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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HAIKUHE CHICHIAN, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B278953 (Los Angeles County Super. Ct. No. BC523698)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Affirmed.

David L. Scott for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendants and Respondents.

* * * * * *

A homeowner sued a city for inverse condemnation, contending the repair and stabilization work the city performed on an adjacent hillside damaged the home and its downslope patio. Following a bench trial on the issue of liability, the trial court found that the homeowner did not carry its burden of proving that the city's work was a "cause" or a "substantial factor in causing the damage" to the home or patio. On appeal, the homeowner argues that the trial court misapplied the law, wrongly excluded evidence, and improperly evaluated the evidence. We reject each of these challenges and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The Property*

Between 1999 and 2001, Avik Yurdumyan (husband) and Maro Burunsuzyan (wife)—then a married couple—built a house on a hillside overlooking the Hollywood Reservoir (the Property). Because the house is built at the top of the hill as well as the upper part of the slope, the western portion of the house is built on concrete slab, and the eastern portion is built on wooden support beams. Two staircases lead down from an exterior deck on the eastern portion of the house to a patio partway down the slope; the patio rests atop 12 or 14 rebar-enforced concrete "piles" or "caissons" that are sunk into the hillside for support. Just to the south of the patio is a sump pump designed to pump any water runoff from the home back up to the street that runs along the western side of the home.

At the time of the home's construction, husband recorded a written acknowledgement that the Property was built on "uncertified fill" and "landslide debris," and thus that he was "fully aware of the potential for settlement and cracking of the

rear-yard stairways, [and] retaining walls and slabs." He also executed an affidavit regarding the "sump pump" in which he "agree[d] to maintain a . . . (dual) pump system in proper working condition at all times."

B. *Hillside Stabilization and Repair Project*

In late 2004 and early 2005, Southern California experienced record high levels of rainfall. This deluge caused major landslides along the slopes to the south of the Property. The hill beneath and to the east of the Property itself remained intact.

In 2009, defendants City of Los Angeles and the Los Angeles Department of Water and Power (collectively, the City defendants) started a project to stabilize and repair the damage to the hillside just to the south of the Property (the Project). The Project was to proceed in two phases: In 2009 through 2010, the City defendants stabilized the hillside (phase one); in 2011 through 2013, the City defendants removed the current material on the slopes, replaced it with new fill, and compacted that fill (phase two).

On November 2, 2009, one of the City defendants' excavators struck and scraped one of the caissons on the Property several times.

Just over two years later, on January 28, 2012 and February 8, 2012, one of the City defendants' contractors used a vibratory compacting machine to compact the new fill on the hillside to the south of the Property.

II. Procedural Background

A. *Complaint*

In 2013, plaintiff Haikuhe Chichian—the trustee of the trust that holds title to the Property—sued the City defendants

for inverse condemnation. The complaint alleged that the City defendants' Project was "a substantial contributing cause of . . . damage to the improvements on the [P]roperty." Plaintiff sought "in excess of $500,000" to repair the damage.

B. *Trial*

The parties agreed to bifurcate the issues of liability and damages, and the matter proceeded to a four-day bench trial on liability.

1. *Wife's testimony*

Wife testified that prior to the Project's commencement in 2009, the house and patio had, at most, "minor hairline cracks." She said that the house "vibrat[ed] very violently" when the City defendants' workers struck the caisson beneath the patio with the excavator in 2009, and went on to testify that she thereafter started noticing "large," "unusual," and "significant" cracks in the patio and noticed that the floor of the house's dining room was sloping. She testified that the City defendants' use of the vibratory compacting machine in January 2012 caused the house to vibrate so much that the bathwater in the upstairs bathtub sloshed around.

2. *Expert testimony*

The remainder of the trial came down to a proverbial "battle of the experts."

a. Plaintiff's experts

Plaintiff called two expert witnesses.

Plaintiff called a geotechnical engineer. He testified that phase one of the Project had damaged the patio in two ways. First, the City defendants' excavation of the hillside immediately south of the patio without shoring it up allowed the patio to move *southward* toward the Project. Second, the City defendants'

striking of the caisson and the ensuing vibrations caused the sump pump to move southward faster than the pump's drain line, which caused the drain line to crack, water to leak, and the soil to become saturated in a way that accelerated the patio's southward movement. The geotechnical engineer also opined that the cracks in the patio could not be due to settlement of the patio on the uncertified fill because there was no "evidence of settlement" prior to the Project.

Plaintiff also called a structural engineer. The structural engineer acknowledged that the wooden support beams beneath the house's dining room suffered from "a lot of dry rot" but opined that the dry rot was "irrelevant." Instead, he stated that the City defendants' use of a vibratory compactor either "caused" or "exacerbated" the already-existing, dry-rot cracks in those beams. The weakening of this structural support, he went on, caused further cracks throughout the house.

b. The City defendants' experts

The City defendants called three expert witnesses.

They called a geophysicist. He testified that the patio was built on "poorly compacted fill" that had "potential to settle and crack." This potential was even greater here because the fill under the patio was comprised of clay soil that expands and contracts to a greater degree when it gets wet and then dries out and because the non-waterproofed sump pump right next to the patio was leaking water into that soil. The cracks in the patio, he opined, were attributable to this settlement. The expert also explained that plaintiff's geotechnical engineer was incorrect in his opinion that the patio was moving southward because such movement would result in bigger cracks on the southern part of the patio as compared with the northern part, yet the pattern of

cracks was "the complete opposite."

The City defendants called their own geotechnical engineer. The engineer measured the vibratory impacts on the ground from repeated strikes from an excavator as well as from the use of a vibratory compactor. Comparing this data with data points collected and amalgamated by the United States Bureau of Mines to assess whether ground impacts of a certain magnitude and amplitude would cause damage to structures at a particular distance from those impacts, the expert opined that the excavator strikes and vibratory compactor were statistically unlikely to damage the patio or house. This was true, he opined, even though people inside the house could feel those vibrations. The expert further refuted plaintiff's geotechnical engineer's opinion that the excavator strikes caused the sump pump to separate from its drain, explaining that the sump pump and drain pipe were the same distance from the strikes and thus were not moving away from one another; nothing the City defendants did, he concluded, had caused the sump pump to leak.

The City defendants finally called an architect. He opined that the house suffered from several "design and construction deficiencies" that would cause cracks to appear in and around the house—namely, (1) disintegrated floor supports beneath the house's dining room due to long-term water intrusion from the exterior deck, which occurred because there was no waterproofing or flashing where the deck and house come together; (2) insufficient floor supports beneath the upstairs master bedroom closet and bath, which occurred because the supports were built for carpet and not the heavier tile that was ultimately installed; (3) movement between the two concrete slabs used to construct the exterior deck, which occurred because the deck was

constructed with multiple concrete pours (rather than a single pour); and (4) release of water into the hillside, which occurred because some of the drains from the house drained into the slope itself and because the sump pump's burnt-out wires were proof that the sump pump had not been pumping water back to the street for some time. The architect also noted that several photos wife took of the patio prior to the Project showed the same cracks that existed in 2015.

C. *Statement of Decision*

The trial court issued a six-page statement of decision. After summarizing the testimony, the court explained the pertinent legal principles, including that it was plaintiff's burden to show "a substantial cause-and-effect relationship" between the Project and the damage to the Property that "exclude[ed] the probability that other forces *alone* produced" the damage.

The court found that plaintiff "failed to meet its burden" of proving that the City defendants' activities were "a cause" or "a substantial factor in causing the damage to" the home or the patio; in the court's view, "[o]ther factors alone were the cause of the damage to" the home and to the patio.

With regard to the home, the court found that "the cause of the damage to the [home] were the structural deficiencies uncovered during the investigation of the residence"—namely (1) "substantial dry rot" "due to improper flashing and maintenance of the property," (2) "increased weight of the tiles on the second floor which the flooring was not designed to hold," and (3) the testimony of the City defendants' geotechnical engineer that the vibrations from the 2009 excavator strike and the use of the vibratory compactor in 2012 "were neither a cause nor even a concurrent cause of the damage to the" home. The court found

the testimony of plaintiff's structural engineer to be "less than compelling" and expressed "concern[s]" about the "accuracy" of wife's testimony that the house had only "hairline" cracks prior to 2009.

With regard to the patio, the court found that several photos taken by wife prior to the Project showed "the same cracks" as photos taken after the City defendants' allegedly damaging activities. The fact that these cracks had existed long before the City's activities was proof that the "damage to the patio was caused by the fact that it was built on un-certified fill as acknowledged by [husband] and verified by [the City defendants'] experts." At the same time, the long-standing existence of the cracks "call[ed] into question" the "entire report" of plaintiff's geotechnical engineer because a major premise of that report was that there was no damage prior to the City defendants' activities. The photos also prompted the court to further question "the accuracy of [wife's] assessment" that the house and patio had nothing but "hairline" cracks prior to the Project.

D. *Appeal*

Following the entry of judgment for the City defendants, plaintiff filed this timely appeal.

DISCUSSION

Our state Constitution provides that "[p]rivate property may be taken or damaged for a public use . . . only when just compensation . . . has first been paid to . . . the owner." (Cal. Const., art. I, § 19, subd. (a).) This provision empowers private landowners to sue for inverse condemnation when their property is damaged by public projects. (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 558 (*Belair*).) To prevail on a

claim for inverse condemnation for damage to property, the landowner-plaintiff must prove (1) it owns private property, (2) its property was damaged, (3) the defendant was in the midst of a public project, and (4) the public project proximately caused the damage to the property. (*California State Automobile Assn. v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 480, 484 (*California State Automobile*); *Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486 (*Bookout*).) The landowner-plaintiff need not prove that the damage was foreseeable (*Belair*, at p. 558) or that the public entity was negligent (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 257).

With respect to "proximate causation," the landowner-plaintiff must establish a "'"substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury." [Citations.]'" (*Belair*, *supra*, 47 Cal.3d at p. 559.) Where it is shown that more than one cause contributed to the damage, the landowner-plaintiff need only establish that the public project was "a substantial contributing factor" to, or "a substantial concurring cause" of, that damage. (*Id.* at pp. 559-560; *California State Automobile*, *supra*, 138 Cal.App.4th at p. 481.)

In this appeal, plaintiff challenges the trial court's findings regarding causation on what boil down to three grounds: (1) the court did not apply the correct legal principles (because it mis-assigned the burden of proof and because it improperly considered evidence of the homeowner's contributory negligence); (2) the court improperly cut off plaintiff's geotechnical engineer's testimony about the caissons; and (3) the court placed too much weight on the pre-Project photographs of the patio.

The first issue chiefly involves an alleged misapplication of the law, which is a legal question we review de novo. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) The second issue involves an evidentiary ruling, which we review for an abuse of discretion. (*Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 786.) And the third issue, and to some extent the first issue, challenge the trial court's factual findings regarding causation, and we review such a challenge for substantial evidence. (*Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 555-556 [trial court's finding of lack of causation in inverse condemnation case "is a finding of historical fact" reviewed for substantial evidence].) In reviewing a finding for substantial evidence, we view the evidence in the light most favorable to that finding. (*Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1141.) We also defer to the trial court's credibility findings, including its findings regarding the soundness of expert testimony. (*City of El Monte v. Ramirez* (1982) 128 Cal.App.3d 1005, 1011-1012.) Under no circumstances may we "reweigh the evidence." (*Bookout*, *supra*, 186 Cal.App.4th at p. 1486.)

I. Legal Errors

A. *Mis-assignment of the Burden of Proof*

Plaintiff argues the trial court erred in requiring it to prove that the City defendants' activities were a "substantial concurring cause" of the damage to the house and patio. In plaintiff's view, once its experts offered testimony that the City defendants' actions were a cause of the damage, the court was required to shift the burden to the City defendants to disprove any causal link. For support, plaintiff cites language from *California State Automobile*, *supra*, 138 Cal.App.4th 474. The

court's failure to shift the burden, plaintiff asserts, was legal error that mandates reversal.

In *California State Automobile*, the landowner-plaintiff proved that all three possible contributing causes to the raw sewage damage to his home—"tree roots, [inadequate] slope [of the sewer main] and standing water in the [sewer] main"—were "entirely within the City[-defendant]'s control," but the trial court still ruled in the City's favor because the landowner-plaintiff had not also proven "how or why" the resulting blockage "in the City's main occurred." (*California State Automobile*, *supra*, 138 Cal.App.4th at pp. 481, 484.) The Court of Appeal held this was error, explaining: "[W]here, as here, there were three substantial *factors* in causing the sewage backup, . . . the burden would shift to the public entity to produce evidence that would show that other *forces* alone produced the injury." (*Id.* at p. 483, italics added.)

California State Automobile does not support plaintiff. By its plain language, the burden shifting referred to in that case only kicked in after the plaintiff proved that "three substantial factors" "within the City's control" had "caus[ed]" the damage. (*California State Automobile*, *supra*, 138 Cal.App.4th at pp. 481-484.) In this case, the trial court found that plaintiff had *not* proven that any of the City defendants' actions was "a cause" or "a substantial factor in causing the damage to" the home or the patio. Consequently, plaintiff's showing never triggered the burden shifting referenced in *California State Automobile*.

Plaintiff makes three arguments in response.

First, plaintiff argues that a trial court assessing whether a landowner-plaintiff has proven that a public entity's project was a substantial factor in causing damage to its property (and thus

whether to shift the burden to the public entity under *California State Automobile*) is confined to looking only at the plaintiff's evidence—and may *not* consider any evidence presented by the public entity. We reject this argument. Nothing in *California State Automobile* calls for such a compartmentalized evaluation of the evidence. We further decline to adopt such a rule on our own. A trial court restricted to considering the plaintiff's evidence regarding causation—and *only* the plaintiff's evidence—would be hard pressed not to find that the public entity-defendant's actions were a contributing cause. This would effectively shift the burden of proof in the vast majority of cases, thereby contravening the well-established principle—noted in *California State Automobile* itself—that "[t]he *plaintiff*" in an inverse condemnation case "has the burden of proving a substantial causal relationship between the defendant's act or omission and the injury." (*Bookout*, *supra*, 186 Cal.App.4th at p. 1486; *California State Automobile*, *supra*, 138 Cal.App.4th at p. 481.) We decline to read *California State Automobile* as being internally inconsistent.

Second, plaintiff asserts that the trial court misapplied *California State Automobile* because the court examined causal "factors" while the case speaks in terms of causal "forces." This assertion is without merit for the simple reason that *California State Automobile* itself treats the two terms interchangeably, as the italicized words in the above quoted passage indicate. (*California State Automobile*, *supra*, 138 Cal.App.4th at p. 483.)

Lastly, plaintiff seems to suggest that *California State Automobile*'s burden shifting mechanism should kick in because plaintiff *did* prove causation. This amounts to a challenge to the trial court's factual findings regarding causation, which we

discuss below.

B. *Improper Consideration of Contributory Negligence*

Plaintiff contends that the trial court erred because a landowner-plaintiff's contributory negligence may not be considered in evaluating multiple concurrent causes of damage to private property. For support, plaintiff cites *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77 (*Blau*). Because the trial court here considered—and, indeed, ultimately concluded—that the damage to the home and patio was caused by construction and maintenance defects attributable to husband and wife (and, by extension, plaintiff), plaintiff concludes that the trial court committed reversible error.

This argument lacks merit. *Blau* held that a trial court errs in instructing a jury that it must return a verdict for a public entity-defendant in an inverse condemnation case if it finds that the landowner-plaintiff's negligence was a substantial contributing cause, *even if it finds that the public entity-defendant's conduct was also a substantial contributing cause*. (*Blau*, *supra*, 32 Cal.App.3d at pp. 83-85 & fn. 2.) This holding is entirely consistent with the general rule regarding causation in inverse condemnation cases that a public entity is liable as long as its acts substantially contribute to the damage. *Blau* did no more than articulate a logical corollary of that general rule—namely, that other contributory causes (including those attributable to the landowner-plaintiff) do not cancel out the public entity's liability once that liability is proven. At no point did *Blau* hold that the landowner-plaintiff's acts are irrelevant, inadmissible, or incapable of constituting the sole cause of the damage to the property. Thus, the trial court did not err in considering evidence that defects in the construction and

maintenance of the house and patio caused the damage to the Property. And to the extent plaintiff argues that the trial court erred in finding, as a factual matter, that these construction and maintenance issues were the cause, we address that substantial evidence challenge below.

II. Evidentiary Errors

Plaintiff articulates or otherwise suggests that the trial court made three evidentiary errors that individually and collectively warrant reversal: (1) it improperly cut off plaintiff's geotechnical engineer's testimony about the caissons; (2) it allowed the City defendants to elicit evidence on construction and maintenance issues as possible causes of the damage to the house and patio; and (3) it considered photographs taken in 2015 without requiring the City defendants to account for the whereabouts of photographs they took of the property in 2012. We need only consider the first argument (which defeats plaintiff's argument of collective evidentiary error): The second argument lacks merit because, as discussed above, evidence that a landowner-plaintiff's acts may have substantially contributed to damage is both relevant and admissible; and the third argument was forfeited because plaintiff did not object on that ground before the trial court (Evid. Code, § 353).

The trial court did not abuse its discretion in limiting the plaintiff's geotechnical engineer's testimony about the caissons. During direct examination, this expert testified to how the City defendants' excavator damaged the southernmost caisson and how the vibrations from that impact damaged the sump pump's drain (and hence the patio). However, when plaintiff's attorney started asking questions about what the caissons were made of and their dimensions, the trial court "interject[ed]" under

Evidence Code section 352 because "this caisson issue is not apparently relevant to the things at hand." During cross-examination, the City defendants' attorney asked several questions about the construction of the caissons before the trial court interrupted, saying, "we're getting—352 . . . I've heard enough about the caissons. I know what caissons are."

Contrary to what plaintiff argues on appeal, the trial court did not cut off *all* testimony about the caissons or preclude plaintiff from proving that the excavator strikes to one caisson contributed to the damage to the home and patio. That testimony came in. Instead, the trial court excluded under Evidence Code section 352 testimony regarding the composition and structure of the caissons themselves, both because the court knew "what caissons are" and because their composition was not directly pertinent to plaintiff's theory of causation. Evidence Code section 352 grants trial courts the "discretion" to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The trial court did not abuse that discretion in excluding testimony that was tangential to plaintiff's theory of causation when it would consume undue time. Plaintiff makes the bold argument that Evidence Code section 352 should simply not apply in bench trials because the statute refers to "substantial danger of . . . misleading *the jury*." (*Ibid.*, italics added.) However, that *one* of the grounds for excluding evidence under Evidence Code section 352 applies only in jury trials does not mean that *all* of the remaining grounds that do not refer to juries only apply in jury trials or that the statute itself does not apply at all in bench

trials.

III. Substantial Evidence

To the extent plaintiff challenges the substantiality of the evidence supporting the trial court's findings that the damage to the house and patio were caused by construction and maintenance issues (and *not* by the City defendants' Project), we reject those challenges. The trial court found that the damage to the house was caused by substantial dry rot, by improper support of the upstairs flooring, and by crediting the City defendants' geotechnical engineer's testimony that the vibrations from the 2009 caisson strikes and 2012 vibratory compactor could not have damaged the house or patio, and that finding of causation is supported by the trial testimony when viewed in the light most favorable to the court's finding. The trial court found that the damage to the patio was caused by settling because the cracks in the patio predated the Project, and that finding of causation is supported both by photographic evidence as well as testimony.

Plaintiff asserts that the trial court's decision to place weight on the pre-Project photographs over plaintiff's experts' testimony was "outrageous" because the photographs are just a "scintilla of evidence." By this argument, plaintiff is inviting us to reweigh the evidence. This is an invitation we must decline. (*Bookout*, *supra*, 186 Cal.App.4th at p. 1486.) Nor is there a basis to reweigh the evidence, as the photographs constitute unbiased and contemporaneous proof of the condition of the patio. Plaintiff further asserts that there were not photographs from prior to 2009, and that wife testified that there were only "hairline cracks" prior to the Project, such that there is no proof that the cracks date all the way back to the patio's construction, which is what one would expect if the cracks were due to settlement of the

uncertified fill below the patio. We reject this further assertion because wife's testimony regarding the extent of cracking, as the trial court intimated, was substantially impeached by the photographs. If a "trier of fact is not required to believe the testimony of [a] witness, even if uncontradicted" (*Bookout*, at p. 1487), we are certainly not compelled to credit a witness whose testimony *is* contradicted, particularly when we are otherwise required to view the evidence in the light most favorable to the verdict below. Under the applicable standard of review, we must resolve any doubts about the age of the cracks against plaintiff.

DISPOSITION

The judgment is affirmed. The City defendants are entitled to their costs.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST