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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARLENE MAO, Plaintiff and Appellant, v. PIERS ENVIRONMENTAL SERVICES, INC., Defendant and Respondent; AIM INTEGRATED MATRIX DEVELOPER ENTERPRISES, INC., Movant and Appellant.	H041214 (Santa Clara County Super. Ct. No. CV197938)

Marlene Mao, Ph.D. (Mao), is the majority shareholder and president of her closely-held corporation, AIM Integrated Matrix Developer Enterprises, Inc. (AIM). In 2000, Mao purchased commercial property in Milpitas (the property) with a loan from the Bank of Santa Clara (the Bank). In connection with its due diligence on the proposed loan to Mao, the Bank hired an environmental consulting firm, PIERS Environmental Services, Inc. (PIERS) to perform a surface and subsurface environmental assessment of the property. PIERS reported no contamination. In 2005, Mao hired PIERS to perform a limited-scope update of the initial environmental assessment. In 2006, Mao transferred the property to AIM. In 2010, petroleum contamination was discovered on the property.

This appeal arises from an action filed in 2011 by Mao against PIERS alleging negligence in PIERS's failure to discover the contamination during its

2000 and 2005 assessments. The trial court granted summary judgment for PIERS, finding that Mao had failed to effectively oppose the motion and could not prove damages because she no longer owned the property when the contamination was discovered. After the court entered judgment for PIERS, AIM unsuccessfully sought leave to file a complaint in intervention to assert a negligence cause of action against PIERS.

Mao and AIM (together, appellants) challenge the trial court's rulings on PIERS's motion for summary judgment and on AIM's motion for leave to intervene. We affirm.

I. BACKGROUND

A. Mao's Complaint

Mao filed this action against PIERS in April 2011 asserting a single cause of action for negligence. According to the complaint, Mao learned for the first time in May 2010 that the environmental assessments completed by PIERS had failed to reveal contamination on the property. It alleged that Mao had retained PIERS to conduct site testing of the property and to provide "the documentation necessary to help protect all parties involved in a real estate transaction from environmental liabilities." Mao further alleged that she relied on the environmental reports for her initial purchase of the property and subsequent application for new building permits. She generally alleged that PIERS owed her a duty of care, diligence, and judgment in the site assessments and had breached that duty by failing to exercise reasonable care, causing Mao to suffer compensatory damages. Attached to the complaint was the "Phase II Environmental Site Assessment" prepared in May 2010 by a third-party environmental consulting firm documenting contamination on the property.

B. PIERS's Motion for Summary Judgment

PIERS filed a motion for summary judgment (Code Civ. Proc., § 437c) on

PIERS filed a motion for summary judgment (Code Civ. Proc., § 437c) on January 17, 2014, asserting three independent bases for judgment in its favor. PIERS argued: (1) that it owed no professional duty of care to Mao in 2000; (2) the alleged negligence by PIERS in 2005 did not cause Mao any damages; and (3) there was no genuine dispute that PIERS was not negligent in any of its investigations of the property. PIERS submitted declarations and evidence in support of its motion. Mao filed opposition but raised no objections to PIERS's evidence and offered no evidence in turn. Of the 64 facts that PIERS asserted in its separate statement of undisputed material facts, Mao identified 11 facts as "disputed" but did not reference any supporting evidence.

The following facts are not in dispute. In December 1999, the Bank authorized PIERS to perform and complete a "Phase I Site Assessment" (Phase I) on the property. The agreement identified the Bank as the client and lender. It identified Mao as the "buyer," along with her agent, under "Contact for Site Inspection." The Phase I assessment dated January 2000 stated that it had "been prepared for the exclusive use of Bank of Santa Clara and/or its agents." It described the former presence of a gas station on the property and a repaired gas pump leak and recommended a subsurface investigation to evaluate the potential impact from the gas station.

The Bank authorized a "Limited Phase II ESA/Subsurface Investigation" (Phase II) of the property. According to the declaration of PIERS's president, Dawn Murray, the Bank requested the least expensive screening for Phase II which did not allow for comprehensive drilling and sampling throughout the property. PIERS sampled groundwater at three locations in the presumed "downgradient area of the former gasoline underground storage tanks . . . ." The samples did not uncover detectable levels of contaminant. The Phase II assessment dated February 2000 recommended "no further subsurface

assessment dated February 2000 recommended “no further subsurface investigation” for the site.

Mao purchased the property in March 2000. A building fire occurred on the property in November 2004 that destroyed the commercial retail building. Mao contacted PIERS in 2005 and authorized a “Phase I Environmental Site Assessment Update Report” (Phase I Update). The Phase I Update consisted of a review and comment on the previous Phase I report, on-site reconnaissance, and environmental database review. It had no subsurface component. Mao’s responses to a questionnaire and disclosure statement for the Phase I Update indicated that she was not aware of the property’s historical use as a gas station or of the past existence of petroleum products on the property. The Phase I Update dated October 2005 noted the former presence of a gas station and repeated the finding from the Phase II assessment that there was no evidence of impacts to groundwater.

Mao transferred ownership of the property via grant deed to AIM in September 2006. A subsequent “Phase II Environmental Site Assessment” dated May 2010 and conducted by a third-party detected contamination and recommended further assessment. A corrective action plan submitted on behalf of AIM to the Santa Clara County Department of Environmental Health (County) described PIERS’s assessment in 2000 as a limited Phase II surface investigation consisting of three temporary borings for the collection of groundwater samples and no collection of soil samples. The site assessment in 2010 consisted of 16 soil borings and four groundwater monitoring wells. It revealed contaminants from a “release of petroleum-based fuels” at the site of the former gas station. The corrective action plan advised that passive biodegradation, as opposed to active remediation, and groundwater monitoring were appropriate.

were appropriate.

In April 2013, an environmental consultant submitted a final quarterly groundwater report and closure request (Closure Request) to the County on behalf of Mao and AIM. The Closure Request compared the results of groundwater and other data collected at the property to regulatory criteria and concluded that the site appeared "suitable for case closure." The Closure Request stated that with the County's approval, AIM was prepared to decommission the existing groundwater monitoring wells and proceed with commercial redevelopment of the property. On October 28, 2013, the County responded that the fuel leak investigation of the property would be closed.

C. **Summary Judgment Order**

The trial court granted summary judgment in favor of PIERS on April , 2014 and filed a written order on April 9, 2014. There was no oral argument on the motion. The court found that PIERS had negated the damages element of Mao's negligence claim by establishing that AIM, not Mao, was the property owner responsible for any monitoring and remediation. The court found that Mao had submitted no evidence in support of assertions that she "remains the majority shareholder and managing partner of AIM and has expended her own funds to pay for all of the reconstruction and environmental remediation costs associated with the Property since 2005." The court reasoned that even accepting those assertions as true, Mao's showing was insufficient as a matter of law because a person who voluntarily pays the debt of another without request cannot recover it either from the debtor or creditor (*Thompson v*. *Thompson* (1963) 218 Cal.App.2d 804, 807-808 (*Thompson*)), nor can a stockholder maintain an action in his own behalf for a wrong done by a third person to the corporation (*Grosset v*. *Wenaas* (2008) 42 Cal.4th 1100, 1108, fn. 5). The court also emphasized Mao's failure to comply with the requirement that any material

also emphasized Mao's failure to comply with the requirement that any material fact disputed by the party opposing summary judgment "shall be followed by a reference to the supporting evidence." (§ 437c, subd. (b)(3).) The court concluded that Mao had failed to demonstrate a triable issue of material fact as to damages.

The trial court entered judgment for PIERS and dismissal of the action on May 16, 2014, and PIERS filed its notice of entry of judgment on May 28, 2014. A few weeks after the entry of judgment, Mao filed a substitution of counsel.

D. **AIM's Motion to Intervene**

On June 10, 2014, Mao's new counsel filed an ex parte application on behalf of AIM for leave to file a complaint in intervention against PIERS. The proposed complaint in intervention recited the history of the Phase I, Phase II, and Phase I Update of the property. It alleged that when Mao transferred the property to AIM in September 2006, AIM "relied on PIERS' Site Assessment Reports in taking title to the Property, and specifically relied on the fact that there was no known evidence of contamination to the Property." AIM alleged that PIERS was negligent in its performance of the site assessments for the property and, because AIM would not have taken title to the property had it known of the contamination, AIM as a result incurred substantial monetary costs in connection with implementing the corrective action plan, remediating the property, permitting, and loss of rental business income.

The trial court set briefing on the motion and held a hearing. AIM argued that it satisfied the requirements for permissive intervention under section 387, including timeliness, because intervention is possible after judgment. AIM contended that it had a direct and immediate interest in the action as the owner of the property and the responsible party under the corrective action plan. AIM further argued that intervention would not enlarge the issues in the action

further argued that intervention would not enlarge the issues in the action because its complaint (1) rested on the same general set of facts as Mao's complaint, (2) involved the same injury and (3) same instrumentality, and (4) was not opposed by Mao and would not cause prejudice to PIERS.

PIERS opposed the motion. It argued the proposed intervention was not timely, given AIM's knowledge of the action prior to its adjudication on the merits, and that AIM's interest in the action was not sufficiently direct or immediate to warrant permissive intervention. Contrary to AIM's contention that its claims should "relate back" to the filing of Mao's complaint, PIERS argued that AIM's claims were separate and independent from Mao's and therefore time-barred.

During oral argument, counsel for AIM emphasized that "motions for permissive intervention are to be liberally construed in favor of intervention." AIM urged the court to consider various cases "where intervention has, in fact, been permitted after judgment." Counsel for PIERS argued that Mao's case had gone on "for years" yet "now she brings her closely held corporation in to try to intervene to try to revive a suit." PIERS argued that AIM had known about the case due to Mao's role as AIM's managing officer and president and was dilatory in seeking leave to intervene.

The court expressed concern with AIM's motion after adjudication on the merits: "[T]his isn't the case where there's going to be a default judgment. There was actually a motion and the Court granted it and entered judgment. I think once judgment has been entered the Court's authority to do anything in the case is very limited. . . . [T]he cases you cited are ones where somebody sought to intervene in order to set aside a default, that kind of thing . . . ." AIM responded that "the published authorities say . . . that intervention can be permitted to occur after judgment, and it can be permitted on behalf of intervenors who are seeking to intervene as Plaintiffs. [¶] This is an action that should have a chance to be

to intervene as Plaintiffs. [¶] This is an action that should have a chance to be heard on the merits of it, though, and it wasn't through the fault of former counsel . . . not just filing a simple motion to amend the complaint before the entry of summary judgment."

The court acknowledged AIM's difficult position but concluded "that under these facts I have less authority to do this, and to the extent it's discretionary I'm going to deny the motion." In a written order filed on July 2, 2014, the trial court denied AIM's motion for leave to file a complaint in intervention as untimely: "As judgment has already been entered in the case against the original Plaintiff, no case is left in which to intervene. (See *Lohnes v*. *Astron Computer Products* (2001) 94 Cal.App.4th 1150, 1153-1154; *Andersen v*. *Barton Memorial Hospital*, *Inc*. [(1985)] 166 Cal.App.3d 678, 685, fn. 9.)" Appellants timely appealed.

II. DISCUSSION

A. Summary Judgment

1. *Legal Principles and Standard of Review*

A trial court properly grants a motion for summary judgment when there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (§ 437c.) A defendant moving for summary judgment has the burden of demonstrating that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. (*Id*., subd. (p)(2); *Aguilar v*. *Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849 (*Aguilar*).) Once the defendant meets that burden, justifying a finding in its favor as to one or more elements of the cause of action, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to that cause of action or the defense. (§ 437c, subd. (p)(2).)

The plaintiff opposing summary judgment may not "rely upon the mere allegations or denials of its pleadings" but must set forth "specific facts" beyond

allegations or denials of its pleadings" but must set forth "specific facts" beyond the pleadings to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).) A triable issue of fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

On appeal from the granting of a motion for summary judgment, the reviewing court "examine[s] the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*Miller v*. *Department of Corrections* (2005) 36 Cal.4th 446, 460.)

2. ***Grounds for Summary Judgment***

Mao's complaint identified two periods of conduct in which PIERS allegedly failed to meet the standard of care—the Phase I and Phase II assessments in 2000, before Mao purchased the property, and the Phase I Update in 2005, before Mao transferred the property to AIM for redevelopment. PIERS argued that it owed Mao no duty in 2000, when it conducted the Phase I and Phase II assessments exclusively for the Bank, and that its work for Mao in 2005 caused her no damages. PIERS also argued as to both time periods that it had not breached the standard of care.

The trial court ruled based on the damages element and on Mao's failure to support her opposition with evidence. The court did not differentiate between the 2000 and 2005 time periods and did not analyze the other grounds raised by the motion. Because the summary judgment ruling eliminated Mao's entire negligence action, PIERS suggests that implicit in the ruling is a finding that PIERS owed Mao no duty in 2000. It is also possible that the court found the issue of damages to be dispositive for both time periods.

issue of damages to be dispositive for both time periods.

On appeal, we affirm a grant of summary judgment if it is correct on any of the grounds asserted in the trial court and are not bound by the trial court's stated reasons. (*Garrett v*. *Howmedica Osteonics Corp*. (2013) 214 Cal.App.4th 173, 181; *Knapp v*. *Doherty* (2004) 123 Cal.App.4th 76, 85; *California School of Culinary Arts v*. *Lujan* (2003) 112 Cal.App.4th 16, 22 [" 'appellate court may affirm a summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court' "].) Before affirming an order granting summary judgment on grounds not relied upon by the trial court, however, the reviewing court must "afford the parties an opportunity to present their views on the issue by submitting supplemental briefs." (§ 437c, subd. (m)(2).) In view of this provision, we invited supplemental briefs from the parties.

We find on the evidence presented that the issues of duty and damages entitle PIERS to a to a grant of summary judgment. Accordingly, we do not reach the third issue of PIERS's alleged breach of the standard of care.

3. ***Negligence***

" '[N]egligence is conduct which falls below the standard established by law for the protection of others.' " (*Bily v*. *Arthur Young & Co*. (1992) 3 Cal.4th 370, 396 (*Bily*), quoting Rest.2d Torts, § 282.) The elements of negligence are duty, breach of duty, proximate cause, and damages. (*Lockheed Martin Corp*. *v*. *Superior Court* (2003) 29 Cal.4th 1096, 1106; *Artiglio v*. *Corning Inc*. (1998) 18 Cal.4th 604, 614.)

On appeal, " 'we take the facts from the record that was before the trial court when it ruled' " on the motion for summary judgment. (*Wilson v*. *21st Century Ins*. *Co*. (2007) 42 Cal.4th 713, 716-717.) We apply the same three-step analysis as the trial court: first identify the issues framed by the pleadings; next,

analysis as the trial court: first identify the issues framed by the pleadings; next, determine if the moving party has shown that one or more elements of a cause of action cannot be established, justifying judgment in the movant's favor; and last, if the moving party has carried its burden, determine if the opposition demonstrates the existence of a triable issue of material fact. (*Lattimore v*. *Dickey* (2015) 239 Cal.App.4th 959, 967; *Chavez v*. *Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

As we noted, Mao essentially pleaded two theories of negligence based on separate time frames. Her complaint alleged that she retained PIERS "to conduct site testing of her Property" and "[i]ncluded in the professional services to be provided by Defendants was to provide the documentation necessary to help protect all parties involved in a real estate transaction from environmental liabilities." It alleged that Mao relied on PIERS's environmental reports "for initial purchase of" the property and for "subsequent application for new building permit." Mao sought compensatory damages and "all economic and consequential damages, including . . . loss of business opportunity, loss of profits and other gains Plaintiff reasonably anticipated from the event in an amount to be proven at the time of trial."

For purposes of summary judgment, " '[i]f a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them.' " (*Teselle v*. *McLoughlin* (2009) 173 Cal.App.4th 156, 163.) We begin with damages, which formed the basis for the trial court's summary judgment order.

a. *Damages*

Tort damages are awarded to fully compensate the victim for all injury suffered. (*Erlich v*. *Menezes* (1999) 21 Cal.4th 543, 550; Civ. Code, § 3333 [measure of damages for breach of obligation not arising from contract "is the

[measure of damages for breach of obligation not arising from contract "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not"].) Given the broad measure of damages, Mao may cast a wide net in claiming harm—but not so wide a net that she herself slips through it. A viable negligence claim requires proof of " 'appreciable and actual harm' " caused by the tortious conduct. (*County of Santa Clara v*. *Atlantic Richfield Co*. (2006) 137 Cal.App.4th 292, 317, quoting *Budd v*. *Nixen* (1971) 6 Cal.3d 195, 201 (*Budd*), superseded in part by § 340.6.) "The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (*Budd*, *supra*, at p. 200; *Jimenez v*. *Superior Court* (2002) 29 Cal.4th 473, 483 [" 'appreciable, nonspeculative, present injury is an essential element of a tort cause of action' "].)

PIERS offered evidence that (1) Mao transferred her ownership of the property by grant deed to AIM in September 2006, (2) the petroleum contamination was discovered in 2010, (3) the proposed corrective action was not taken until 2011, and (4) the corrective action plan submitted to the County in 2011 was submitted " 'on behalf of the property owner, [AIM].' " Although Mao owned the property in 2005 when she retained PIERS for the Phase I Update, she transferred full ownership of the property to AIM in 2006. This established that Mao was not the owner of the property at the time that remediation costs or damages associated with the discovery of the contamination began to accrue. Mao's complaint states that she learned of the contamination on the property in May 2010. The Closure Request submitted to the County in April 2013 summarized the site's suitability for "consideration for regulatory case closure." Several months later, the County responded that the site could be closed and the groundwater monitoring wells destroyed. Thus, PIERS met its initial burden of

groundwater monitoring wells destroyed. Thus, PIERS met its initial burden of showing that any "appreciable and actual" damages for monitoring and remediation associated with the contamination occurred starting in 2010 when AIM was the owner of the property. (*Budd*, *supra*, 6 Cal.3d at p. 200.)

In response, Mao asserted that: (1) if PIERS had discovered the contamination in 2005, Mao would not have proceeded with rebuilding plans after the fire, "avoiding costs paid to architect, structure engineers, permits, etc."; (2) if PIERS had discovered the contamination in 2000, Mao would have reconsidered the value of the property prior to purchase or would have negotiated remediation, avoiding future damages due to contamination; and (3) as "the majority shareholder and the managing partner of AIM," Mao "expended her own funds to pay for all of the reconstruction and environmental remediation costs since 2005."

Because Mao failed to dispute PIERS's evidence or support her assertions with evidence as required by section 437c, subdivision (b)(3), PIERS's statement of undisputed material facts is uncontroverted. " 'Without a separate statement of undisputed facts with references to supporting evidence in the form of affidavits or declarations, it is impossible for the [opposing party] to demonstrate the existence of disputed facts.' " (*California School of Culinary Arts v*. *Lujan*, *supra*, 112 Cal.App.4th at p. 22, quoting *Lewis v*. *County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) Mao nevertheless maintains that she suffered damages as a result of PIERS's failure to discover the contamination because she paid costs to investigate and remediate the property in her capacity as the owner and president of AIM. She points to a verified supplemental interrogatory response which states that she "expended at minimum $479,885.11 for costs associated with addressing the soil contamination and rebuilding of the subject property" and provides a list of "softcost[s]."

property" and provides a list of "softcost[s]."

Mao's discovery response is insufficient to create a triable issue of fact. PIERS filed the discovery response in connection with an unrelated motion to compel. Mao did not reference it in her opposition to the summary judgment motion or her separate statement of facts. While the trial court may be authorized to consider material elsewhere in the record, it " 'cannot be expected to address expressly every piece of evidence contained in a voluminous record, much less address evidentiary items on which a party has not relied to create a disputed issue of material fact.' " (*Collins v. Hertz Corp*. (2006) 144 Cal.App.4th 64, 75; see also *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 195 [evidence submitted on another motion was insufficient to raise a triable issue of fact in response to a motion for summary judgment]; *San Diego Watercrafts*, *Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315 [" '[f]acts stated elsewhere [than in the separate statement] *need not be* considered by the court . . . .' "].) Also, Mao may not use her own interrogatory response to oppose a summary judgment motion. (§ 2030.410; *Great American Ins. Cos. v. Gordon Trucking, Inc*. (2008) 165 Cal.App.4th 445, 450 ["the responding party may not use its own interrogatory responses in its own favor"].)

Nor does Mao advance a theory under which she, acting as an officer of the corporation, is entitled to claim damages personally. We reject her assertion that it "was not necessary" to submit evidence in support of her contentions due to the fact that PIERS did not dispute Mao's position as a shareholder and officer of AIM. "It is fundamental, of course, that a 'corporation is a distinct legal entity separate from its stockholders and from its officers.' " (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729; see also *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 [corporation is separate and distinct from stockholders, officers, and directors, with separate and distinct

and distinct from stockholders, officers, and directors, with separate and distinct liabilities and obligations].) This basic premise likely prompted the trial court, in granting PIERS's motion for summary judgment, to reference circumstances in which individuals are limited in claiming redress for harm done to the corporation (*Grosset v*. *Wenaas*, *supra*, 42 Cal.4th at p. 1108, fn. 5 [noting shareholders in derivative suit derive no direct personal benefit, nor can stockholder generally maintain an action in his own behalf for a wrong done to the corporation]; see also *Desaigoudar v*. *Meyercord*, *supra*, 108 Cal.App.4th at p. 183 [corporation suffering injury to its property "is the party that possesses the right to sue for redress]") and generally are unable to recover debts paid voluntarily and without request on behalf of another (*Thompson*, *supra*, 218 Cal.App.2d at pp. 807-808). While these cases are factually distinguishable, Mao offers no legal authority or factual support for her contention that she "properly and legitimately sought to recoup remediation expenses that she incurred on her own behalf and in her capacity as an officer and shareholder of AIM."

Mao asserts two additional bases for damages, arguing first that had she known the property was contaminated, she would not have purchased it or would have struck a better deal, and second that as a former owner, she remains liable under California law for contamination on the property. Setting aside briefly the question of whether PIERS owed Mao a duty of care in 2000, we find that because Mao has offered no evidence in support of her assertions, both theories amount to no more than "speculative harm" (*Budd*, *supra*, 6 Cal.3d at p. 200) and do not suffice to create a triable issue of material fact as to damages.

Mao contends that had PIERS discovered the contamination in 2000, when it performed the Phase I and Phase II assessments, she "would have been able to evaluate the purchase of the property at that time or request that the contamination be remedied before she took ownership." Mao argues these are

contamination be remedied before she took ownership." Mao argues these are cognizable damages for the reason given in *Mola Development Corp*. *v*. *Orange County Assessment Appeals Bd*. (2000) 80 Cal.App.4th 309. That case arose from a disagreement between an assessment appeals board and the taxpayer concerning the board's methodology in valuing contaminated commercial property. On review, the court observed that "given the potentially astronomical liability for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), no rational buyer is going to want to touch commercial property unless effectively immune from CERCLA liability, and therefore will require from the seller either a discount on the nominal price or a promise to pay all cleanup costs . . . ." (*Id*. at p. 311.) *Mola* addressed only a narrow issue of law, i.e., "How *are* pollution cleanup costs to be handled in property tax valuations?" (*id*. at p. 316); it offers no authority for Mao's damages claim here.

It is possible to conceive of a set of facts whereby the unsuspecting acquisition of contaminated property could result in cognizable damages under Civil Code section 3333 based on the reduced value of the property and prospective cleanup costs, or future liability under CERCLA or other laws. But Mao has offered no evidence to that effect. "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Absent some showing related to her purchase price for the property and the purported reduction in value or increase in liability that she allegedly suffered, Mao has failed to carry her burden to make a prima facie showing that a triable issue of material fact exists as to "actual and appreciable" damages. (§ 437c, subd. (p)(2); *Budd*, *supra*, 6 Cal.3d at p. 201.)

subd. (p)(2); *Budd*, *supra*, 6 Cal.3d at p. 201.)

Mao's second contention suffers the same shortcoming. Former property owners potentially can be liable for costs associated with the discovery of contamination on their property. For example, the Ninth Circuit Court of Appeals in *Carson Harbor Village*, *Ltd*. *v*. *Unocal Corp*. (9th Cir. 2001) 270 F.3d 863, noted that in some circumstances, interim owners may be liable under CERCLA for the passive migration of contaminants on their property, such as from leaking underground storage tanks. (*Id*. at pp. 880881.) California courts also have confirmed that a continuing nuisance cause of action based on soil contamination may be a viable claim against former owners whose activities led or contributed to a continuing nuisance on an affected property. (See, e.g., *Mangini v*. *AerojetGeneral Corp*. (1991) 230 Cal.App.3d 1125, 1137 [former lessee's contamination of property can constitute a continuing nuisance]; *KFC Western*, *Inc*. *v*. *Meghrig* (1994) 23 Cal.App.4th 1167, 1179 [the defendants' "status as former owners does not immunize them from a nuisance action arising from their activity on the property"]; *Capogeannis v*. *Superior Court* (1993) 12 Cal.App.4th 668, 676 [permitting continuing nuisance claim against former owner for contamination caused by leaking underground storage tank but limiting recovery to " 'actual injury suffered' " within the statute of limitations period].)

But that general principle has no application here, where Mao has offered no evidence that she faces liability for remediation. (Cf. *Transwestern Pipeline Co*. *v*. *Monsanto Co*. (1996) 46 Cal.App.4th 502, 509, 532 [award of future damages in negligence and strict liability action was not speculative but based on the plaintiff's continuing obligation to contribute to a third party's remediation costs].) The closure letter from April 2013 describes the soil and groundwater impacts as localized, stable, and presenting a low likelihood for potential migration. The County's response states that the site "should be closed" and the

migration. The County's response states that the site "should be closed" and the groundwater monitoring wells destroyed. The only reasonable inference to be drawn from these documents is that further investigation or remediation at the site is not required and future liability is an unlikely prospect. Nor do we not infer personal liability merely from the fact that Mao's name appears on a document submitted to or issued by the County (e.g., Closure Request submitted "[o]n behalf of Ms. Marlene Mao and AIM Development Enterprises, Inc."), since Mao is the owner and president of AIM and the natural point of contact for correspondence with the County.

In sum, the contention that Mao has suffered an injury because she "remains liable for the costs of monitoring and remediating the contamination" at the property does not present an " 'appreciable, nonspeculative, present injury' " sufficient to raise a triable issue of material fact. (*Jimenez v*. *Superior Court*, *supra*, 29 Cal.4th at p. 483; *Budd*, *supra*, 6 Cal.3d at p. 200.) Our conclusion is dispositive of Mao's negligence cause of action. Yet given PIERS's argument that Mao cannot establish damages from the 2000 assessments due to the lack of a duty owed to Mao, we turn to that issue.

b. *Duty of Care*

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." (*Bily*, *supra*, 3 Cal.4th at p. 397.) While " '[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct' " (*Rowland v*. *Christian* (1968) 69 Cal.2d 108, 112; Civ. Code, § 1714, subd. (a)), courts " 'have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow from every negligent act . . . ." ' " (*Bily*, *supra*, at p. 397, quoting *Thompson v*. *County of Alameda* (1980) 27 Cal.3d 741, 750.)

County of Alameda (1980) 27 Cal.3d 741, 750.)

In support of its argument that PIERS owed Mao no professional duty in 2000 when it prepared the Phase I and Phase II assessments exclusively for the Bank, PIERS offered uncontradicted evidence that: (1) its contract for the Phase I and Phase II assessments was with the Bank, not Mao; (2) the Bank was the proposed lender for a transaction involving the property; (3) the Phase I and Phase II reports were provided only to the Bank for purposes of due diligence; (4) the Bank authorized PIERS to conduct a limited subsurface investigation of the property; and (5) Mao hired PIERS for the first time only in 2005. The evidence thus established no privity of contract between PIERS and Mao at the time in question.

Whether there is a legal duty to a third party who is not in privity of contract is a question of law and a matter of policy, which involves balancing several factors. (*Bily*, *supra*, 3 Cal.4th at p. 397 [courts employ "a checklist of factors . . . in assessing legal duty in the absence of privity of contract between a plaintiff and a defendant"]; *Biakanja v*. *Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*) ["whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors"].) Case-by-case, courts balance " 'the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him [or her], the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.' " (*Bily*, *supra*, at p. 397, quoting *Biakanja*, *supra*, at p. 650.)

In view of these factors and the pertinent authorities, we find that Mao's position as a prospective purchaser of commercial property, whose lender contracted with the defendant for an environmental investigation as part of the

contracted with the defendant for an environmental investigation as part of the lender's due diligence in funding the property purchase, does not support a legal duty as between PIERS and Mao.

Mao focuses foremost on foreseeability. She argues it was readily foreseeable that negligence in the performance of the assessments would harm her as the prospective purchaser and eventual owner, because PIERS knew that the Bank would use the results for its due diligence in deciding whether to lend funds to her for the purchase. But the presence of a foreseeable risk of injury to third persons is not sufficient, standing alone, to impose liability for negligent conduct (*Bily*, *supra*, 3 Cal.4th at p. 399), particularly where the context is a business transaction in which the loss to a third party is purely economic. (*Quelimane Co*. *v*. *Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 58.) It is in other words not enough that a prospective buyer of a property who reads and relies on environmental reports prepared for the lender's due diligence purposes may foreseeably be harmed by inaccuracies in the report.

In *Bily*, the California Supreme Court considered whether an accountant's duty of care in the preparation of an independent audit of a client's financial statements extended to persons other than the client. (*Bily*, *supra*, 3 Cal.4th at p. 375.) The plaintiffs claimed they had relied on the audit to inform their investments, which failed shortly after. (*Id*. at pp. 377379.) The court recognized that "economic injury to lenders, investors, and others who may read and rely on audit reports is certainly 'foreseeable,' " but in view of the *Biakanja* factors and several policy-related concerns, declined to allow "all merely foreseeable third party users of audit reports to sue the auditor on a theory of professional negligence." (*Id*. at p. 398.) The court identified three areas of concern. (*Ibid*.)

First, "[g]iven the secondary 'watchdog' role of the auditor, the complexity

First, "[g]iven the secondary 'watchdog' role of the auditor, the complexity of the professional opinions rendered in audit reports, and the difficult and potentially tenuous causal relationships between audit reports and economic losses from investment and credit decisions, the auditor exposed to negligence claims from all foreseeable third parties faces potential liability far out of proportion to its fault . . . ." (*Bily*, *supra*, 3 Cal.4th at p. 398.) Second, unlike ordinary consumers, the "generally more sophisticated" third party in an audit scenario can reduce risk from inaccurate financial reporting by " 'private ordering' " (e.g., by commissioning separate investigations or expending personal resources to verify the subject financial statements) (*ibid*.), thereby promoting "sound investment and credit practices" and preventing the auditor from being "in effect, an insurer of not only the financial statements, but of bad loans and investments in general." (*Id*. at p. 403.) Third, the court found it unlikely that expanding liability to third parties for auditor negligence would deter auditor mistakes or improve audits. (*Id*. at p. 404.) The court concluded that an accountant's "liability for general negligence in the conduct of an audit of its client financial statements is confined to the client, i.e., the person who contracts for or engages the audit services." (*Id*. at p. 406.)

Like the "potentially tenuous causal relationships between audit reports and economic losses from investment and credit decisions" (*Bily*, *supra*, 3 Cal.4th at p. 398), we find the causal relationship here strained by the expressly limited nature of the professional opinions rendered by PIERS based on the terms of engagement with the Bank and on the restricted extent of subsurface investigation actually performed in the Phase II assessment. Exposing the environmental consultant to a negligence claim for harm arising from later discoveries based on more extensive subsurface investigation conducted for a different purpose (in connection with redevelopment of the property after a fire

different purpose (in connection with redevelopment of the property after a fire destroyed the premises) creates the potential for liability substantially disproportionate to fault. (See *id*. at p. 400.)

Nor do the other *Biakanja* factors lead us to find a legal duty here. Two cases that inform our assessment are *Beacon Residential Community Assn*. *v*. *Skidmore*, *Owings & Merrill LLP* (2014) 59 Cal.4th 568, 581 (*Beacon*) and *Mission Oaks Ranch*, *Ltd*. *v*. *County of Santa Barbara* (1998) 65 Cal.App.4th 713 (*Mission Oaks*), disapproved on another ground in *Briggs v*. *Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, footnote 10.

The California Supreme Court in *Beacon* considered whether design professionals, specifically architects, owed a duty of care to a homeowners association and its members over construction design defects that allegedly made the homes unsafe and uninhabitable. (*Beacon*, *supra*, 59 Cal.4th at p. 571.) The court identified several factors that distinguished the case from *Bily* and justified its conclusion that an "architect owes a duty of care to future homeowners where the architect is a *principal architect* on the project . . . even if the architect does not actually build the project or exercise ultimate control over construction decisions." (*Id*. at p. 581.)

One factor was the close connection between the defendants' "primary role in the design of the Project" and the homeowners' injury, in contrast with " 'the connection between the auditor's conduct and the third party's injury (which will often be attenuated by unrelated business factors that underlie investment and credit decisions). . . .' " (*Beacon*, *supra*, 59 Cal.4th at p. 581, quoting *Bily*, *supra*, 3 Cal.4th at p. 402.) Another factor was that the defendants' work " 'was intended to affect the plaintiff,' and 'the "end and aim" of the transaction was to provide' safe and habitable residences for future

the transaction was to provide' safe and habitable residences for future homeowners, a specific, foreseeable, and well-defined class." (*Beacon*, *supra*, at p. 584, quoting *Biakanja*, *supra*, 49 Cal.2d at p. 650.) The court also found "the prospect of private ordering as an alternative to negligence liability" (*Beacon*, *supra*, at p. 584) to be less compelling than in *Bily*, given the reliance of a "typical homebuyer" (*ibid*.) on the skills of the developer and the "unrealistic" expectation for homebuyers to hire architects to investigate the structure and design of each home they consider purchasing. (*Id*. at p. 585.)

As compared to the architects' "primary role" in planning and approval of the housing project design in *Beacon*, we find PIERS's role in performing the Phase I and Phase II assessments for the Bank's due diligence to be more attenuated and similar to the auditor's role in *Bily*, where the independent audit provided "a broadly phrased professional opinion based on a necessarily confined examination." (*Bily*, *supra*, 3 Cal.4th at p. 403; cf. *Beacon*, *supra*, 59 Cal.4th at p. 583.) We similarly find the concept of "private ordering" to be slightly more applicable to Mao's position as a prospective buyer of a commercial property than to the average consumer or the "typical homebuyer" discussed in *Beacon*. Like a third-party business investor whose "prudence, diligence, and contracting power" may be directed at reducing the risk of relying on an audit conducted for the benefit of the client (*Bily*, *supra*, at p. 403), the buyer of commercial property can consider anticipated uses for the property and conduct additional due diligence or contractually bargain for increased security if the lender's due diligence fails to provide adequate assurances.

The extent to which the transaction between PIERS and the Bank was intended to affect Mao is also distinguishable. In *Beacon*, the defendants undertook the design work "with the knowledge that the

Beacon, the defendants undertook the design work "with the knowledge that the finished construction would be sold as condominiums and used as residences" (*Beacon*, *supra*, 59 Cal.4th at pp. 583584), and " 'the "end and aim" of the transaction was to provide' safe and habitable residences for future homeowners . . . ." (*Id*. at p. 584; see also *Biakanja*, *supra*, 49 Cal.2d at p. 650 [notary public who negligently drafted a will owed a duty of care to the will's intended beneficiary, in part because "the 'end and aim' of the transaction was to provide for the passing of" the estate to the plaintiff].) The same cannot be said for PIERS's transaction with the Bank. Even viewing the stated purpose of the Phase I assessment (to "determine potential environmental liabilities associated with the current and past uses of the Property") in the light most favorable to Mao, we infer that the primary objective of the assessment was to inform the Bank's due diligence in connection with a financial transaction. The intent to affect or protect Mao as a prospective purchaser or future owner was at best secondary.

Mission Oaks is more analogous to the circumstances of this case. After the County of Santa Barbara rejected a land development proposal, the developer sued, claiming in relevant part that the County of Santa Barabara's environmental consultant had been negligent in its review of the proposed project. (*Mission Oaks*, *supra*, 65 Cal.App.4th at pp. 718, 721.) The appellate court considered in light of the *Biakanja* factors whether the consultant, who was retained by the county, owed a duty to the developer. (*Id*. at p. 725.) The court reasoned that the contract to prepare the environmental review of the proposed project "was not intended to affect [the developer] directly; it was intended to provide the County and the public with the information it needed to assess the proposed project pursuant to CEQA [California Environmental Quality Act]." (*Ibid*.) Citing *Bily*, the court noted that while it is "foreseeable that the project

(*Ibid*.) Citing *Bily*, the court noted that while it is "foreseeable that the project proponent may suffer economic harm," the environmental review process under CEQA and requirement that the county make an independent decision whether to proceed with the project establish "little degree of certainty and less closeness of connection between the consultants' conduct and the 'injury' suffered" by the developer. (*Ibid*.) The court ultimately held that the environmental consultant hired by the county owed no duty of care to the third-party developer for the proposed project and could not be liable for negligence under the circumstances. (*Id*. at pp. 725-726.)

Mao seeks to distinguish *Mission Oaks* because PIERS's environmental assessments were not prepared pursuant to CEQA, under which *Mission Oaks* found the environmental consultant's "responsibility to provide an accurate EIR [Environmental Impact Report] is owed solely to the County, and not to the developer or to other third parties." (*Mission Oaks*, *supra*, 65 Cal.App.4th at p. 723.) Though the Phase I and Phase II assessments were not subject to a statutory or regulatory scheme akin to CEQA, they were prepared under industry guidelines that advise prospective third party users to consult the assumptions and limitations built into the particular assessment based on the client's objectives, and to "independently evaluate" whether those limitations meet their needs. Moreover, as with the EIR in *Mission Oaks*, the fact that a potential effect on Mao was foreseeable does not define the intent of the transaction between PIERS and the Bank. (*Id*. at p. 725.) Just as *Mission Oaks* found "little degree of certainty and less closeness of connection between the consultants' conduct and the 'injury' suffered" by the developer, in part due to the county's independent decisionmaking role under CEQA (*ibid*.), PIERS's conduct and the "injury" suffered by Mao is less than closely connected, particularly given the independent occurrences of the fire and further subsurface investigation of the

independent occurrences of the fire and further subsurface investigation of the property.

Two additional cases that Mao references for support—*Soderberg v*. *McKinney* (1996) 44 Cal.App.4th 1760 (*Soderberg*) and *Leko v*. *Cornerstone Bldg*. *Inspection Service* (2001) 86 Cal.App.4th 1109 (*Leko*)—are inapposite because they address duty to a third party in the context of negligent misrepresentation. As our Supreme Court made clear in *Bily*, legal duty to a third party may be present in a claim for negligent misrepresentation even when it is not present in a claim for negligence. (*Bily*, *supra*, 3 Cal.4th at pp. 376, 406-407.) *Bily* held that "an auditor owes no general duty of care regarding the conduct of an audit to persons other than the client" (*id*. at p. 376, fn. omitted) but may be "held liable for negligent misrepresentations in an audit report to those persons who act in reliance upon those misrepresentations in a transaction which the auditor intended to influence . . . ." (*Ibid*.) Thus, persons who are not clients of the auditor but are "specifically intended beneficiaries of the audit report who are known to the auditor and for whose benefit it renders the audit report" (*id*. at p. 407) are not without recourse when they "reasonably come to receive and rely on" the report; those persons may recover on a theory of negligent misrepresentation. (*Id*. at p. 406.)

Soderberg and *Leko* rely on *Bily*'s analysis of duty in the context of negligent misrepresentation. Because Mao has not pleaded the elements of negligent misrepresentation, *Soderberg* and *Leko* do not help her. The outofstate cases that Mao cites are similarly unconvincing because they do not analyze duty under California law, as articulated by application of the *Biakanja* factors in *Bily*, *Beacon*, and *Mission Oaks*.

The balance of the remaining factors do not tilt in Mao's favor. As discussed *ante*, section II.A.3.a, Mao has failed to offer any admissible evidence

discussed *ante*, section II.A.3.a, Mao has failed to offer any admissible evidence of economic injury as a result of PIERS's failure to identify the petroleum contamination in 2000 or 2005. The degree of certainty that the plaintiff suffered injury is therefore slight.

As to moral blame, Mao compares PIERS's conduct to that of an attorney who negligently drafts a will or contract, or a broker or escrow holder who negligently mishandles documents in a real estate transaction. We do not find the analogy to an attorney or broker to be apt under the circumstances present here, where the connection between PIERS's conduct and Mao's asserted injury is attenuated. By way of comparison, the court in *Beacon* found "significant moral blame" in the defendants' conduct due to their "unique and well-compensated" role in designing the project and their "awareness that future homeowners would rely on their specialized expertise in designing safe and habitable homes." (*Beacon*, *supra*, 59 Cal.4th at p. 586; see also *Biakanja*, *supra*, 49 Cal.2d at p. 651 [notary public who negligently drafted a will was blameworthy for "highly improper" conduct in engaging in the unauthorized practice of law].) Absent a stronger showing by Mao, we find little blame in PIERS's conduct.

Finally, the " ' "policy of preventing future harm" ' "—in balance with our assessment of the other factors—does not compel a finding of duty to Mao. Of course, one purpose of imposing liability in tort is to deter future harm. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1079.) Holding an environmental consultant liable for harm to a foreseeable, non-client prospective purchaser might act as a general deterrent to negligent conduct, though it is not clear at what cost. We are guided by the discussion in *Bily* and *Beacon* of "private ordering options that would more efficiently protect" the rights of the injured party. (*Beacon*, *supra*, 59 Cal.4th at p. 581.) Given the potentially limited scope of an

(*Beacon*, *supra*, 59 Cal.4th at p. 581.) Given the potentially limited scope of an assessment—whether by contractual design or due to factors on the property, we decline to apply the policy of preventing future harm to favor a finding of duty here.

We conclude based on the circumstances of this case that PIERS did not owe Mao a duty of care at the time that it performed the Phase I and Phase II assessments for the Bank. Viewed in conjunction with our finding that Mao failed to demonstrate a triable issue of material fact on the element of damages, we determine that the trial court properly granted summary judgment in favor of PIERS.

E. **Motion to Intervene**

Appellants contend the trial court erred by denying AIM's motion to intervene. They argue that AIM satisfied the criteria for permissive intervention and that postjudgment intervention is liberally permitted under California law. The order denying AIM's motion to intervene is appealable " 'because it finally and adversely determines the moving party's right to proceed in the action.' " (*Siena Court Homeowners Assn*. *v*. *Green Valley Corp*. (2008) 164 Cal.App.4th 1416, 1422 (*Siena*); see *County of Alameda v*. *Carleson* (1971) 5 Cal.3d 730, 736 [nonparty may appeal from the order denying intervention].)

Section 387 authorizes intervention by a third party in existing litigation. AIM sought permissive intervention pursuant to subdivision (a) of the statute, which provides in relevant part: "Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." (§ 387, subd. (a).) "Timeliness is therefore one of the prerequisites for granting an application to intervene." (*Northern Cal*. *Psychiatric Society v*. *City of Berkeley*

application to intervene." (*Northern Cal*. *Psychiatric Society v*. *City of Berkeley* (1986) 178 Cal.App.3d 90, 109 (*Northern Cal*. *Psychiatric Society*).)

The trial court "has discretion to permit a nonparty to intervene where the following factors are met: (1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action." (*Reliance Ins*. *Co*. *v*. *Superior Court* (2000) 84 Cal.App.4th 383, 386 (*Reliance*).) The determination if the standards for intervention have been met is based on the particular facts in each case. (*City and County of San Francisco v*. *State of California* (2005) 128 Cal.App.4th 1030, 1036 (*San Francisco*).) An order denying leave to intervene under section 387, subdivision (a) is reviewed for abuse of discretion. (*Siena*, *supra*, 164 Cal.App.4th at p. 1428; *San Francisco*, *supra*, at p. 1036.)

The parties dispute whether the motion was timely and further disagree about the nature of AIM's interest in the action, whether intervention will enlarge the issues in the litigation, and if the factors favoring intervention outweigh those in opposition. We find the issue of timeliness to be of primary concern and begin there.

The order denying AIM's motion to intervene stated, "The motion for leave to intervene is untimely and is DENIED. As judgment has already been entered in the case against the original Plaintiff, no case is left in which to intervene." The order cited two cases, *Lohnes v*. *Astron Computer Products*, *supra*, 94 Cal.App.4th 1150 (*Lohnes*) and *Andersen v*. *Barton Memorial Hospital*, *Inc*., *supra*, 166 Cal.App.3d 678 (*Andersen*). To the extent the written order may be read to conclude that intervention was barred by the judgment against Mao, we find that reasoning to be flawed.

find that reasoning to be flawed.

"Upon timely application," is not defined in the statute. At least one Court of Appeal decision has determined that a judgment does not divest the trial court of jurisdiction to permit intervention when otherwise appropriate. In *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434 (*Mallick*), a class representative sought to intervene in an identical class action brought by a different plaintiff, in order to vacate the judgment and remove the class representative in that action. The trial court found that it had no jurisdiction to grant the motions given the judgment and a pending appeal. (*Id*. at p. 436.) The appellate court reversed, explaining that section 387 "formerly limited intervention to a time before trial, but this limitation was removed by the 1977 amendment to the section, which now reads 'Upon timely application' rather than 'At any time before trial.' Thus intervention is possible, if otherwise appropriate, at any time, even after judgment." (*Mallick*, *supra*, at p. 437.) The court reasoned that the petitioner fell within the class and was "thus entitled to appear in the action." (*Id*. at p. 436.) Since "class members may intervene after judgment to protect their interests" (*id*. at p. 437) and "the issue of intervention is not a matter 'embraced in or affected by the judgment' " (*ibid*., citing *County of Alameda v. Carleson*, *supra*, 5 Cal.3d 730), the court concluded that the trial court had jurisdiction to consider the motion to intervene despite the judgment and appeal. (*Mallick*, *supra*, at pp. 437-438.)

Appellants point to *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459 (*Jade K*.) and *Nasongkhla v. Gonzalez* (1994) 29 Cal.App.4th Supp. 1 (*Nasongkhla*) as further support for postjudgment intervention. While both cases involved intervention by an insurer for purposes of vacating a default judgment against the defendant, *Jade K*. offered no analysis of timeliness under section 387, instead focusing on the merits of the motion to vacate the default judgment. (*Jade K*., *supra*, at p. 1470.) *Nasongkhla* similarly did not address timeliness under section

supra, at p. 1470.) *Nasongkhla* similarly did not address timeliness under section 387 but noted only that "[a]n insurer may, in some circumstances, intervene and set aside a default against its insured as to itself." (*Nasongkhla*, *supra*, at p. Supp. 3.) Accordingly, we draw little guidance from either case. (*Sonic-Calabasas A*, *Inc*. *v*. *Moreno* (2013) 57 Cal.4th 1109, 1160 [" 'cases are not authority for propositions not considered' "].) We nevertheless agree, for the reasons stated in *Mallick*, that postjudgment intervention is not per se untimely.

Andersen and *Lohnes*, cited in the trial court's written order, do not alter our conclusion. Both cases involved the filing of a complaint in intervention after the original plaintiffs had already filed a voluntary dismissal of part or all of the action. The court in *Andersen* observed in a footnote that the intervener's action against a previously-dismissed defendant failed because, under section 387, " '[a]n intervention takes place when a third person is permitted to become a party to an action or proceeding *between other persons* . . . .' (Italics added.)" (*Andersen*, *supra*, 166 Cal.App.3d at p. 685, fn. 9.) Because the plaintiffs had already dismissed the action against one defendant, "there was no action pending against [that defendant] into which anyone could intervene." (*Ibid*.) The court in *Lohnes* similarly explained that a complaint in intervention filed prior to the plaintiff's voluntary dismissal of the underlying complaint could endure after the dismissal, but the "intervener could not file a new complaint in intervention when the underlying action had already been dismissed ([*Andersen*, *supra*,] 166 Cal.App.3d [at p.] 685, fn. 9), and the one-year statute of limitations had already run on the underlying action." (*Lohnes*, *supra*, 94 Cal.App.4th at p. 1154.)

We do not find the circumstances of a voluntary dismissal sufficiently analogous to apply the same reasoning here and, in any event, are not bound to affirm or reverse the trial court's decision based on its reasoning. (*D'Amico v*. *Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [it is a settled principle " 'that

Board of Medical Examiners (1974) 11 Cal.3d 1, 19 [it is a settled principle " 'that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason' "].) The trial court did not rule that AIM's motion to intervene was untimely only on the basis of the judgment. The court stated at the hearing "that under these facts I have less authority to do this, and to the extent it's discretionary I'm going to deny the motion." Given AIM's posture in the litigation and the timing of its motion to intervene, we find no abuse of discretion in the trial court's determination that AIM failed to meet the timeliness requirement under section 387.

AIM argues that its application was timely because it moved to intervene less than two weeks after the trial court entered judgment against Mao. This is not entirely correct. Any consideration of timeliness must at least begin from the date the trial court granted summary judgment in favor of PIERS, and more appropriately should begin from the time that AIM knew or should have known that its interests in the litigation were at risk. (*Ziani*, *supra*, 243 Cal.App.4th at p. 282 [timeliness "under section 387 should be determined based on the date the proposed interveners knew or should have known their interests in the litigation were not being adequately represented"]; see also *Allen v*. *California Water & Tel*. *Co*. (1947) 31 Cal.2d 104, 108 ["a right to intervene should be asserted within a reasonable time and . . . the intervenor must not be guilty of an unreasonable delay after knowledge of the suit"].)

In *Northern Cal*. *Psychiatric Society*, the intervener was a citizen coalition that earlier in the litigation had filed an amicus curiae brief in support of one of the parties. (*Northern Cal*. *Psychiatric Society*, *supra*, 178 Cal.App.3d at pp. 97-98.) Months later, after the trial court heard oral argument on a motion for summary judgment, the coalition formally moved to intervene in the action and was denied. (*Id*. at p. 98.) The appellate court found no abuse of discretion,

was denied. (*Id*. at p. 98.) The appellate court found no abuse of discretion, noting that the coalition "had been involved in the lawsuit from the outset, and had filed an amicus brief in support of the City . . . six months before the motion for summary judgment was filed and heard." (*Id*. at p. 109.)

Like in *Northern Cal*. *Psychiatric Society*, AIM does not contend that it was unaware of Mao's litigation against PIERS. Mao initiated the litigation in 2011. PIERS moved for summary judgment in January 2014. The trial court issued a tentative decision to grant the motion for summary judgment on April 4, 2014, which Mao did not contest, and filed the order granting summary judgment in favor of PIERS one week later. The court entered judgment for PIERS on May 15, 2014, and AIM filed its ex parte motion for leave to file a complaint in intervention on June 10, 2014.

AIM thus sought to intervene more than three weeks after the entry of judgment and more than eight weeks after the granting of summary judgment in favor of PIERS. The trial court recalled this timing and the court's deliberate delay before signing the judgment, explaining, "[W]e're looking at a little more time than just the judgment. I mean, I think you'd be in a different position if the motion had been filed before the judgment was signed. [¶] . . . [¶] And I often wait a little bit to see if anybody's going to file a motion for new trial or reconsideration after I grant a motion for summary judgment and nothing came in." Considering Mao's position as the head of her own closely-held corporation, AIM knew or should have known as of that time—and realistically as of the filing of the motion for summary judgment—that its interests as the property owner may not have been adequately represented.

AIM raises an additional point—that even a delay in pursuing intervention should not have affected its right to intervene, because intervention is the only means for AIM to obtain redress against PIERS, and intervention would cause no

means for AIM to obtain redress against PIERS, and intervention would cause no prejudice to PIERS other than requiring PIERS to defend against AIM's claims. AIM cites *Truck Ins*. *Exchange v*. *Superior Court* (1997) 60 Cal.App.4th 342, 351, in which the court reasoned that "timeliness is hardly a reason to bar intervention when a direct interest is demonstrated and the real parties in interest have not shown any prejudice other than being required to prove their case." This statement was premised on the court's conclusion that the intervener had satisfied the factors for intervention, based largely on the "direct and substantial effect" that the underlying action would have on the intervener's right to seek equitable contribution from the other insurers of the defendant facing a default. (*Id*. at p. 346.)

In contrast, we make no such finding here. AIM's interest in prosecuting the complaint in intervention in order to recover remedial costs it incurred as a result of PIERS' alleged negligence, and AIM's property interest as the owner of the property, are not interests "of such a direct and immediate nature that the moving party ' "will either gain or lose by the direct legal operation and effect of the judgment." ' " (*San Francisco*, *supra*, 128 Cal.App.4th at p. 1037.) The judgment against Mao does not threaten AIM's property interest. (Cf. *Save Oxnard Shores v*. *California Coastal Com*. (1986) 179 Cal.App.3d 140, 146 [interveners sought to set aside action that "would deprive them of economic development of their property and constitute a taking without just compensation"].) AIM has alleged an interest and damages independent of Mao; its interest is affected by the judgment only to the extent that Mao is the majority shareholder and appears to be closely entwined with AIM. A judgment against Mao does not " '*of itself* add[] to or detract[] from' " AIM's independent legal rights. (*San Francisco*, *supra*, at p. 1037; see also *Siena*, *supra*, 164 Cal.App.4th at pp. 1428-1429 [intervener condominium association lacked direct and

at pp. 1428-1429 [intervener condominium association lacked direct and immediate interest in construction defect action brought by neighboring association despite sharing common areas affected by the suit, because a judgment would not affect the respective obligations of the two associations under a joint use and maintenance agreement]; cf. *Reliance*, *supra*, 84 Cal.App.4th at p. 387 [intervener insurer may be required to satisfy any default judgment entered in the litigation against its insured].)

This applies equally to AIM's argument that because it was not permitted to intervene, "it lost by operation of" the trial court's order granting summary judgment for PIERS, since its negligence claim against PIERS is now time-barred under the statute of limitations. The judgment against Mao did not of itself deprive AIM of recourse against PIERS by causing the statute of limitations to run, just as the lost opportunity to litigate a negligence claim against PIERS does not transform AIM's indirect and consequential interest in the litigation to one that is direct and immediate. We conclude that any effect on AIM is indirect and consequential, and thereby insufficient for intervention. (*San Francisco*, *supra*, 128 Cal.App.4th at p. 1037.)

We conclude that the trial court did not abuse its discretion by denying AIM intervention in this case on the ground of timeliness. Consideration of the remaining factors for permissive intervention would be superfluous.

III. **disposition**

The judgment and the order denying the motion for leave to intervene are affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

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