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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LEE TARTRE, individually and as Trustee,  
etc. et al.,

Plaintiffs, Cross-defendants and  
Appellants,

v.

CITY OF POWAY,

Defendant, Cross-complainant and  
Appellant;

WEST COAST ARBORISTS, INC.,

Defendant and Respondent.

D056319

(Super. Ct. No. 37-2008-00076297-  
CU-NP-CTL)

APPEALS from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed in part, reversed in part.

These cross-appeals concern the scope of the City of Poway's (the City) sewer easement across multiple properties, including one owned by Lee Tartre and her husband, Don Tartre, and another by Diane Armstrong and Alex Armstrong (together

with Tartre, Plaintiffs). After Plaintiffs sued the City and West Coast Arborists, Inc. (WCA), a company the City hired to remove trees on the easement, a jury found the City was negligent in the tree removal. The trial court later partially granted Plaintiffs' motion for judgment notwithstanding the verdict (JNOV), concluding that the City also violated Plaintiffs' civil rights under 42 U.S.C. section 1983 (section 1983).

The City appeals, contending the trial court erred in: (1) granting Plaintiffs' motion for JNOV on the section 1983 claim; and (2) denying its request for an injunction requiring Tartre to remove a tennis court on its easement. Plaintiffs also appeal, contending the trial court erred in: (1) denying their motion for JNOV against the City on their inverse condemnation, trespass and trespass to trees claims; (2) finding WCA was not liable under section 1983; and (3) denying their motion for JNOV against WCA on the trespass and trespass to trees claims.

We conclude the trial court erred when it granted Plaintiffs' motion for JNOV on the section 1983 claim because substantial evidence supported the jury's verdict denying this claim. Accordingly, we reverse the judgment on this claim. In all other respects, the judgment is affirmed.

#### FACTUAL AND PROCEDURAL BACKGROUND

Preliminarily, we point out that the parties' factual recitations and briefing are of little assistance to us because their record citations are not supported with references to the volume and page number of the record where the matter appears, as required by California Rules of Court, rule 8.204(a)(1)(C). We remind the parties that we are not required to search the record to determine whether it contains support for their

contentions. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

With that admonishment, we continue with our consideration of this case.

In 1974, before the City was incorporated, the City's predecessor received an easement for sewer maintenance over Plaintiffs' properties. Shortly thereafter, the predecessor quitclaimed most of the easement area back to the property owners, leaving only a 10-foot wide easement.

In 2002, Tartre sought approval from the City to build a tennis court on her property. During the application process, Tartre met with Lisa Mercurio, a planner in the City's Department of Development Services. On a site plan showing the proposed location of the tennis court, Mercurio noted the location of the City's sewer easement. The site plan, which was part of Tartre's permit application, showed the tennis court encroaching or abutting the easement. After City Council members visited Tartre's property, they approved the permit for the tennis court and Tartre completed its construction in 2003.

In 2007, the City engaged WCA to clear trees on its sewer easement. To determine the easement area, the City relied on a mapping system of as-built drawings rather than running a title search. The City had used this mapping system for more than 30 years to track and delineate easement boundary lines. The as-built plans showed the easement over Plaintiffs' properties was significantly larger than the actual easement area.

The City sent written notice to Plaintiffs that it needed to perform work on the easement. City employees later met with Tartre and Diane Armstrong at their properties

and showed them the trees that would be removed, which had previously been marked. Plaintiffs consented to allowing the City to trim or remove trees on the easement.

The City showed WCA the marked trees and instructed it to cut them down. In accordance with the City's directions, WCA removed the marked trees. Many of those trees, however, were outside of the City's easement area.

After the trees were removed, Tartre complained that the City cleared trees beyond the scope of its easement. Diane Armstrong also informed the City that the easement, according to her documents, was much smaller than the City's records reflected. At that point, the City did a title search on the properties and discovered the quitclaim deeds transferring portions of the easement back to Plaintiffs. The City acknowledged that it relied on "faulty documents that resulted in [] tree removal . . . outside the boundaries of the City's sewer easement."

Plaintiffs sued the City and WCA, alleging trespass to trees, trespass, nuisance, conversion, negligence, negligent and intentional infliction of emotional distress, violation of their civil rights under section 1983, and inverse condemnation. The City cross-complained seeking, among other things, an injunction requiring Tartre to remove her tennis court, which encroached on its 10-foot wide easement.

By special verdict, the jury found that the City was negligent in the tree removal and apportioned 80% of the negligence liability to the City and 20% to Plaintiffs. The City's negligence caused damages to Tartre in the amount of \$119,810.40 and to the Armstrongs in the amount of \$67,462.40. The jury found in favor of the City and WCA, however, on the trespass, trespass to trees, and section 1983 causes of action. In

regard to the section 1983 claim, the jury found that the City did not intentionally use and WCA did not intentionally rely upon an outdated document in the tree removal project. The trial court separately rendered a decision in favor of the City on Plaintiffs' inverse condemnation claim and denied the City's request for an injunction, thereby permitting Tartre to maintain her tennis court on the easement.

Plaintiffs moved for a new trial and for a partial JNOV, arguing that the evidence did not support the judgment on the section 1983 claim against the City, the negligence claim against WCA, the trespass and trespass to trees claims against the City and WCA, and the inverse condemnation claim. The court partially granted the motion for JNOV, finding the City was liable under section 1983 because it "intentionally used a system and engaged in a policy of using outdated . . . as-built[] [maps]." Accordingly, the court entered an amended judgment that included the City's liability under section 1983 and awarded Plaintiffs attorney fees in the amount of \$407,138.75.

## DISCUSSION

### I. *The City's Appeal*

#### A. JNOV on Section 1983 Claim Against the City

The City argues the trial court erred in granting the JNOV motion on the section 1983 claim because substantial evidence supported the jury's findings that this case involved negligence and not a section 1983 violation. We agree.

A trial court may grant a JNOV motion if there is no substantial evidence to support the verdict. (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057-1058.) In deciding whether to grant the motion, the trial court

cannot weigh the evidence or assess credibility (*Castro v. State of California* (1981) 114 Cal.App.3d 503, 512) and must view the evidence in the light most favorable to the verdict, disregard conflicting evidence, and indulge in every legitimate inference to support the verdict. (*Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal.App.4th 488, 493-494 (*Paykar*).) "On appeal, we determine de novo whether there is substantial evidence to support the verdict and whether the moving party is entitled to judgment in its favor as a matter of law." (*Id.* at p. 494.)

Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." A municipality can be held liable as a "person" under section 1983 where its policy or custom violates constitutional rights or exhibits deliberate indifference to constitutional rights and thereby causes such a violation. (*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 694; *Gibson v. County of Washoe, Nev.* (9th Cir. 2002) 290 F.3d 1175, 1185-1186.)

The Due Process Clause is not implicated by negligent acts causing unintended losses. (*Daniels v. Williams* (1986) 474 U.S. 327, 328.) Rather, it protects against "*deliberate decisions* of government officials to deprive a person of life, liberty, or property." (*Id.* at p. 331, second italics added.) "Inadvertent errors, honest mistakes,

agency confusion, even negligence in the performance of official duties, do not warrant redress under [section 1983].'" (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1034 (*Galland*); see also *Aaitui v. Grange Properties* (1994) 29 Cal.App.4th 1369, 1382-1383 [stating "the Fourteenth Amendment does not guarantee appropriate bureaucratic decisions"].)

Here, both sides engage in a considerable discussion regarding the contours of section 1983 liability. However, the critical issue is whether substantial evidence supported the jury's findings on the section 1983 claim. The parties appear to agree that where a policy or custom is not unconstitutional on its face, section 1983 liability requires more than mere negligence; rather, it requires deliberate indifference or a deliberate flouting of the law.

The jury found that the City was negligent, but in regard to the section 1983 claim, it found the City did not "*intentionally* use an outdated document to plan [the] tree removal project." (Italics added.) Indulging all inferences in favor of the verdict, as we must, this finding is tantamount to a determination that the City did not make a *deliberate* decision to deprive Plaintiffs of their property. Thus, we turn to whether the finding is supported by substantial evidence.

Plaintiffs contend that the use of the outdated as-built plans constitutes substantial evidence of the City's deliberate indifference to the rights of property owners. We are not persuaded that the City's use of the as-built plans was a deliberate decision to deprive Plaintiffs of their rights such that it rises to the level of a section

1983 violation because there was evidence from which the jury could have concluded that the City's conduct was unintentional negligence.

Brad Voorhees, who was in charge of the tree trimming project for the City, testified that when he undertook to determine the easement boundary lines, he relied on as-built maps and believed the easement on Plaintiffs' properties extended 10 feet north and approximately 50 to 60 feet south of the sewer main. He did not learn that the easement was much narrower until the project was completed. Similarly, David Vigliotti, who was at the site supervising the tree removal for the City, stated that he showed Tartre the as-built plans and believed that was the only information the City had regarding the easements. Tom Howard, the City's Public Works Utilities Manager, testified that he was unaware of the narrowed scope of the easement until after the project was completed.

"When reviewing the validity of a judgment notwithstanding the verdict, an appellate court must resolve any conflict in the evidence and draw all reasonable inferences therefrom in favor of the jury's verdict. [Citations.]" (*Henriouille v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 515.) Here, we conclude the jury could reasonably infer from the evidence that the City's actions were not deliberate and were not intended to harm Plaintiffs. Rather, the City's actions amounted to a mistake. While the City's use of the as-built plans was somewhat inept and proved to be faulty, it did not amount to a deprivation of Plaintiffs' constitutional rights. Inadvertent errors, honest mistakes, and even negligence do not give rise to section 1983 liability. (*Galland, supra*, 24

Cal.4th at p. 1034.) Accordingly, we must reverse the JNOV on Plaintiffs' section 1983 claim.

## B. Injunction

The City challenges the trial court's denial of its request for an injunction requiring Tartre to remove her tennis court from the sewer easement. Specifically, the City argues the trial court was required to evaluate the relative hardships between the parties, but instead relied on the doctrine of equitable estoppel. We reject the City's contentions, and uphold the denial of the injunction.

### 1. *The Relative Hardship Doctrine*

It is well established that a trial court has discretion to issue a mandatory injunction ordering removal of a structure that encroaches on the plaintiff's property or other rights. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 572 (*Warsaw*); *Christensen v. Tucker* (1952) 114 Cal.App.2d 554 (*Christensen*).) In determining whether a structure should be removed, the court has discretion to deny a mandatory injunction if the equities show an injustice would result if the injunction were granted. (*Warsaw*, at p. 572; *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 758-759 (*Hirshfield*).)

In *Hirshfield*, the court of appeal labeled this process of evaluating the equities the "relative hardship" doctrine: "California courts have long applied the relative hardship doctrine in determining whether to grant an injunction to enjoin a trespass by encroachment on another's land. [Citations.] Under this doctrine, once the court determines that a trespass has occurred, the court conducts an equitable balancing to

determine whether to grant an injunction prohibiting the trespass, or whether to award damages instead." (*Hirshfield, supra*, 91 Cal.App.4th at pp. 758-759.) Undertaking this analysis, the court begins with the premise the party who has encroached on the servient owner's right is a wrongdoer, and that doubtful cases should be decided in the servient owner's favor. (*Id.* at p. 759; *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 238; *Christensen, supra*, 114 Cal.App.2d at p. 562.)

In *Christensen*, the court of appeal rejected a substantial line of authority suggesting that, where a trespass was shown, a court had no discretion to deny a mandatory injunction compelling removal of the encroaching structure. (*Christensen, supra*, 114 Cal.App.2d at pp. 559-562.) It reaffirmed the discretionary authority of the trier of fact to deny such an injunction in certain cases, holding the court must find the following factors: "1. Defendant must be innocent—the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant." (*Id.* at pp. 562-563.)

Following *Christensen*, the California Supreme Court summarized the test as follows: "[W]here the encroachment does not irreparably injure the plaintiff, was innocently made, and where the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, . . . the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages.'" (*Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 858, citing *Christensen, supra*, 114 Cal.App.2d at p. 559.) "When the court finds, however, that there is [irreparable] injury or that the defendant was not innocent, it should grant an injunction." (*Brown Derby*, at p. 858.)

## 2. *The Trial Court's Ruling*

The trial court stated that the City "should be equitably estopped from seeking the removal of the tennis court because of its previous actions in this case[,] because it allowed it, it permitted it, and approved it." Challenging this finding, the City argues the trial court erred in relying on the doctrine of equitable estoppel because it was not supported by the evidence and instead should have undertaken an analysis under the relative hardship doctrine.

Although the trial court termed its holding as one based on equitable estoppel, it appears the trial court utilized the relative hardship doctrine. During the hearing on the matter, the court considered and weighed each of the *Christensen* factors. In regard to the first factor of Tartre's innocence and the City's responsibility for the situation, the trial court found that Tartre "jump[ed] through all of the hoops" to obtain a permit for the tennis court and the City approved it with knowledge of where the sewer line was

located. As to the second factor concerning whether the City would suffer irreparable injury if the encroachment was not removed, the Court found that the City must have another way to access the sewer pipes and that in the case of an emergency, it would be in Tartre's best interest to allow access to the sewer line. The trial court's findings on the second factor are also relevant to the third factor concerning the hardships to the parties. In addition, relative to the third factor, the trial court stated that it would be unfair to require Tartre to remove the tennis court after the City approved it and she spent a significant sum of money constructing it.

### *3. The Evidence Supported the Trial Court's Decision*

The evidence showed that Tartre was innocent and that the City was responsible for creating the encroachment on its easement. Tartre sought approval from the City to build the tennis court and met with Mercurio several times at the property. Mercurio had knowledge of the sewer easement and noted its location on a site plan showing the proposed location of the tennis court. City Council members also visited Tartre's property before approving the permit for the tennis court. Based on this evidence, the City is hard pressed to argue that Tartre is more culpable than it in creating the encroachment. Even if Tartre had notice of the easement, the City did as well and approved the tennis court regardless of the sewer location. Thus, the first *Christensen* factor weighs in favor of Tartre.

On the second factor, there was conflicting evidence regarding the City's need to access the sewer line from Tartre's property. Although Howard testified that the City was unable to conduct a full cleaning and video inspection of the sewer line because it

could not access a manhole on Tartre's property, he also stated that for routine maintenance and ordinary cleaning and video inspection, the City could avoid the manhole on Tartre's property. Based on this evidence, we cannot conclude that the City will suffer irreparable injury if the injunction is not granted.

Lastly, in regard to the hardships to the parties, the City has not pointed to any evidence other than its alleged inability to maintain the sewer line. As we have already stated, the evidence in this regard was conflicting and Howard stated that routine maintenance was possible without accessing Tartre's property. Tartre, on the other hand, would lose the value of her tennis court if the injunction was granted. Accordingly, we do not find that that balancing of hardships weighs in the City's favor.

Based on the evidence and the trial court's findings, we conclude the trial court properly denied the City's requested injunction against Tartre.

## II. *Plaintiffs' Appeal*

### A. Claims Against the City

Plaintiffs argue the trial court erred in denying their motion for JNOV on their inverse condemnation, trespass and trespass to trees claims against the City. We disagree.

#### 1. *Inverse Condemnation*

"[I]nverse condemnation actions implement the constitutional rule that private property may not be 'taken' (U.S. Const., 5th Amend.) or 'taken or damaged' (Cal. Const., art. I, § 19) for public use without just compensation." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 939-940.) "[I]n order to prove the

type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action—or inaction—in the face of that known risk." (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 744.)

"Where damage results from the acts of employees, and not from a policy decision, there is no taking. Recovery, if any, lies in a tort action, such as negligence. [Citation.] In the case of alleged shoddy maintenance, as here, it is the *plan* of maintenance which must be unreasonable to establish a taking. Poor *execution* of a maintenance plan does not result in a taking. [Citations.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 87.)

Here, we agree with the trial court that the City's actions amounted to poor execution of a maintenance plan, which does not result in a taking. The evidence showed that the City's plan in this case was to clear trees on its sewer easement. The plan itself was not negligent. Rather, it was the way that City employees executed the plan that caused the destruction of trees on Plaintiffs' properties. Because negligent execution of a plan does not result in inverse condemnation, we conclude the trial court properly denied Plaintiffs' motion for JNOV on this issue.

## 2. *Trespass*

"The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Such invasions are characterized as intentional torts, regardless of the actor's motivation. Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong. 'A peaceable entry on land by consent is not

actionable.'" (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16-17.) However, "[a] trespass may occur if the party, entering [land] pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1141.)

Here, the jury found that the City negligently, recklessly or intentionally entered Plaintiffs' properties, but did so with Plaintiffs' permission. Plaintiffs argue that the trial court should have granted their motion for JNOV on the trespass claim because while they consented to allowing the City to remove trees on the sewer easement, the City exceeded the scope of that consent by removing trees that were not within the easement area.

Viewing the evidence in the light most favorable to the jury's verdict and indulging all legitimate inferences to support the verdict, as we must (*Paykar, supra*, 92 Cal.App.4th at pp. 493-494), we conclude there was substantial evidence to support the jury's finding. Plaintiffs signed a consent form authorizing the City "to trim and/or remove trees to access City sewer utilities." Even if the scope of that consent was limited to trees within the easement area, City employees also met with Tartre and Diane Armstrong at their properties and showed them all of the trees that would be removed, which had previously been marked. Plaintiffs did not object to the scope of the project. Based on this evidence, the jury could have reasonably inferred that Plaintiffs consented to the City's entry onto their properties. Thus, the trial court did not err in denying Plaintiffs' motion for JNOV on the trespass claim.

### 3. *Trespass to Trees*

In addition to the common law principles generally governing the tort of trespass, the Legislature has enacted a statute to augment the amount of damages to be awarded when a trespass results in damage to trees. In that regard, Civil Code section 3346, subdivision (a), provides: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment . . . ." In order for this damages provision to apply, plaintiff must prove that he did not give permission to cut down the trees or that defendant exceeded the scope of plaintiff's permission. (CACI No. 2002.)

Here, the jury found that the City had permission to cut down trees on Plaintiffs' properties. Plaintiffs argue that the City exceeded the scope of their permission by cutting down trees that were not on the easement. However, as with the trespass claim, we find substantial evidence in the record to support the jury's finding. Based on Plaintiffs' written authorizations and their conduct when City employees showed them the marked trees that would be removed, the jury could reasonably infer that the City had Plaintiffs' consent to cut down the trees. Accordingly, we reject Plaintiffs' argument that the trial court erred in denying their motion for JNOV on the trespass to trees claim.

## B. WCA's Liability Under Section 1983

Plaintiffs argue the trial court erred in finding that WCA was not liable under section 1983 along with the City. Specifically, they claim WCA was liable under that section because it was a "state actor." However, Plaintiffs waived this contention by failing to raise it below. (*Cabrini Villas Homeowners Assn. v. Haghverdian* (2003) 111 Cal.App.4th 683, 693.) Plaintiffs never argued in their new trial or JNOV motions that WCA was liable under section 1983. Rather, Plaintiffs' section 1983 arguments were limited to the City's liability and the arguments as to WCA were focused on negligence. Further, we note that although Plaintiffs argue that "the trial court determined as a matter of law that WCA did not share in [the City's] section 1983 liability," Plaintiffs did not provide any citations to the record for this finding.

In any event, we reject Plaintiffs' argument that WCA was liable under section 1983 as a state actor. In order to be a state actor for purposes of section 1983 liability, the private party must be a "willful participant" in the challenged conduct. (*Dennis v. Sparks* (1980) 449 U.S. 24, 27-28.) Having found that the City was not liable under section 1983 (*ante*, part I.A), we conclude WCA cannot be liable under that section as a state actor. This is, especially true in this case where WCA did not have any involvement in selecting which trees would be removed and cut down only those trees identified by the City. Without any knowledge of the alleged wrongdoing or responsibility for determining the scope of the easement, we conclude WCA was not a "willful participant" for purposes of section 1983 liability and thus was not a state actor.

### C. Trespass and Trespass to Trees Claims Against WCA

Plaintiffs argue the trial court also erred in denying their JNOV motion against WCA on their trespass and trespass to trees claims. They essentially make the same arguments that they did regarding those claims against the City. Having found that the trial court properly denied the JNOV motion as to the City (*ante*, part II.A), we find no reason to reach a different result with respect to WCA.

#### DISPOSITION

The judgment is reversed on Plaintiffs' section 1983 claim against the City and the jury's verdict on that claim is reinstated. The judgment is also reversed with respect to the attorney fee award to Plaintiffs based on their section 1983 claim. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

MCINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.