Filed 5/18/10 Karim v. City of Pomona CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ZAHID KARIM et al., Plaintiffs and Respondents, v. CITY OF POMONA, Defendant and Appellant.	B210049 (Los Angeles County Super. Ct. No. KC047449J)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dan T. Oki, Judge. Affirmed in part, reversed in part and remanded with directions.

Murphy, Campbell, Guthrie & Alliston, George E. Murphy, Suzanne M. Nicholson; Law Office of Robert J. Gokoo and Robert J. Gokoo for Defendant and Appellant.

Rutan & Tucker and Karen E. Walter for Plaintiffs and Respondents.

The first question presented is whether a landslide on an improved, public slope[1] supports liability for inverse condemnation and nuisance due to the damage it caused to private property. The answer is yes. The second question is whether appellant City of Pomona (City) was entitled to an offset against inverse condemnation damages pursuant to Code of Civil Procedure section 877[2] for the amount paid in settlement by codefendants in the nuisance cause of action. The answer is no. The final question is whether the attorney fee award in favor of the respondents (homeowners)[3] under section 1036 was proper. Because the record fails to establish whether the trial court adhered to the law when it determined the amount of the award, the matter must be remanded. We therefore reverse the judgment for a recalculation of the attorney fee award. In all other respects, the judgment is affirmed.

FACTS

In 1977, Pacesetter Homes, Inc. (Pacesetter)[4] hired Douglas Moran (Moran) to conduct a geological investigation of a development site in a portion of the City called Phillips Ranch. He discovered two ancient landslides.[5] To stabilize the building areas,

---

[1] The slope was improved by a private developer. But there is no dispute that the City approved the plans for the slope, the slope was eventually conveyed to the City, and the City can be held liable for inverse condemnation and nuisance the same as if the City had improved the slope itself.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] The homeowners are Zahid Karim, Raina Karim, Abid Karim, Tehseen Desnavi, Horace Lewis, Brenda Lewis, Rosie Banales, Linh Tan, Paul Tran, Albert Alves, Michele Alves, Warren Razza, Jennice Razza, Michele Keetin and Glover Keetin.

[4] In the homeowners' first amended complaint, they allege that Pacesetter merged into Pacesetter Business Properties.

[5] The two ancient landslides were located on tract 33218 of Phillips Ranch. That tract was divided into smaller tracts. The first ancient landslide was on tract 34603 and

he recommended that the developer remove the loosened rock and soil, excavate down to the stable bedrock, and build buttresses of compacted fill. His report, including his recommendation, was submitted along with reports regarding soil engineering, testing and analysis to the City in order to obtain a grading permit. His recommendation was followed as to one ancient landslide. Before work began on the second ancient landslide, Pacesetter terminated Moran's services. He was informed that his charges were too high, he had taken too much time and required the contractor to dig too deep, and that the rest of the project could proceed more rapidly at a lower cost. Moran informed the City that someone else would be responsible for inspecting the work.

The second ancient landslide was left intact but graded and the homeowners' homes were constructed above the newly graded slope (slope).[6] The backyards were located over ancient landslide material. Afterwards, the open space on the slope was conveyed to the City.

From 1992 to 1998, Richard Kaae (Kaae) had a contract with the City to perform rodent control. He dealt with gophers on the slope. When he started, there was a moderate infestation. By 1998, the gophers were under control. In 2003, the City, represented by Larry LaFrenz (LaFrenz), Parks Contract Coordinator, entered into a contract with Artistic Maintenance for landscaping services in Phillips Ranch. The contract was terminated in 2005. From 1998 to 2005, the City made no effort to control the gopher population. By 2005, the slope was riddled with gopher mounds and burrows.

In the winter of 2004-2005, Southern California experienced heavy rainfall. A portion of the second ancient landslide was reactivated, causing a landslide (2005 landslide) on the graded slope and damaging the homeowners' property. They sued the

---

the second ancient landslide was on tract 36876. Sometimes at trial tract 36876 was referred to as Lot 53.

[6] In its opening brief, the City stated: "The repair plans approved by the City for the tract next to [the homeowners'] properties were submitted by the developer of the down-slope properties on Rainbow Ridge. The plans included removal of some of the ancient landslide debris in order to improve stability."

City for inverse condemnation, dangerous condition of public property and nuisance. In addition, the homeowners sued Pacesetter for strict liability, nuisance, and failure to provide lateral and subjacent support, and they sued Artistic Maintenance for negligence.

Before trial, Artistic Maintenance settled with the homeowners for $375,000 and Pacesetter settled for $750,000. The trial court granted motions establishing the good faith of their settlements.

The homeowners and the City waived their right to a jury. Trial was bifurcated into a liability phase and damages phase.

At trial, Moran explained his recommendations for repairing the ancient landslide on the slope. When asked if he felt that removal of the landslide debris would have been sufficient, he stated: "No. We did not feel that simpl[e] removal would be sufficient because the materials, the geologic structure, was unfavorable. And . . . what would have been exposed by a simple removal would have been just as unstable as what was there before." He also testified that gophers and other "critters" dig into material that is easily disturbed, such as ancient landslide material, and "make a lot of borings." They leave open holes "into which water can flow [easily] and loosen soil through which water permeates more rapidly. So they facilitate the introduction of water. And the more gopher borings or animal borings you have, the greater the potential for surface water getting into the subsurface [which] . . . contribute[s] to the occurrence of sliding."

The homeowners' expert, Gregory Axten (Axten), reviewed the City-approved engineering plan for stabilizing the slope, maps of the ancient landslide and the 2005 landslide, photographs, evidence obtained from large diameter borings, bedrock samples and measurements of bedrock angles. He explained that the developer removed material at the top of the ancient landslide. With a long, narrow landslide like this one, removing material at the top "is almost always a destabilizing factor." Axten explained that instability is driven by the groundwater in the slope because groundwater creates buoyancy. That buoyancy is resisted by the top part of the landslide. If the top part is removed, the resistance is removed and the slope becomes more fragile.

Axten performed a slope stability analysis to determine the slope's factor of safety before and after it was graded. In doing so, he considered variables for geometry, shear strength of materials and groundwater levels. For the graded slope, he assumed constant variables for geometry and groundwater levels and adjusted the variables for shear strength until his model achieved a safety factor of 1.0. At a safety factor of 1.0, the model reflected a failing slope. For the unimproved slope, he kept the same variables for geometry and groundwater. He calculated the safety factor of the slope before it was graded by adding in the variables for the landslide materials at the top of the slope, i.e., the weight of the original soil that was removed. His model established a safety factor of 1.6 and he therefore opined that the grading made the slope 60 percent less stable.

According to Axten, the grading of the slope "was a substantial contributing cause" of the 2005 landslide. In addition, he concluded that the burrowing animal population was a second substantial contributing cause because their burrows increased the permeability of the soil.

Timothy Lawson (Lawson), the City's expert, testified that the slope's stability did not change when it was graded, and that slope stability was not significantly impacted by the gopher population. When asked if Pacesetter properly developed its property from a geotechnical perspective, Lawson stated: "Absolutely not." He elaborated as follows: "When [the homes] were developed, the geotechnical consultant should have recognized there was an ancient landslide over the reapportion of those lots, performed engineering analysis, performed investigation, and stabilized those homes so that they would either not be impacted by a landslide that occurred on the slope below or completely remediate the landslide so a landslide would not occur of any form whatsoever." In Lawson's opinion, the 2005 landslide was triggered by an increase in ground water within the landslide materials.[7]

---

[7] The parties stipulated to the dismissal of the dangerous condition cause of action in exchange for a waiver of costs by the City.

After the liability phase of the trial was completed, the trial court issued a statement of decision and indicated the following: The City became the owner of a tract of sloped land to the rear of the homeowners' lots through dedication when a tract map was recorded in January 1980. By 1983, through a lot line adjustment, the City was the owner of all the sloped land to the rear of the homeowners' lots. "The overwhelming weight of the evidence demonstrates that the grading was an inadequate effort to repair the ancient landslide on the slope, as testified by [the homeowners'] experts. Notably, the experts for both [the homeowners] and the City agree that the ancient landslide debris was not adequately removed in 1979-1980 and did not stabilize the slope." A witness observed gopher mounds in the City's open space. Subsequent investigation revealed thousands of burrows and mounds. "[T]he primary cause of the landslide was the failure of the developer to remove the debris of the ancient landslide down to the stable bedrock." The City's decision to cease all rodent control on the slope in 1999 was a substantial concurring cause. The trial court found the City liable for inverse condemnation. In addition, the trial court found that the unstable condition of the slope was a nuisance.

When the damages phase of the trial commenced, the parties stipulated to damages to real property and personal property, and to relocation expenses. The trial court then heard evidence of damages related to the homeowners' annoyance, discomfort and inconvenience due to the nuisance.

The City filed a motion for offset based on the homeowners' settlement with Artistic Management and Pacesetter Business Properties. The trial court granted an offset of $969,750 as to nuisance liability.

Judgment was entered. On the nuisance claim, the trial court awarded a total of $3,001,209.50. Regarding inverse condemnation, it awarded a total of $3,420,959.57 and provided: "The [trial court] recognizes that it has awarded some of the same damages under both [i]nverse [c]ondemnation and [n]uisance. [The homeowners] are only entitled to recover their damages one time. Satisfaction of any damage award under the nuisance cause of action shall be a credit against damages awarded under the [i]nverse

[c]ondemnation [c]ause of [a]ction. Likewise, satisfaction of any damage award under the [i]nverse [c]ondemnation [c]ause of [a]ction shall be a credit against the [n]uisance [c]ause of [a]ction." Pursuant to section 1036, the homeowners were awarded $1,184,145.52 in attorney fees and $510,700.31 in costs in connection with the inverse condemnation cause of action. In addition, they were awarded $708,240.76 in prejudgment interest.

This timely appeal followed.

STANDARD OF REVIEW

When called upon to review a statement of decision, we review the trial court's factual findings under the substantial evidence test. Questions of law are reviewed on an independent basis. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935–936.) If the statement of decision fails to include a particular factual finding that is necessary to support the legal conclusion, we will typically imply all factual findings necessary to uphold the judgment. However, if a party alerted the trial court to the omission, no factual findings will be implied. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133–1134.)

Under the substantial evidence test, we resolve all conflicts in the evidence in favor of the prevailing parties and draw all reasonable inferences that support the judgment. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632–1633.) As a result, we will not reject witness testimony as lacking credibility unless it is physically impossible or inherently implausible. (*State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1626, fn. 5.) The definition of substantial evidence is "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Ibid*.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id*. at p. 652.) "Expert opinion testimony constitutes substantial

evidence only if based on conclusions or assumptions supported by evidence in the record. Opinion testimony which is conjectural or speculative 'cannot rise to the dignity of substantial evidence.' [Citation.]" (*Id.* at p. 651.)

An attorney fee award will not be disturbed absent abuse of discretion. (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228 [an appellate court will interfere with a determination of reasonable attorney fees only where there has been a manifest abuse of discretion].) However, "'the trial court's discretion is limited by the applicable legal principles. [Citations.]'" (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 848.) The court abuses its discretion when it acts in a manner that is arbitrary, capricious or patently absurd. (*In re Mark V.* (1986) 177 Cal.App.3d 754, 759.)

DISCUSSION

A. Inverse condemnation.

According to the City, the evidence was insufficient to prove that the grading caused the 2005 landslide. This argument lacks merit.

1. *The law.*

The source of inverse condemnation liability is the California Constitution. It provides: "Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid." (Cal. Const., art. I, § 19, subd. (a).) In *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, the court held that, subject to two exceptions,[8] "any actual physical injury to real property proximately caused by [an] improvement as deliberately designed and constructed is compensable . . . whether foreseeable or not." (*Id.* at pp. 263–264 [applying former Cal. Const., art. I, § 14, the precursor to Cal. Const., art. I, § 19, to a case involving a landslide triggered by the

---

[8] The two exceptions occur "in situations (1) where the state had the common law right to inflict the kind of damage involved [citation], and (2) where the damage is non-compensable because it results from the proper exercise of the police power [citation]." (*Reinking v. County of Orange* (1970) 9 Cal.App.3d 1024, 1029.) Neither exception is argued by the City.

placement of dirt in a road easement]; *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 555 [regarding a landslide, the court explained that "the public improvement must be a substantial cause of the injury"].) Liability may attach if damage is caused due to the way a work of public improvement is deliberately altered or maintained. (*Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596 (*Pacific Bell*).)

The policy consideration is whether a property owner should go without compensation and be asked to contribute more than his fair share to the public undertaking. "In other words, the underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of public improvements.'" (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 [instability caused by excavation of land to build a rapid transit system]; *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 742 ["'The fundamental justification for inverse condemnation liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged'"].)

A work of public improvement is the proximate cause of damage if the plaintiff proves """'a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury.'"" [Citation.]" (*California State Automobile Assn. v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 481 (*Cal. Auto*), citing *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 559.) "Even where an independent force contributes to the injury, the public improvement remains a substantial concurrent cause if 'the injury occurred in substantial part because the improvement failed to function as it was intended.' [Citation.] The public improvement is a substantial cause unless 'the damage would have occurred even if the project had operated perfectly.' [Citation.]" (*Cal. Auto,* at p. 481.)

2. *Causation.*

The slope was a substantial concurring cause of damage if it contributed to the 2005 landslide by either increasing the risk of landslide or by contributing to the landslide by failing to function as intended. No such factual finding was announced in the statement of decision. But the City did not object to this omission, so we therefore imply all necessary findings. Our inquiry, then, is whether those implied findings are supported by substantial evidence.

The City's primary argument is that Axten's testimony is insufficient to prove causation because it is "'based on inferences, speculation and conjecture.'" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775 (*Saelzler*) [summary judgment granted for defendant in an assault and battery case premised on the theory that an apartment complex did not have sufficient security].) Indeed, "[a]n expert's opinion, even if uncontradicted, may be rejected if the reasons given for it are unsound. [Citations.]" (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523–524.) To be admissible, the opinion must be based on matter (including special knowledge, skill, experience, training and education) perceived by or personally known to the witness "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subd. (b).)

Next, the City argues that the evidence failed to demonstrate a substantial cause and effect relationship between the 2005 landslide and the graded slope.

a. Increased risk of landslide.

To prevail, the City must demonstrate that Axten's version of the landslide was physically impossible or inherently implausible, or that his opinions were the product of speculation instead of logic and reason.

According to the City, Axten's testimony was based on the same type of speculation and conjecture rejected in *Saelzler*. In *Saelzler*, a Federal Express employee was sexually assaulted while attempting to deliver a package to a resident of an apartment complex. (*Saelzler*, *supra*, 25 Cal.4th at p. 769.) The plaintiff's expert opined that the attack would not have occurred had there been daytime security and a more concerted

effort to keep the gates repaired and closed. (*Id*. at p. 771.) The court affirmed summary judgment for the owner of the apartment complex because the plaintiff could not identify her attackers. Even though more security would have prevented outsiders from attacking the plaintiff, the attackers could have been residents of the apartment complex with keys to the gates. As a result, the plaintiff showed no more than a mere possibility of causation, which was not enough. (*Ibid*.) She was required to establish that causation was more probable than not. (*Id*. at p. 776.)

To undermine Axten's testimony, the City points out that he did not testify regarding the actual safety factor of the slope prior to grading, only that it was relatively more stable before than after. But what Axten said is not physically impossible or inherently improbable. Also, it is based on logic and reason, i.e., Axten relied on a scientific methodology. We find *Saelzler* distinguishable. There was no scientific basis for the expert to opine as to the identity of the attacker. Axten's testimony cannot be compared to the exert testimony in *Saelzler*.

The City complains that Axten could not definitively say whether or not the slope would have failed had it not been graded.[9] A review of the trial transcript reveals that while Axten was equivocal at times, he nonetheless specifically testified that the grading was a substantial cause of the 2005 landslide.

---

[9] Axten testified: "I determined that the actual grading of the slope in this case actually substantially lowered the stability, . . . substantially increased the risk of a landslide occurrence in this area." He also stated: "[I]t was just an accident waiting to happen. Sooner or later . . . this would have occurred as a result of the substantially deficient original design and construction." Though the work of improvement was "thought to probably be a landslide repair, . . . it had just the opposite effect." On cross-examination, Axten was asked if the 2005 landslide would have occurred if the ancient landslide had been left in place. He stated: "[T]hat's a hard one, because you'd have . . . 30 feet of dirt sticking up in the air behind the houses. I don't know quite how to visualize that. I could say that if it was just that same natural area, you know, without the houses—which makes sense, you can't kind of have the houses with it being natural—then I don't believe it would have failed."

Last, the City argues that Axten's analysis is speculative because he relied on unsupported variables. Axten's testimony reveals, however, that he supported each of his variables with logic and reason. He maintained constant variables for geometry and groundwater and then adjusted the shear strength data to produce an equation that would lead to slope failure. He then changed the equation to add back in the landslide material that was removed and concluded that the stability of the slope decreased by 60 percent. He was duly qualified as an expert, and his opinion was based on his special knowledge, skill, experience, training and education.

b. Failure to function as intended.

Even if we did not conclude that Axten's testimony was substantial evidence that the grading substantially contributed to the 2005 landslide, we would conclude that there is substantial evidence to support the implied finding that the slope did not function as intended. The inference is that the slope was graded so that the slope would be stable so that the homes built at the top of the slope would not be damaged by subsidence. Further, there was testimony from Axten that the design and construction of the slope was inadequate. As a result, we easily infer that the slope did not operate perfectly and was therefore a substantial cause of damage.

Pacific Bell is instructive. In that case, damage was caused by a bursting cast-iron water pipe. The court held that the public entity was liable because it designed and maintained its pipes without any method or program for monitoring the inevitable deterioration of cast-iron pipes. Further, it employed a "'replace it when it breaks'" method of maintenance so that it could hold down costs and avoid increasing rates. (*Pacific Bell, supra,* 81 Cal.App.4th at p. 607.) The court noted that "a governmental entity's choice to obtain cost savings on a project carries with it the corollary obligation to pay for the damages caused when the risks attending these cost-saving measures materialize." (*Id.* at p. 608.)

Whoever graded the slope eschewed Moran's recommendations in favor of cost savings. The risk was slope instability. The City, the current owner of the slope, must pay for the damages caused by the cost saving measures.[10]

B. Nuisance.

The City argues that it cannot be held liable for nuisance because: (1) there is no evidence that the City was negligent with respect to the slope; (2) the City did not have a duty to make the slope perfectly stable; (3) the City had design immunity; and (4) the City did not withdraw lateral support from the homeowners' property. As we discuss below, these arguments must be rejected.

1. *A finding of negligence was not necessary to a finding of nuisance.*

A nuisance is anything which is "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of . . . property." (Civ. Code, § 3479.) In general, "a nuisance and liability for injuries occasioned thereby may exist without negligence. [Citations.]" (*Shields v. Wondries* (1957) 154 Cal.App.2d 249, 255.) But there is no nuisance liability in the absence of negligence when damage is caused by a natural condition. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 99–100 (*Lussier*).)[11]

The City argues that the slope was a natural condition and therefore the homeowners were required to prove negligence. But the trial court found that the slope

---

[10] Having concluded that the City is liable for inverse condemnation based on the grading, we need not review the alternative grounds for liability, i.e., the City's failure to control the gopher population.

[11] "Liability for nuisance may result from the failure to act. Thus, a possessor of land is liable for a private nuisance caused by an abatable artificial condition that is otherwise actionable, if the possessor (a) knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved; (b) knows or should know that the condition exists without the consent of those affected by it; and (c) has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect affected persons. [Citations.]" (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 141, pp. 463–464.)

was not a natural slope, it was a work of improvement. The City does not explain why this finding was incorrect, nor could it. The slope fits the definition of an artificial condition set forth by our Supreme Court. "The term '"[natural] condition of the land" is used to indicate the condition of land has not been changed by an act of a human being . . . . It is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them.' [Citation.]" (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 362, fn. 3 (*Sprecher*) [rejecting common law immunity for negligence caused by a natural condition].) "'[A] structure erected upon land is a non-natural condition, as are trees and plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces.' [Citation.]" (*Id*. at p. 362, fn. 4.)[12] Because the surface was changed through grading, the slope qualifies as a nonnatural condition.[13]

---

[12] At trial, Moran was asked what the term "natural slope" means in his industry. He testified: "Very simply, a slope that has not been modified or tampered with by human hands in effect or human operations. Basically, just a product of natural processes alone." He was asked if the slope by the homeowners' property was a natural slope. In response, he said no because "it's been substantially modified. There was a cut made down at the low end of the slope, a . . . steeper cut made in that preexisting natural slope. There was removal of slide debris. To the extent that was done I'm not sure because I didn't really get an opportunity to inspect that, but there was some material reportedly removed according to this plan. And there were drains that were supposedly established on the face of it and landscaping and so forth. All of that makes it a controlled or graded slope."

[13] We note, as did *Lussier*, that *Sprecher* stated that the distinction between artificial and natural conditions should be rejected. But we agree with *Lussier* that "in its context, this statement means that liability may no longer be avoided because the defendant was negligent concerning a natural, as opposed to artificial, condition." (*Lussier, supra*, 206 Cal.App.3d at p. 102, fn. 6.) *Lussier* added: "In determining what conduct by the [public entity] could have caused a nuisance, we consider the distinction between natural and artificial conditions on land to be a valid and useful analytical tool, even though it no longer provides an absolute limitation on liability." (*Id*. at p. 102.) As a result, we reject any suggestion by the City that there is no nuisance liability for an artificial condition in the absence of negligence.

2. *The City is not entitled to design immunity.*

To establish design immunity under Government Code section 830.6,[14] a public entity must establish a causal relationship between the design and the accident, discretionary approval of the plan prior to construction, and substantial evidence supporting the reasonableness of the design. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1262 (*Laabs*).) The public entity bears the burden of proof. (*Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 196.) The trial court did not rule on whether the nuisance claim was statutorily barred. We imply a finding that the design of the slope was unreasonable. The question presented is this: is the implied finding supported by substantial evidence?

"Relative to the third element of design immunity, the City must 'present substantial evidence of the reasonableness of the approved design. [Citation.]' [Citation.] '[T]he third element of design immunity, the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design, [is] a matter for the court, not the jury. "[T]he trial or appellate court" is to determine whether "there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan . . . or (b) a reasonable . . . employee could have approved the plan or design or the standards therefor." [Citation.]' [Citation.] 'In determining whether evidence . . . is substantial, the question is whether the evidence "reasonably inspires confidence" and is of "solid value." [Citation.]' [Citation.] Typically, 'any substantial

---

[14] Government Code section 830.6 provides in relevant part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

evidence' consists of an expert opinion as to the reasonableness of the design, or evidence of relevant design standards. [Citations.]" (*Laabs, supra*, 163 Cal.App.4th at pp. 1263–1264.)

Axten testified that the grading plan was defective. And Lawson, the City's expert, testified that the ancient landslide should have been completely remediated. As a result, there is no immunity.

The City suggests the issue is whether it was reasonable for the City to approve the grading plan. The problem, however, is that the City cited *Laabs* in its reply brief. *Laabs* specifically held that a public entity must offer "'"'"substantial evidence supporting the reasonableness of the design.'" [Citations.]' [Citation.]" (*Laabs, supra*, 163 Cal.App.4th at p. 1262.) We generally follow the decisions of other appellate courts unless there is good reason to disagree. (*Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023.) The City has not suggested any rationale for us to depart from *Laabs* and create a split of authority.

In the reply, the City argues for the first time that the preparation and approval of the design by competent professionals establishes that the design was reasonable. We deem this belated argument waived. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1.) Academically, we note that the City cites *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931 (*Grenier*) in support of its belated argument. *Grenier* stated: "'[A]s long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity. The statute does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances.' [Citation.] Generally, a civil engineer's opinion regarding reasonableness is substantial evidence sufficient to satisfy this element. [Citation.] Approval of the plan by competent professionals can, in and of itself, constitute substantial evidence of reasonableness. [Citation.]" (*Id*. at p. 941.) The problem for the City, however, is that it neglects to inform us who prepared and approved the grading plan. Nor did the City cite to any evidence to establish that those people were competent professionals. We have no obligation to hunt through the record to shore up

the deficiencies in the City's appellate briefs. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 ["As a general rule, 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment'"].)

3. *Lateral and subjacent support.*

In the statement of decision, the trial court stated that the unstable slope had caused and continued to cause damage to the homeowners and the City failed to take measures to restore the lateral and subjacent support. The trial court ruled that the condition of the slope was a private nuisance. The nuisance finding was based on Civil Code sections 832, 3479 and 3483. Civil Code section 832 provides that "[e]ach coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement." Under Civil Code section 3479, a nuisance is "[a]nything which is injurious to health . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of . . . property." Finally, Civil Code section 3483 establishes that a property owner who fails to abate a continuing nuisance created by a former owner is liable for the continuing nuisance.

The City argues that it cannot be liable for nuisance under these statutes because it did not withdraw lateral and subjacent report, and there is no liability in the absence of negligence. But the trial court impliedly found that the grading made the slope more fragile. This doubles as an implied finding that whoever performed the grading removed at least some lateral and subjacent support. We therefore conclude that the nuisance judgment is immune from attack.

C. Offset.

Pacesetter Homes and Artistic Management settled with the homeowners and paid a total of $1,125,000. The trial court permitted an offset of $969,750 on the nuisance claim pursuant to section 877. But the trial court ruled that the statute did not permit an offset regarding the claim for inverse condemnation. The City contends that the trial court erred.

Section 877 provides that when a plaintiff settles with one or more persons liable for a tort, the trial court shall reduce the claims against the others by the greater of the amount stipulated in the release or in the amount of consideration paid. The question is whether the statute requires a court to give a public entity an offset in an inverse condemnation action. We think not. The statute only applies to torts, and inverse condemnation is not a tort. (*Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 604 [inverse condemnation not grounded in tort principles]; *Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 656, fn. 8 ["We have consistently rejected the contention that the right to recover in eminent domain derives from tort doctrine, emphasizing that as a matter of policy the owner of property taken or damaged for public use should not contribute a disproportionate share of the cost of a public undertaking"].) Still, the City argues that an offset is appropriate.

The City relies on *Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776 (*Sanchez*), *Kohn v. Superior Court* (1983) 142 Cal.App.3d 323 (*Kohn*), *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831 (*Greathouse*), *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290 (*Mesler*) and *County of San Mateo v. Berney* (1988) 199 Cal.App.3d 1489 (*Berney*).

In the first case, *Sanchez*, a woman received minor injuries in a car accident, went to a hospital and died due to negligent care. Her children sued for wrongful death. They settled with the owners of the other car in the accident and obtained a judgment against the health care provider. The trial court gave the health care provider an offset pursuant to section 877. The reviewing court affirmed. (*Sanchez, supra,* 116 Cal.App.3d at p. 796.) The court noted that the owners of the other car "were codefendants in a single-

count complaint for the wrongful death of [the woman]. They were charged with liability for this same tort, to wit, the death of [the woman]. As we stated [in a prior opinion]: 'Even though persons are not acting in concert, if the result produced by their acts are indivisible, each person is held liable for the whole. Death, burning of a building or sinking of a boat are such indivisible results.'" (*Ibid*.) In our view, *Sanchez* does not aid the City's cause. Pacesetter Homes and Artistic Management were not sued for liability based on inverse condemnation, nor could they have been. It bears repeating, also, that inverse condemnation is not a tort and therefore does not fall within the statutory language.

At issue in *Kohn* were claims of negligence, fraud and conspiracy to commit fraud in connection with the sale of a house. The plaintiff alleged that the seller, brokers, contractors and inspectors failed to disclose and adequately inspect and repair with regard to prior damage. Two of the codefendants settled, and the cross-complaints against them were dismissed. On appeal, the issue was whether the nonsettling defendants could sue the settling defendants for indemnity. The court concluded that indemnity was barred by section 877. In concluding that the statute applied, the court stated: "Here, there was but one injury, purchase of a house which was worth less than plaintiffs believed. [Citation.] The alleged tortious activities by the contractor, pest control inspector and seller were not independent, but combined to create one indivisible injury which took place when the sale was consummated." (*Kohn*, *supra*, 142 Cal.App.3d at p. 329.) *Kohn* did not hold—as the City suggests—that the "tort" referenced in section 877 is the harm suffered instead of the theory of liability. Rather, *Kohn* simply held that section 877 applies when there are torts which cause an indivisible injury. Whether the codefendants were liable for the same tort or different torts, the court did not seem to consider important. We find it significant the buyer alleged a conspiracy amongst the codefendants to commit fraud, which means all the codefendants were—at least as to one cause of action—being sued for the same tort.

Greathouse was a wrongful death case. The plaintiffs, the surviving family of a contractor who died from asbestos-related disease, sued 20 defendants and settled with all but one. The plaintiff proceeded to trial against the remaining defendant and prevailed. The trial court granted the defendant a set off for economic damages. On appeal, the defendant argued that the trial court should have allocated 74.3 percent of the award to economic damages instead of 20 percent. For our purposes, *Greathouse* was not remarkable. It stated that the set off provided by section 877 "applies whenever the acts of multiple defendants 'have combined to cause "one indivisible injury."' [Citations.]" (*Greathouse*, *supra*, 35 Cal.App.4th at p. 840.) In context, the case was referring to an indivisible injury caused by tortious conduct. The court did not intimate that section 877 requires a set off for liability on a nontort.

The court in *Mesler* considered "whether a plaintiff may pursue a tort action against a parent corporation on the theory that it is the alter ego of its subsidiary, the alleged tortfeasor, after entering into a settlement and release agreement with the subsidiary." (*Mesler*, *supra*, 39 Cal.3d at p. 294.) The court stated: "At issue is the applicability of [section 877], which abrogates the common law rule that settlement with one alleged tortfeasor bars action against any others claimed liable for the same injury. We conclude that the statute does apply, and thus release of an alleged tortfeasor under these circumstances does not preclude suit against its claimed alter ego." (*Mesler*, *supra*, 39 Cal.3d at pp. 294–295.) In reaching this conclusion, the court noted that section 877 affords a defendant an offset even though its liability for tortious conduct is vicarious. The City invites us to conclude that because the statute was interpreted to apply to vicarious liability for a tort and such liability does not require fault, the statute applies any time there is liability without fault, such as inverse condemnation. This argument lacks traction. Simply put, we have no authority to depart from the language of section 877 and read out the necessity of liability for a tort.

This brings us to *Berney*. It held that a public entity was liable for inverse condemnation may seek indemnification from "third parties whose negligent or fraudulent acts were causative factors in the damaging or taking of private property." (*Berney*, *supra*, 199 Cal.App.3d at p. 1494.) Ostensibly, *Berney* permits the City to sue Pacesetter Homes and Artistic Management for indemnity. It does not, however, establish a right to an offset.

The City's last argument is that the judgment permits a double recovery. But the City did not sufficiently analyze the issue to demonstrate its point. Nor did it cite law establishing that what the trial court did was error.

D. Attorney fees.

The City assigns error to the award of attorney fees on the theory that the trial court improperly relied on the homeowners' contingency fee agreement and refused to apportion fees as between claims and parties. As we explain, the award must be reversed and remanded for a redetermination.

1. *The amount of the attorney fee award.*

Pursuant to section 1036, a trial court must award the prevailing plaintiffs in an inverse condemnation action their reasonable, actually incurred attorney fees.[15] The trial court is vested with the discretion to determine the amount. (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 950.) Because the statute requires a separate analysis of the fee actually incurred and what would be a reasonable fee, we agree with *Andre v. City of West Sacramento* (2001) 92 Cal.App.4th 532, 537 (*Andre*) that if the plaintiffs have a contingency fee agreement, as did the homeowners, the

---

[15] "In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding." (§ 1036.)

agreement establishes the amount actually incurred. That amount actually incurred acts as "a ceiling to any fee award." (*Ibid*.) Consequently, the trial court must award a reasonable fee or the amount actually incurred, whichever is the lesser. *Andre* explained it thusly: in an inverse condemnation case, the "plaintiff [is] entitled to an award of attorney fees only for fees actually incurred, and then only to the extent they were reasonable." (*Id*. at pp. 538–539.)

In determining what constitutes a reasonable fee pursuant to section 1036, "the court may consider the contingent nature of the fee agreement as one factor in determining a reasonable fee. Other factors to be considered by the court, where appropriate, include: the novelty and difficulty of the questions involved and the skill required to perform the legal services properly; the likelihood that the acceptance of this particular employment would preclude other employment by the attorneys; the amount involved and the results obtained; the time limitations imposed by the clients or by the circumstances of the case; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the attorneys who performed the services; the time and labor required of the attorneys; and the informed consent of the client to the fee agreement. [Citations.]" (*People ex rel. Dept. of Transportation v. Yuki* (1995) 31 Cal.App.4th 1754, 1771 (*Yuki*).)

Appellate courts have traditionally been wary of contingency fee agreements for inverse condemnation actions. Because the attorney and client know that the public entity will pay the fee, the bargaining between the attorney and client is less likely to guarantee that the fee is reasonable. (*Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 279 (*Imperial Cattle*); but see *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465 [affirming an award of a contingency fee in a condemnation action even though it amounted to compensation for the attorney at $3,644 an hour].)

In its tentative ruling, the trial court explained that "the fees actually incurred are a ceiling to any fee award; fees may be reduced because they are unreasonable and pose an unnecessary burden on public funds, but they cannot be increased beyond what was actually incurred. . . . The award of attorney fees should thus be based on the amount of time spent on the case, as well as other factors, and it should not be based solely on a contingent fee arrangement between attorney and client." The trial court went on to state: "The validity of the billings documented by the [homeowners'] attorneys does not really appear to be questioned by the City, and the [trial court] finds that the vast majority, if not all, of that work was necessary to prosecute the inverse condemnation cause of action regardless of the theory of liability or the defendant being pursued. The [trial court] therefore finds that no questions exist as to the work performed by the [homeowners'] attorneys and no apportionment of fees is necessary . . . . The [trial court] also finds that the contingency fee agreement of 30 [percent] of the recovery or, alternatively, the hourly rate[] charged by counsel . . . was quite reasonable in light of the nature and complexity of this litigation." The homeowners were tentatively awarded a contingency fee of $1,026,167.60. The ensuing judgment augmented the award to $1,184,145.52.

In our view, the trial court abused its discretion.

The homeowners' attorney, Michael A. Hearn (Hearn) declared that his firm billed 3,220.60 hours. He also declared that his firm billed $928,348.75 at a below market rate. Though he charged $350 an hour in the billing, he stated: "I have been advised by several law firms that lead counsel [in an inverse condemnation action] should be charging at least $500 an hour." He did not, however, calculate his bill using the higher rate.

In essence, the trial court stated that $928,348.75 or a 30 percent contingency would be reasonable. But there is more than a $250,000 difference between the two, and the trial court never indicated why it selected the higher amount. Nor did the trial court analyze the factors in *Yuki* and explain why it was reasonable for Hearn's firm to receive more than it billed. Also troubling is the difference between the tentative ruling of $1,026,167.60 and the actual award of $1,184,145.52. It is apparent from the tentative

ruling that the trial court was aware of the legal principles, but whether it adhered to those principles cannot be ascertained.

The homeowners cite *Imperial Cattle* in their defense. In *Imperial Cattle*, the trial court awarded a 40 percent contingency fee of $92,800 even though a multiplication of the time spent on the case and the attorney's hourly rate was $90,025. On appeal, the public entity argued that the award was not reasonable. The court concluded that the issue had been waived because it was not raised before the trial court. Though the court expressed concern over "a trial court's reliance on a percentage contingent fee negotiated by the client," it went on to state that "the trial court understood its independent obligation to assure that the fee award was reasonable, and the hourly time records and billing rates fully support the fees awarded." (*Imperial Cattle*, *supra*, 167 Cal.App.3d at p. 279.) Under these circumstances, we believe the trial court's award of $ 92,800 in fees must be affirmed. (*Id*. at p. 280.)

Here, it cannot be said that the hourly time records and billing rates fully support the fees awarded. The homeowners argue that using the $500 an hour rate for Hearn, the fee award based on the time records would be $1,180,975.75, just $3,169.77 less than awarded. The problem is that the homeowners did not provide this calculation to the trial court, and there is no indication that the trial court considered a $500 an hour rate for Hearn to be reasonable. Further, calculating the bill at $500 an hour for Hearn, the total would only be $1,121,098.75.[16] In other words, there is a difference of $63,046.77. Consequently, *Imperial Cattle* is inapposite because the time records and hourly rates do not support the amount awarded.

---

[16] Hearn logged 1,285 hours in the billing sheets. At $350 an hour, his total bill was $449,750. If he had billed at $500 an hour, the total would have been $642,500. The difference is $192,750.

2. *Apportionment.*

The trial court found that a vast majority, if not all, of counsel's work was necessary to the inverse condemnation action. This finding was equivocal because the trial court left open the possibility that not all the work overlapped. The law requires apportionment between "attorney fees incurred in litigating the inverse condemnation claim and fees incurred with respect to other claims for which attorney fees are not recoverable." (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 365.) Still, "the trial court has discretion to award fees incurred with respect to a noninverse condemnation cause of action that is relevant to the inverse condemnation claim. [Citation.]" (*Ibid.*) On remand, the trial court shall apportion attorney fees, if possible.

DISPOSITION

The award of attorney fees is reversed and remanded for a recalculation. In all other respects the judgment is affirmed. The homeowners are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD