

No: S243247

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF OROVILLE, *Petitioner,*

v.

SUPERIOR COURT OF BUTTE COUNTY, *Respondent.*

CALIFORNIA JOINT POWERS RISK
MANAGEMENT AUTHORITY et al., *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

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

After a decision by the Court of Appeal
Third District

IMMEDIATE STAY REQUESTED

CRITICAL DATE: October 27, 2017

Further Case Management Conference (and expected Trial Setting)

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Petitioner, City of Oroville, submits the following in Reply to the Answer filed on behalf of 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.

I.

INTRODUCTION

The introduction section of the Answer filed by plaintiffs serves as an overview of their positions taken in the courts below. The Answer falls short in every material respect from addressing the substantial and important legal issues of statewide concern raised in the Petition.

This case is important for reasons that far transcend the interests of the litigating parties, as reflected by the amicus letters filed in support of this Court's review. The Petition asks this Court to review legal issues pertaining to totally unsettled and unpublished law that is creating results in the courts below that are contradictory and completely unpredictable. The legal issues presented are of statewide and urgent concern to pretty much every city and sewer system operator in the State of California, from north to south, and east to west.

II.

BACKGROUND OF THE CASE

Background information relating to the case is sufficiently addressed in prior filings and will not be further addressed in this Reply Brief.

III.

LEGAL ARGUMENT

A. Supreme Court Review is Necessary to Establish Published Legal Guidelines and Secure Uniformity of Decisions on Important Legal Issues of Urgent Statewide Concern.

Plaintiffs' Answer argues that elements of inverse condemnation law

are “well settled.” They make this argument despite the absence of a single published case on the issues presented, ignoring stated concerns expressed by the trial court judge during oral argument on the liability motion brought below. During that hearing the trial court struggled with the language of *California State Auto Ass’n Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474 (“CSAA”) and the obvious fact that plaintiffs neglected to install a legally required backwater valve to protect their property, stating:

I did some research, the research attorney did research and some statewide and countrywide and nationwide research. **We may be making new law because I cannot find a case that deals with this particular issue...**

(Bold emphasis added. Reporter’s Transcript of hearing held on Wednesday, July 23, 2014, at Volume IV, Exhibit 30, Pages 00971 – 00972.)

The Petition outlines the manifest ambiguity, confusion, and fundamental unfairness in the law as it is being applied against public entities in missing backwater valve (BWV) cases. This is demonstrated by polar opposite appellate court opinions and results grappling over the identical legal issues raised in this Petition, and by the level of amicus support urging this Court to grant the Petition so further briefing can take place on these important legal issues of statewide concern.

What is truly well settled is the law obligating property owners to comply with all applicable Building and Plumbing Codes when building and maintaining their property. What is not at all settled is the law governing inverse condemnation proceedings where property owners fail to comply with applicable Building and Plumbing Codes with respect to installing and maintaining functioning backwater valves on their property to interface with public sewer systems to protect their property and the public at large. This important and statewide legal issue is squarely raised

in the Petition, which discusses and explains how the “design and operation” of municipal sewer systems takes into consideration a private property owner’s obligation to comply with Building and Plumbing Codes designed to complement and interface with the “design and operation” of sewer systems.

Here, it is evident that important legal issues of statewide concern raised in the Petition are not “well settled.” Indeed, they have never been addressed in a published decision in the State of California. This has led to havoc in the trial and appellate courts below, causing inordinate expense to prosecute, defend, and settle litigation involving these types of cases throughout the state. The urgent need for review sought by Petition is also illustrated by the following amicus letters filed in support of the Petition:

1. Amicus Letter dated August 10, 2017, filed by Amici Curiae The League of California Cities (475 California cities located throughout the State of California) and The California Association of Sanitation Agencies (“CASA”), which consists of more than 115 local public agencies throughout the State that provide wastewater collection serving millions of California residents, businesses, industries and institutions;
2. The California Association of Joint Powers Authorities (“CAJPA”) letter dated July 31, 2017. CAJPA consists of 99 Joint Powers Authorities (“JPA”) providing insurance and risk management services to the majority of public entities in California;
3. The Public Entity Risk Management Authority (“PERMA”) letter dated August 1, 2017. PERMA consists of 32 public entity members, many of whom operate public server systems;
4. The California Sanitation Risk Management Authority (“CSRMA”) letter dated July 26, 2017. CSRMA consists of 60

members, all public agencies in California that provide sewer collection services to private property owners; and

5. The California Joint Powers Risk Management Authority (“CJPRMA”) letter dated July 26, 2017. CJPRMA provides liability self-insurance coverage to 21 California public agencies, which combined encompass more than 100 California public entities, most of which operate public sewer systems.
6. The California Joint Powers Insurance Authority (“CJPIA”) letter dated August 3, 2017. CJPIA is a public agency joint powers authority that provides pooled liability self-insurance to its 116 members, including 96 cities, many of which provide sanitary sewer collection services to private property owners.

Summarizing, the Petition and accompanying amicus letters submitted in support of the Petition demonstrate an urgent need for a published decision that takes into account the important and overlapping legal obligations of public entities and private landowners and contractors that utilize public entity sewer systems, to comply with their respective legal obligations and ensure that sewer systems can operate as deliberately conceived, designed, constructed, and maintained.

B. The Absence of a Legally Required Backwater Valve Should Be Considered the Sole Legal Cause of Sewage Intrusion into a Plaintiffs’ Property

Throughout their Answer, plaintiffs essentially argue that strict liability applies against public entities in sewage intrusion cases. They argue at the bottom of Page 7 of their Answer that: “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.” On Page 8, they argue that: “. . . Plaintiffs need only prove that other forces alone did not

cause the damage. . . .” citing *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 500, a flood control project case that is inapplicable for reasons discussed in the Petition.

In their filings, plaintiffs do not even attempt to address legal causation or fault pertaining to the legally required but missing backwater valve issue raised in this Petition, which has never been addressed in a published legal opinion in the State of California. The law should not allow property owners and contractors to negligently or even intentionally neglect to pay for, install, and maintain a legally required backwater valve on their property, **which is designed and meant to interface with the public sewage disposal system**, and then collect against a municipality (i.e. their neighbors and the public at large) for inverse condemnation damages and attorney fees if sewage enters their property. On a public policy level, it is also noteworthy that private property owners can insure against damage caused by sewage intrusion, while municipalities are often precluded from obtaining insurance coverage for such losses based on an inverse condemnation theory.

With the total absence of published case law on the issues before this Court, the Court is respectfully asked to take up the Petition and provide a published legal opinion that attorneys, their clients, and the courts below, can follow under circumstances similar to those presented here.

C. Petitioner’s Mention of Unpublished Cases Does Not Violate the Rules of Court.

Petitioner’s mention of unpublished cases involving missing backwater valves does not violate the Rules of Court.

The Supreme Court may order review of a Court of Appeal decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law; ...

(CRC, Rule 8.500(a)(1) and 8.500(b)(1).)

Petitioner has never argued that an unpublished missing backwater valve case has precedential value. The point of mentioning these cases is to demonstrate the absence of any published case law on these issues and to provide an understanding of how these legal and factual issues were addressed in other proceedings.

Here, given the absence of published law on this important issue of statewide concern and the sharp conflict in unpublished cases dealing with *CSAA* and the issues presented, mention of the unpublished cases is appropriate and necessary to discuss the widely divergent manner in which these important legal issues are being addressed throughout the State. They illustrate the need to seek and secure uniformity of decision throughout the State, and to settle a very important question of law that is of statewide concern. (*California Civil Appellate Practice* (3d Ed. CEB 2017) section 22.26, p. 22-16.2.)

IV.

CONCLUSION

For the reasons set forth in the City of Oroville's Petition and in the Amicus Letters filed in support of the Petition, the Court is asked to grant this Petition and allow briefing on the issues presented. Doing so will be of great service to all property owners and municipalities throughout the State of California. Doing so will assist this Court in establishing published legal guidelines for trial and appellate courts to review the obligations of public entities, public utility providers, and private citizens with respect to

addressing backwater claims for sewage intrusion when legally required
backwater valves are not installed on private property.

Dated: August 16, 2017

Respectfully Submitted,

/s/ Mark A. Habib

By Mark A. Habib (SBN 150087)
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Attorneys for Petitioner
CITY OF OROVILLE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.049(c) of the California Rule of Courts, I hereby certify that this Reply contains 1,650 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: /s/ Mark A. Habib

Mark A. Habib

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 16, 2017 at Los Angeles, California.

Fernando Mercado

PRINT NAME

/s/ Fernando Mercado

SIGNATURE

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **OROVILLE, CITY OF v. S.C. (CALIFORNIA JOINT POWERS RISK
MANAGEMENT AUTHORITY)**

Case Number: **S243247**

Lower Court Case Number: **C077181**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

08-16-2017

Date

/s/Mark A Habib

Signature

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