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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Maria Aversa et al.

Plaintiffs and Appellants,

v.

City of Mill Valley

Defendant and Respondent.

A132554

(Marin County  
Super. Ct. No. CIV092040)

Plaintiffs Maria Aversa et al.<sup>1</sup> appeal from the judgment for defendant City of Mill Valley (City) after the City's motion for summary judgment was granted. Plaintiffs allege that their properties were damaged by water that leaked from a drainage pipe owned the City (the Pipe). The court determined that plaintiffs' claims were barred by statutes of limitations. We disagree and reverse the challenged portions of the judgment.

**I. BACKGROUND**

Plaintiffs own two abutting parcels of land at 149/153, and 157 Throckmorton Avenue in the City. Maria Aversa and her now deceased husband purchased 149/153 Throckmorton in 1971. Their son, Fabio Aversa, purchased 157 Throckmorton in 1999.

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<sup>1</sup> The other plaintiffs are: Lucia Della Santina and Costantino B. Aversa, as trustees of The Salvatore Aversa Testamentary Trust; Fabio R. Aversa, individually and as a trustee of The Salvatore Aversa Testamentary Trust; and Ann Aversa.

Until December 2008, the Pipe ran under a City sidewalk adjacent to 149/153 Throckmorton, and then through 157 Throckmorton to a creek. According to an April 2008 letter from plaintiffs' engineer, Charles Allen, to City Engineer and Public Works Director Wayne Bush, the Pipe "ultimately changes from clay to corrugated metal [before it] flows to the creek." There are no records of who built the Pipe or when it was installed. Water from another City drainage pipe running down a nearby hill under Madrona Street, and waters from nearby City catch basins, flow into a City catch basin in front of plaintiffs' properties and into the Pipe. Bush has acknowledged that the Madrona Street pipe "gathers water from all of the terrain in this general vicinity, whether it's coming from yards, roof leaders, or catch basins and gutters."

Allen has opined that the Pipe was owned by the City. He testified: "[You] have a city storm drain system that goes to the front of the building into a drainage inlet that's in the city property, and then the clay pipe continues on the city property under the city sidewalk, which is city property, of course, and then it continues down the Aversa property to the creek. To do that, it would have had to have been approved by the city at some point. It's city stormwater it's carrying and my opinion is it's owned by the [City]." Allen stated that the Pipe's only purpose was "to drain city water, city surface water, stormwater. It has no benefit for the owners, the Aversas. It's a benefit for the citizens of Mill Valley."

The Pipe is colored in blue on a City map, indicating that it was City owned. However, Bush testified that the map was prepared by a summer intern, not a civil engineer, in the 1960's, and he did not believe that "anybody can vouch for [its] accuracy." Based on his review of City records, Bush opined that the City was not involved in the design or installation of the Pipe. Bush stated that it was "a very common occurrence throughout Marin County and most notably in Mill Valley because of the way the terrain is and the way the city was built [that] storm water run-off is in a private facility and then its outfall onto a public facility and then returns to a private facility. . . . [I]f you would trace the course of any raindrops starting at the top of the mountain it

would go through numerous iterations of private and public property until it finally got to the bay.”

In September 2002, an engineering firm involved with redevelopment plans for 157 Throckmorton noticed “a substantial amount of distress to the west and south concrete walls” of 149/153 Throckmorton. In October 2002, plaintiffs hired Allen’s firm, Allco Engineering, to investigate the problem. In March 2003, Allen reported that excessive moisture in the basement of 153 Throckmorton was being caused by “[n]atural subsurface water seep[ing] through the foundation,” and surface water “soak[ing] through the openings in the sidewalk and at the joint where the sidewalk meets the front of the building.” Allen proposed repairs to fix the problem, which were completed in September 2003.

In the meantime, in April 2003, City Associate Engineer Dick Dudak wrote a memo to City Planning Director Rory Walsh concerning the proposed improvements to 157 Throckmorton. Dudak wrote that the Pipe, “a 12-inch culvert running from the catch basin in front of [149/153 Throckmorton] to the creek,” was “rotten and undersized. The applicant will be required to remove and replace the culvert as part of this project. . . . [¶] There are two ways to go as far [as] the ownership and maintenance of the culvert. One way is for the applicant to give the City an easement where we would assume ownership and maintenance of the culvert. The downside for them is that we wouldn’t let them build over the easement. The other way to go is to let them build over the culvert. By doing so, they would be required to take ownership and maintenance responsibilities for the culvert, and indemnify the City.” Dudak testified that the portion of the Pipe that was “visibly rotten” was the end of the metal section of the Pipe that emptied into the creek. Allen admitted being aware of Dudak’s memo in 2003.

Dudak testified that the 157 Throckmorton project did not go forward and that there were no further communications concerning the subject matter of the April 2003 memo. Walsh (City Planning Director) testified that the City would not follow through on a problem like the one described in the memo unless it raised a “life safety issue.” Dudak testified that the Pipe could cause water to “pull up” on Throckmorton because it

was undersized but that, rather than fix the Pipe, the City attempted to rectify flooding on Throckmorton by other means. He said that, in “parts of the city that were more recently developed, say from the ‘60’s on,” the City maintained “storm drains crossing private property for which there are easements.” However, the City did not inspect or maintain storm drains “where there’s not an easement but it is attached to a public or city catch basin.” ~CT 477)~ Dudak conceded that the April 2003 memo showed that he did not know who owned the Pipe.

After the 2003 repairs to 149/153 Throckmorton, water continued to enter the property during heavy rains, and Allen continued to investigate the problem. Maria and Fabio Aversa declared that the problem would “ebb and flow” with the weather. Allen believed that the problem was being caused by “stormwater surface and subsurface runoff,” but began to suspect that the Pipe might be a contributing factor and had a video of the Pipe made in February of 2005. A February 15, 2005, diagram of a portion of the Pipe at 149 Throckmorton from the contractor, California Pipe Survey, showed numerous slightly “offset joint[s],” several “break[s] in connection,” and two “[m]ultiple fractures.” Allen testified that he saw on the video that “ the joints separated and I thought, okay, water’s leaking out of the pipe, but I didn’t think it to be that significant.” Allen “saw openings . . . where potentially water would . . . exit,” but “while I thought [the Pipe] was leaking from the video, I didn’t get the sense that [a] dramatic amount of leakage was occurring.” Thus, he continued to believe that storm water surface and subsurface runoff were the causes of the problem.

Allen’s opinion changed in April 2008. Fabio Aversa declared that, in 2007, Allen provided a budget for long-term repairs for 153 Throckmorton, which “include[d] a perimeter drain along the foundation of the building to address the reoccurring groundwater issue. A demolition permit was issued and in December 2007, demolition commenced. In March 2008 the permit for the proposed repairs and improvements was issued. [¶] . . . Construction commenced, and in April 2008, the pipe at issue was revealed while digging a trench for the drain.” Allen testified that when the Pipe was uncovered during the excavation, he first “realized that the bulk, majority of the water

was coming from the pipe.” He said that “you just can’t see it as clear in a video how big a gap is sometimes, because the bell and spigot kind of hides the gap a little when it’s open, and when there is a crack, sometimes there’s dirt that makes it difficult to see if anything’s really leaking.” But when “we uncovered the pipe . . . we saw how much water was leaking out of it.”

On April 7, 2008, Allen wrote Bush a letter reporting that the Pipe was leaking and requesting that the City remove the Pipe from plaintiffs’ property. The letter stated that the leaks might be damaging the parking area at 157 Throckmorton as well as the building at 153 Throckmorton. The letter said that excavation in connection with installation of a subsurface drainage system at 153 Throckmorton had “confirm[ed] that the [Pipe] is the major source of the excessive moisture conditions” that had caused the damage. The letter advised that plaintiffs had paid more than \$150,000 over the last several years trying to fix the problem.

Allen and Fabio Aversa met with Bush on April 14, 2008. Bush told Fabio that “we could be liable for flooding the City streets if we took remedial measures to protect our property by capping off the pipe at our property line.” Bush indicated that “it would be difficult to get the City to respond [to their concerns], and a claim would need to be filed with [t]he City.”

Plaintiffs filed a claim against the City on September 18, 2008, and an amended claim on September 29, 2008, estimating \$247,632.38 in damages caused by the Pipe.

At a meeting on October 20, 2008, the City Council adopted a resolution “declaring emergency circumstances regarding the failed storm drain” at 153 and 157 Throckmorton, and “authorized [spending] up to \$150,000 from [the] General Fund” to fix the problem.

On October 28, 2008, the City rejected plaintiffs’ claim as untimely.

Fabio Aversa declared that, on November 1, 2008, before the City began repairs, over two feet of water flooded into the basement of 149/153 Throckmorton during “flash rains.” He stated that, in December 2008, the City redirected the Pipe off 157

Throckmorton through an adjacent public parking lot, which stopped intrusion of water into plaintiffs' properties.

Plaintiffs filed their complaint against the City on April 24, 2009, alleging causes of action for negligence, nuisance, trespass, inverse condemnation, and injunctive relief. The appeal does not contest the judgment for the City on the cause of action for injunctive relief.

## II. DISCUSSION

“The rules of review [of a summary judgment determination] are well established. If no triable issue as to any material fact exists, the defendant is entitled to a judgment as a matter of law. [Citations.] In ruling on the motion, the court must view the evidence in the light most favorable to the opposing party. [Citation.] We review the record and the determination of the trial court de novo. [Citations.]” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499.)

Plaintiffs were required file a claim against the City within one year of the accrual of their tort causes of action (Gov. Code, § 911.2, subd. (a)), and to file suit on those claims within six months after notice that the City had rejected them (Gov. Code, § 945.6, subd. (a)(1)). Plaintiffs had three years to assert the cause of action for inverse condemnation. (Code Civ. Proc., § 338, subd. (j).)

The court found that plaintiffs' causes of action accrued at the latest in February 2005 when their engineer observed that the Pipe was leaking. “By that time,” the court wrote, “Allen was aware, or should have become aware of facts through a reasonable investigation, [of] the existence of the injury and the fact it was caused by someone's wrongdoing.” The court noted that “*unreasonable* failure to investigate the facts does *not* delay accrual” of a cause of action. The court found that plaintiffs were bound by information that Allen “actually knew about the dilapidated culvert, or that which a reasonable investigation would have revealed once he was placed on inquiry notice.”

The court's decision is unsupportable. The court relied on *Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732 (*Wilshire*), and *Lyles v. State of California* (2007) 153 Cal.App.4th 281 (*Lyles*), but those cases are inapposite.

In *Wilshire*, the plaintiffs alleged that former lessees of their property caused the soil to become contaminated. Before the plaintiffs bought the property, they hired a soils consultant who failed to discover the contamination. It was undisputed that the contamination would have been revealed by a reasonably diligent investigation. Accrual of the plaintiffs' causes of action was not delayed by the "incorrect professional advice" they received from their consultant. (*Id.* at pp. 741-742.) "[T]he burden of this incorrect advice must fall on [the plaintiffs], not on the wholly uninvolved [defendants]." (*Id.* at p. 741.) Thus, the plaintiffs' remedy was against the consultant, not the defendants. (*Id.* at p. 742.)

Here, the court essentially found Allen guilty of professional malpractice in failing to discover, before the Pipe was excavated in 2008, that it was causing plaintiffs' water damage. However, there is no basis in the record for any such finding. The City "agrees that plaintiffs must rely upon the knowledge of their expert for the running of the statute of limitations." The City notes that "[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of" (Civ. Code, § 2332), and that Allen was aware in 2005 that the Pipe was a "potential cause" of plaintiffs' damage. But he investigated that suspicion by having the pipe videotaped, and the only knowledge of the Pipe's effects that could be imputed to plaintiffs before 2008 was his conclusion that those effects were not significant. No evidence has been presented that he was negligent in so concluding.

Under the discovery rule that "operates to protect the plaintiff who is 'blamelessly ignorant' of his cause of action" (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 408 (*Leaf*)), a cause of action does not accrue until the plaintiff " 'could have discovered injury and cause through the exercise of reasonable diligence' " (*id.* at p. 407). The plaintiffs in the *Lyles* case on which the trial court relied were not "blamelessly ignorant" of their causes of action. They sustained property damage in a storm, did nothing to investigate the cause, and did not sue until someone told them that a neighbor had recovered for the same damage they had suffered. (*Lyles, supra*, 153 Cal.App.4th at pp. 285-286.) *Lyles* held that "in a patent property damage case, wrongful cause of the

damage is inherently possible or suspect enough to require a reasonable, prompt investigation.” (*Id.* at p. 288.) Because the plaintiffs had not investigated the matter, the discovery rule did not assist them and summary judgment for the defendant was affirmed on statute of limitations grounds. *Lyles* distinguished the decision in *Leaf* (*Lyles, supra*, 153 Cal.App.4th at pp. 288-289), where the plaintiffs, “at the outset, made reasonable but unsuccessful, efforts to identify the . . . cause of [their] damage” (*Leaf, supra*, 104 Cal.App.3d at p. 408). The *Leaf* court wrote: “Where, as in this case, plaintiffs consulted with professional engineers as to the source of their injury, they were entitled to rely upon that advice.” (*Ibid.*)

While the issue of the plaintiffs’ reasonable diligence in getting to the root of the problem could be decided as a matter of law in *Lyles*, that issue is ordinarily one of fact. (*Leaf, supra*, 104 Cal.App.3d at p. 409; see also, e.g., *Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 31.) Insofar as it appears from the evidence here, plaintiffs promptly hired a competent engineer to address their water damage, and reasonably relied on his professional advice. It is thus at the least a triable issue of fact whether plaintiffs were reasonably diligent in determining the cause of their injury. The City was not entitled to judgment on the ground that, as a matter of law, plaintiffs should have discovered before April 2008 that the Pipe was the culprit.<sup>2</sup> And if plaintiffs’ causes of action did not accrue until April 2008, they were timely asserted. (Gov. Code §§ 911.2, subd. (a), 945.6, subd. (a)(1); Code Civ. Proc., § 338, subd. (j).)

Nor can the summary judgment be justified on the alternative ground that the City did not own or control the Pipe. The City surprisingly asserts that it authorized expenditure of \$150,000 in general funds to fix a pipe it did not own or control simply “as a favor” to plaintiffs. However, the City’s remedial activity in redirecting the Pipe off of plaintiffs’ land supported a finding that the City in fact controlled it. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1166.) Further evidence of City control over the Pipe was

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<sup>2</sup> In view of this conclusion, we need not decide whether the court also erred in finding that the nuisance and trespass causes of action were time barred because the leaks from the Pipe were a permanent, rather than continuing, nuisance and trespass.

provided by Bush's warning that plaintiffs would be liable for flooding on City streets if they took matters into their own hands and capped the Pipe at their property line. The Pipe is shown as a City pipe on a City map. Conflicting opinions have been presented as to who owned the Pipe. Under the circumstances, ownership and control of the Pipe are triable issues.

### **III. DISPOSITION**

The judgment for the City on the cause of action for injunctive relief is affirmed. The balance of the judgment is reversed. Costs on appeal are awarded to plaintiffs.

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Jenkins, J.

We concur:

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McGuinness, P. J.

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Pollak, J.