch* and *Belair* referred to numerous cases, including *McMahan's*, as setting forth a rule that applies strict inverse condemnation liability to public improvements that divert water from its natural drainage channel and cause damage. [Citations.] City argues that *Bunch's* decision to replace the strict liability standard with a reasonableness standard overruled the entire line of cited cases, including *McMahan's*, applying the strict liability standard, and therefore in cases with factual patterns analogous to *McMahan's* an inverse condemnation claim must be evaluated under the reasonableness test.

“Although [the Supreme Court] replaced the strict liability approach with a reasonableness requirement for *flood control improvements* [italics added], we do not perceive those cases to have overruled *McMahan's*. *McMahan's* did not involve a failure of a flood control improvement causing damage to a property that was historically subject to flooding. Furthermore, the ratio decidendi of [the Supreme Court cases] does not support extension of the reasonableness standard here. The [Supreme Court] approach was decided in the narrow and unique context of water law, and holds that neither the common law absolute immunity rule formerly applicable to damages caused by private flood protection measures, nor the strict liability rule applicable to damages caused by public improvements, appropriately balanced the competing interests.

“In the present context, damages caused by failure of a private water pipe system would not have enjoyed absolute immunity at common law. More importantly, the concerns that animated the rejection of the strict liability rule in the context of public flood control projects has no counterpart here. [The Supreme Court] reasoned that strict liability for failure of a public flood control improvement would make the public entity an insurer against floods; the potentially enormous exposure could deter the public entity from building flood control projects and thereby deprive the public as

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a whole, including the damaged landowner, of protection against flooding. Because the landowner would suffer some flood damage in the absence of the flood control project or if the constructed project failed, the principle requiring compensation if the damaged landowner bore a disproportionate cost of the public benefit did not require a strict liability approach; instead, compensation was required only if the project exposed him to an unreasonable risk of harm. [Citation.]

*10 “Unlike flood control improvements, the purpose of a water delivery system is not to protect against the very injury that its failure caused. Unlike flood control improvements, failure of the pipe here subjected Pacific Bell’s facility to injury from flooding that was not a risk it was exposed to in the absence of the pipe. [Fn. omitted.] Thus, the private landowner damaged by failure of the pipe, if left uncompensated, is forced to contribute a disproportionate share of the public undertaking. Because damages caused by failure of a water delivery system do not resemble damages caused by failure of a flood control system, we conclude the [Supreme Court] reasonableness test should not be extended to the facts of this case, and the ordinary rules of inverse condemnation strict liability for damages caused by public improvements are applicable.” (*Pacific Bell*, *supra*, 81 Cal.App.4th at pp. 613-615, citing *McMahan’s*, *supra*, 146 Cal.App.3d 683.)

We accordingly reject the City’s reliance on *Pacific Bell* and *McMahan’s* as requiring more than negligence in a non-flood-control context.

City acknowledges that blockage is an inherent risk of a sewer system, stating in its brief to this court that “everyone knows and agrees that City’s system was

designed to overflow, when and if an overflow became necessary for any reason, at the next upstream manhole cover. Plaintiffs and their experts freely acknowledge this to be the accepted design and construction for City’s gravity flow system.” City then argues there was no inherent risk of a backup onto the private property if the property owner had installed a backwater valve. City states, as did the trial court, that the valve was a necessary part of the sewer design. Then perhaps City should assure compliance before issuing certificates of occupancy. In any event, we have explained that absence of the valve does not defeat the inverse condemnation claim.

We conclude the trial court properly found City liable in inverse condemnation.

DISPOSITION

The stay previously imposed on the bifurcated issue of damages is lifted. The trial court’s order finding the City liable in inverse condemnation is affirmed. The parties, including CJPRMA, may continue to litigate the remaining matters. Real parties in interest are awarded their costs.

We concur:

ROBIE, J.

MAURO, J.

All Citations

Not Reported in Cal.Rptr.3d, 2017 WL 2554447

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