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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| LORRAINE MARTINI,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>BEL AZURE HOMEOWNERS ASSOCIATION et al.,<br><br>Defendants and Respondents. | D071846<br><br>(Super. Ct. No. 37-2014-00024081-CU-PO-NC) |

APPEAL from a judgment and postjudgment order of the Superior Court of San Diego County, Robert P. Dahlquist, Judge. Affirmed.

Mesisca, Riley & Kreitenberg and Dennis P. Riley, Rena E. Kreitenberg for Plaintiff and Appellant.

Hartsuyker, Stratman & Williams-Abrego and Robert L. Popeney; Law Offices of Roxanne Huddleston and Roxanne Huddleston for Defendants and Respondents Bel Azure Homeowners Association and Morning View Associates, LLC.

Diederich & Associates and Jeffrey Mathew Anielski; Law Office of Bruce Adelstein and Bruce Adelstein for Defendant and Respondent City Service Contracting, Inc.

Plaintiff and appellant Lorraine Martini sued defendants and respondents Bel Azure Homeowners Association (Association), Association's manager Morning View Associates, LLC (Morning View), and contractor City Service Contracting, Inc. (City Service) for negligence on a theory of a dangerous property condition after Martini tripped on loose gravel while accessing a private street within Association that was undergoing repaving. The jury returned a special verdict finding Association and Morning View each 35 percent negligent and Martini 30 percent negligent, but City Service not negligent. It awarded Martini $11,000 in past economic and noneconomic damages. Martini challenges the jury's verdict in City Service's favor, contending it is not supported by substantial evidence, it is fatally inconsistent with the verdicts of liability against Association and Morning View and it is the result of prejudicial instructional error. She further contends a defense medical expert's opinion was based on inadmissible hearsay, the jury's damage award is inadequate and contrary to undisputed evidence, and there is no evidence that she was comparatively negligent. She argues the court erred as a result by denying her motion for new trial. We affirm the judgment and postjudgment order.

## FACTUAL AND PROCEDURAL BACKGROUND

Bel Azure is a 30-unit condominium complex governed by Association. The complex has no sidewalks, and residents enter through one entry street to reach their

units, which are on another circular drive. The circular drive has a concrete swale running down the middle of the street. Morning View was Bel Azure's property manager, acting on Association's behalf and carrying out the decisions of Association's board of directors. In 2010, Association, at Morning View's recommendation, hired City Service to repave its streets, but that coating failed. The 2010 repaving work took one day without any accidents or homeowner complaints about access.

In 2012, Association rehired City Service to redo the paving job, which was scheduled to take place over two days in August.[1] About a month before the work was to begin, Morning View's owner sent a notice to all of the homeowners stating that the board had approved a resurfacing contract, that the project had been scheduled for August, and that the crew would arrive between 7:00 a.m. and 8:00 a.m. The notice provided: "You will not be able to drive on [the circular drive] for those two days" and asked residents to either keep their cars garaged or move them to the entry street for the project's duration. It also stated: "You may want to inform any service or delivery

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1 City Service's contract contained a provision entitled "Job Site Preparation" that provided in part: "Job site must be prepared for commencement of work expressed in the 'scope of work' to be executed. This includes, but is not limited to the following— [¶] (i) The job site must be in the same condition as when the job was bid. [¶] . . . [¶] (iii) 'City Service Paving, Inc.' shall be given the job site free of vehicles or objects that would interfere with the scope of work to be executed the day of commencement. Delays caused by such vehicles and/or objects will incur back charges to customer as "standing time" for time/labor/rental equipment per hour. 'City Service Paving, Inc.' is not authorized by law to tow vehicles or hire a towing company to do so."

people that may need entrance to the community that they will need to park on [the entry street] and walk into the community for those two days."

Martini, who was 83 years old at the time of the incident at issue in this appeal, has been a resident of Association since 1995. In 2006, she complained of pain in both knees, with her left worse than her right. At that time she was diagnosed with osteoarthritis in both knees and received injections in her left knee to help alleviate that pain. In May 2012, before the incident, Martini was observed to have narrowing of her joint space in her right knee and severe degenerative arthritis in her left knee. She was treated with cortisone injections in her knees.

At around 11:00 a.m. on the second day of the project, Martini and her daughter decided to leave Martini's house in Bel Azure because it was hot and they wanted to go to a place with air conditioning. Martini's daughter had parked her car outside the complex the day before, and to get to it they decided to walk down the center of the circular drive on the cement swale to avoid the tar. Martini had received Morning View's written notice about the work telling them they had to leave their cars in the garage or park them outside the driveway, but she had not planned on leaving the complex. She recognized it was unsafe to walk on the tar, but figured it would be safer to walk on the cement swale. When Martini and her daughter left Martini's unit, they saw a worker with some large truck-like equipment. He looked at them but they did not say anything to each other; Martini figured he would have said something to them if it was not okay to walk through the job site. Martini's daughter was walking to the right of and a little bit behind Martini. As they walked, Martini saw a gray pile of material that looked like gravel, about a foot

square and two-to-three inches high, partly on the cement. She stopped, looked down and saw it, but when she started to walk again her toe or shoe caught her left foot and she went "face down."[2] Her hands, knees and the right side of her face hit the ground. One of City Service's workers came over to help her, but Martini's daughter had already helped Martini up. Martini and her daughter walked to the car and left. Martini's daughter made an appointment with Martini's doctor and Martini saw him that afternoon. She eventually had an arthroscopic procedure on her left knee, and a surgeon recommended she undergo a knee replacement.

Martini sued Association, Morning View, and City Service for negligence, and the matter proceeded to a jury trial in May 2016. At trial, she presented testimony from Morning View's owner, as well as City Service project manager Brian Brown. Morning View's owner testified that City Service controlled their job site and was responsible for providing any safe passage for homeowners where that was feasible, but on the day of Martini's fall, the owner did not see any clear pathway for anyone to walk onto the property. She knew people would be coming in and out of the complex during the day, but believed they would walk on the grass. Ultimately, she felt City Service had not provided a safe passageway, but it was not feasible for City Service to do so, and Martini

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2 Martini was impeached with her deposition testimony, in which she stated that when she saw the gravel she came to a stop. When asked what she did next, she testified, "I just saw it and then I started to walk and my foot must have caught because I went down. . . . My toe just caught onto it and I just went flat down."

should not have left her home that day.[3] Morning View's owner admitted she did not notify any of the homeowners that they should not be walking through the complex, but she discussed with Brown that no cars or pedestrians would be allowed on the street and was communicating her understanding to the homeowners. She testified that Morning View staff had called each homeowner, told them when the work would start, and advised them no persons or cars would be allowed on the street.

Brown testified that before the job began, he spoke with Morning View's owner and told her no cars or people would be allowed to access the property. According to Brown, Morning View was responsible for giving owners notice, and he expected it to notify them about the job details and the fact that no vehicle or pedestrians were allowed; he essentially told Morning View's owner she needed to notify the homeowners that they would be in or out of the complex the entire time, and left it to her to do so. Brown did not recall seeing the email from Morning View to the owners, so he did not know whether the notification was actually done. He agreed that notification was "always extremely important" for safety.

Brown testified that when he arrived at the job on the day of Martini's fall, he saw homeowners walking through the construction site. This concerned him because he knew it was dangerous to be walking there, and he told people two or three times not to walk

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[3] Morning View's owner also testified that though she had previously signed discovery responses stating that City Service was in charge of the site and should have provided an alternate path for pedestrians, at trial, her position was that it was not feasible to provide any other walkway, and that Martini should not have left her home.

through. He called Morning View's owner to let her know because he was concerned about the individuals' safety. While Brown was working, he heard a yell and walked to where Martini had fallen. By the time he arrived, she was already standing. He told Martini and her daughter they could not be walking there, and one of them responded that they had not received any notice. Brown believed Martini had tripped on asphalt that had gotten into the swale where she was walking.

On cross-examination, Brown testified there was no separate pathway at the job where pedestrians could travel on and off the project because it was physically impossible, and he related that information to Morning View's owner. He never agreed to have delivery men come onto the property because it would be "asking for someone to get hurt or get in trouble." Brown admitted he had control of the job site from the time his crew arrived until they left.

Martini testified that she could not recall whether she had had problems with her knees before the accident; she may have had pain "many, many years ago" but had never experienced "this kind of pain." She could not remember whether she told her primary physician in 2006, 2007, 2008 and 2009 that she was experiencing pain in her knees. One of Martini's daughters testified that Martini had "some issues with her knees, a little arthritis" before but "nothing like what it is now." She characterized Martini as now in "constant pain"; preventing her from getting up early in the morning and making it hard for her to move. She described her mother as having a changed lifestyle in that she never used a cane before the accident but now did, and previously had had no problems getting around.

Martini's counsel read to the jury deposition testimony from a board certified orthopedic surgeon, Dr. Norman Kane, who saw Martini in November 2013 after her fall. He testified that Martini had significant arthritis in her left knee and a torn meniscus with swelling, which he treated with cortisone injections. He explained that Martini had moderate arthritis in her right knee. He performed arthroscopic surgery in February 2014. Six days later, he recommended exercises for Martini, as she did not want to go to physical therapy. He testified Martini had a preexisting degenerative process that had become symptomatic because of the fall, and he explained to her she might be a candidate for knee replacement. Dr. Kane admitted, however, that he had not seen Martini's medical records from before the fall, and his understanding was she had "no pain prior to the incident when she fell." Dr. Kane testified that Martini had told another doctor that her "left [knee] never caused much trouble" before her fall. He admitted that even after his arthroscopic procedure, Martini's preexisting arthritis would still be present.

Defense counsel presented an expert orthopedic surgeon, Gregory Loren, who examined Martini and reviewed her medical records. Martini told Dr. Loren that she had undergone physical therapy after the accident and that her facial injury and wrist and hand pain from contusions and bruising had resolved without any additional complaints. Dr. Loren testified that Martini did not fracture her knees, but bruised them. Martini reported persistent and diffuse pain and weakness in both knees, with the pain being worse in her left knee. Neither knee had any catching or locking, and she denied any falling as a result. Martini's records showed that she had complained of occasional right

knee pain in 2001, and constant pain in both knees by March 2006, at which time her doctor diagnosed her with osteoarthritis or wearing of the joint surface cartilage. In May 2012, Martini had narrowing of the joint space in the right knee and severe degenerative arthritis in her left knee. She was treated with an injection in her left knee about that time, but continued to complain of left knee pain in June 2012.

Dr. Loren testified that before her fall Martini had preexisting, "bone-on-bone" symptomatic arthritis in both knees; the contusions she sustained from the accident were treated with physical therapy, and Martini's subsequent complaints and treatment were related to her preexisting arthritis. Over Martini's counsel's objection, Dr. Loren related Martini's pain levels as recorded by the physical therapist; he testified that after therapy Martini's knees returned to her usual baseline level of pain. Dr. Loren did not find strong evidence that she sustained damage to her joints as a result of her fall; there were no fractures, she recovered from the contusions she suffered, and those contusions did not cause or contribute to her arthritis in any way. He testified that X-rays of her left knee confirmed that Martini had the same arthritic condition that she had before the accident.

Dr. Loren acknowledged that Martini had arthroscopic surgery after the accident but he testified when a person primarily has arthritis, arthroscopic surgery is "not terribly effective." He testified Martini's surgery was not successful because Martini stated it did not help her, and he reiterated it usually does not benefit patients with arthritis. He agreed knee replacement surgery would be available, and Martini would benefit from that procedure to eliminate the arthritis. Dr. Loren did not agree that Martini's fall was a substantial factor in the need for her arthroplasty, expressing his belief that Dr. Kane was

not aware of Martini's ongoing knee complaints and treatment from before the incident. Dr. Loren opined Martini's present condition was a natural progression of arthritis that had gotten worse over the years, including the four years since the incident. On cross-examination, he conceded that a post-accident MRI showed meniscus tears in Martini's left knee, but he explained that "meniscus tears in the setting of severe arthritis [were] almost universal"; there were "few exceptions in patients that have bone-on-bone arthritis that don't have meniscus tears" and that the MRI was "very, very consistent with degenerative tears related to the arthritis, not traumatic tears." Dr. Loren believed Martini's tears preexisted the accident.

The court instructed the jury concerning ordinary negligence as to all of the defendants with CACI Nos. 400 and 401, which related the elements of negligence (CACI No. 400), and told the jury that negligence "is the failure to use reasonable care to prevent harm to oneself or to others"; that "[a] person can be negligent by acting or by failing to act" and that "[a] person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation." The court instructed the jury: "You must decide how a reasonably careful person would have acted in this situation." It instructed the jury with CACI Nos. 1001, 1003 and 1004 pertaining to the

duty of care of a person who "owns or controls" property as to Association and Morning View, but not City Service.[4]

The jury returned a special verdict finding that Association and Morning View were negligent, but City Service was not. It allocated 35 percent responsibility each to Association and Morning View. It also found Martini was negligent and that her negligence was a substantial factor in causing her harm, allocating her 30 percent responsibility. The jury awarded Martini $5,000 for her past economic loss and $6,000 for her past noneconomic loss. The court entered judgment accordingly, adjusting the $11,000 award to reflect Martini's negligence and ordering Martini to recover $3,850 from Association and $3,850 from Morning View.

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4 The court read those instructions to the jury as follows: "A person who owns or controls property must use reasonable care to discover any unsafe conditions and to repair, replace or different adequate notice . . .—I'm sorry—or give adequate warning of anything that could be reasonably be expected to harm others. In deciding whether Bel Azure Homeowner's Association and Morning View Associates used reasonable care, you may consider among other factors the following: [¶] The location of the property, the likelihood that someone would come on the property in the same manner as . . . Martini did. The likelihood of harm and the probable seriousness of such harm; whether Bel Azure Homeowner's Association and Morning View Associates knew or should have known that [*sic*] the condition that created the risk of harm; the difficulty of protecting against the risk of harm; and the extent of Bel Azure Homeowner's Association and Morning View Associate's control over the condition that created the risk of harm. [¶] Bel Azure Homeowner's Association and Morning View Associates were negligent in the use and maintenance of the property if: [¶] One, a condition on the property created an unreasonable risk of harm. [¶] Two, Bel Azure Homeowner's Association and Morning View Associates knew or through the exercise of reasonable care should have known about it. [¶] And three, Bel Azure Homeowner's Association and Morning View Associates failed to repair the condition, protect against harm from the condition or give adequate warning of the condition. [¶] If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the owner who controls the property does not have to warn others about the dangerous condition."

Martini unsuccessfully moved for a new trial on multiple grounds, including irregularity of proceedings, irregular and improper court orders preventing her from having a fair trial, inadequate damages, insufficiency of the evidence to justify the verdict, and error in law including instructional error. Thereafter, she filed this appeal from the judgment and postjudgment order denying a new trial.

## DISCUSSION

### I. *Judgment in City Service's Favor*

#### A. *Claim of Nondelegable Duty to Warn and Maintain Property*

Martini challenges the judgment in City Service's favor, suggesting City Service was a "possessor" of Bel Azure while it performed its work, and contending that City therefore had a nondelegable, independent duty to warn and maintain the property undergoing repaving. She asserts City Service contractually retained exclusive control over the area to be repaved, but Brown took no action to stop individuals from accessing it other than to tell them not to do so, and did not take steps to notify the homeowners or ensure the notice given was adequate, even though he admitted notice was always extremely important. She also asserts it is undisputed that City Service "created the conditions at the property over which it assumed control" and that Brown admitted its repaving work "created an unsafe condition of property." (Italics omitted.) According to Martini, California common law places responsibility on a contractor for defects in areas both under its control and where it had worked, and the contractor has a duty to protect the public against dangerous conditions where it actually controls the premises. For the

latter proposition, she relies on authorities such as *Thirion v. Fredrickson & Watson Const. Co.* (1961) 193 Cal.App.2d 299, *Gibbons v. City of San Bernardino* (1951) 108 Cal.App.2d 33, *Johnston v. De La Guerra Properties, Inc.* (1946) 28 Cal.2d 394, and *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120.

"The nondelegable duties doctrine prevents a party that owes a duty to others from evading responsibility by claiming to have delegated that duty to an independent contractor hired to do the necessary work. The doctrine applies when the duty preexists and does not arise from the contract with the independent contractor." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600-601.) This doctrine is one of many exceptions to the general common law rule that a person hiring an independent contractor was not liable for injuries suffered by third persons caused by the contractor's negligence in performing the work. (See *SeaBright*, at p. 598; *Privette v. Superior Court* (1993) 5 Cal.4th 689, 693; *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1107; *Koepnick v. Kashiwa Fudosan America, Inc.* (2009) 173 Cal.App.4th 32, 36.)[5]

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5 Another exception to the common law rule of hirer nonliability for an independent contractor's torts is the peculiar risk doctrine, under which " 'a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others. By imposing such liability without fault on the person who hires the independent contractor, the doctrine seeks to ensure that injuries caused by inherently dangerous work will be compensated, that the person for whose benefit the contracted work is done bears responsibility for any risks of injury to others, and that adequate safeguards are taken to prevent such injuries.' " (*Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 646-647, quoting *Privette v. Superior Court*, *supra*, 5 Cal.4th at p. 691.) Either exception could apply to repaving work involving hot tar and heavy equipment.

Relevant here, the law is settled that a landowner or land possessor's duty to maintain its premises in reasonably safe condition is not delegable. (*Knell v. Morris* (1952) 39 Cal.2d 450, 456; *Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 259; *Srithong v. Total Investment Co*. (1994) 23 Cal.App.4th 721, 726.)[6] Thus, if an owner or possessor hires an independent contractor to do work on the property, the owner will be held vicariously liable and answerable for harm caused by the contractor's negligent failure to perform its work in a reasonably safe manner, irrespective of whether the contractor's negligence lies in incompetence, carelessness, inattention or delay. (*Brown*, at p. 260, quoting Rest. Torts, § 422, com. a, pp. 1138-1139; *Srithong v. Total Investment Co*, at p. 726; see *Pappas v. Carson* (1975) 50 Cal.App.3d 261, 268-269.) "The critical factor thrusting the duty upon a land possessor is his *legal and actual control* over the premises in which the instrumentality causing the harm is located." (*Pappas*, at p. 269, italics added.)

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6 *Brown v. George Pepperdine Foundation* observed: "The general rule is set forth in the Restatement of the Law of Torts, Negligence . . . section 422, as follows: 'The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay.' " (*Brown v. George Pepperdine Foundation*, *supra*, 23 Cal.2d at p. 260.) In *Brown*, a child fell down an elevator shaft after she opened the elevator door. (*Brown*, at pp. 258-259.) The California Supreme Court upheld the grant of new trial on grounds the court had misinstructed the jury by declining to impute the negligence of the elevator maintenance company to the landlord, in doing so stating that "[a] landlord cannot escape liability for failure to maintain elevators in a safe condition by delegating such duty to an independent contractor." (*Id.* at pp. 259-260.)

In *Srithong*, the court explained: "[T]he nondelegable duty rule is a form of vicarious liability because it is not based on the personal fault of the landowner who hired the independent contractor. Rather, the party charged with a nondelegable duty is 'held liable for the negligence of his agent, whether his agent was an employee or an independent contractor.' . . . [¶] The rationale of the nondelegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' [Citation.] The 'recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' [Citation.] Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability." (*Srithong v. Total Investment Co.*, *supra*, 23 Cal.App.4th at p. 727, italics and fn. omitted; see also *Koepnick v. Kashiwa Fudosan America, Inc.*, *supra*, 173 Cal.App.4th at pp. 35-37.)

In addressing Martini's contention that City Service owed the same nondelegable duty as did Association or Morning View, we dispose of several underlying premises of Martini's arguments that are unsupported by the record or the law. First, we see nothing in the provisions of City Service's contract with Association that "expressly" required that City Service retain "exclusive" or "complete" control over its job site. Martini cites to Brown's admission on cross-examination that he had control of the job site from the time he crew arrived until it left, but Brown said nothing about any contractual provisions requiring such control, and we see none. Martini does not supply a pinpoint cite to the contract in her opening brief. In reply, her citation is to a trial exhibit list.

Second, Brown did not admit City Service's work created a dangerous condition of property.[7] Brown merely testified that the construction repaving site was not a safe place for pedestrians to be walking, a general proposition that is not reasonably subject to dispute. (*Toste v. Calportland Construction* (2016) 245 Cal.App.4th 362, 370 [" 'A construction site can be a dangerous place' "], quoting *Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 22.)

Third, the trial evidence was that City Service's status was solely that of an independent contractor working on private property and not an owner or "possessor" of the property. The California Supreme Court has explained that the Restatement of Torts defines the term "possessor of land" to "include 'a person who is in occupation of the land with intent to control it . . . .' " (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1159, citing Rest.2d Torts, § 328E.[8]) " 'In common law parlance, the possessor of land is the party bearing responsibility for its safe condition. Possession, in turn, is equated with *occupancy plus control*. [Citations.] Thus, in identifying the party vulnerable to a verdict, control dominates over title. "The crucial element is control." ' " (*Alcaraz*, at

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7 Brown testified: "[Question:] Were pedestrians allowed to be on the road during paving? [¶] [Brown:] No. [¶] [Question:] Why not? [¶] [Brown:] Because it's not safe. [Question:] Why wasn't it safe? [Brown:] Because there was heavy equipment. It was all over the street. There was wet asphalt. You could see it. It just wasn't safe. I knew not to get on it."

8 The Restatement Second of Torts, section 328E, page 170, states: "A *possessor of land* is [¶] (a) a person who is *in occupation of the land with intent to control it* or [¶] (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or [¶] (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." (Italics added.)

p. 1159, italics added.) A possessor with such responsibility must have "*legal* and actual control over the premises" (*Pappas v. Carson*, *supra*, 50 Cal.App.3d at p. 269; see *Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 197 [respondents did not own or have "legal possession" of a planting strip]); it may be a lessee or tenant (see *Johnston v. De La Guerra Properties, Inc.*, *supra*, 28 Cal.2d at p. 401 [restaurant tenant exercised control over lighting of the approach to a side entrance to a building, inviting customers to use that entryway, but failed to warn a business invitee of a dangerous condition on this path]; *Pappas v. Carson*, at pp. 268-269 [tenant who installed and had control over electrical outlets]; *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 831-832) or a landlord for those areas over which it retains control such as common passageways. (*Alcaraz v. Vece*, at p. 1153; *Low*, at p. 832.)

City Service did not retain any legal control either by contract or otherwise; it did not occupy or possess Association's land within the meaning of the Restatement and the doctrine of nondelegable duty, but merely entered into a contract with Association's manager, Morning View, to render paving services. There is no dispute that the property owner here was Association, who as the landowner had a preexisting, nondelegable, duty to exercise reasonable care to maintain the property in a safe condition, which it sought to do via its agent Morning View, which took on the responsibility to notify homeowners about the lack of ingress and egress from the complex during the repaving job. Association via its agent hired City Service, and was vicariously liable for City Service's actions in repaving its private streets under the nondelegable duty doctrine. Though *Alcaraz* makes clear that a duty to warn of known hazards arises on a person who does

not own or exercise control over the hazard and even if the person does not own abutting property on which the hazard is located (*Alcaraz*, at pp. 1155, 1156), Martini has not pointed to any case applying *Alcaraz*'s principles to an independent contractor performing work for a property owner. The evidence does not support Martini's contention that City Service was a "possessor" or in "possession" of the property so as to owe a *nondelegable* duty under the law.

Nonetheless, as the trial court instructed the jury in this case, City Service was subject to liability for its own *ordinary negligence* causing injury to an occupant of property on which it was working. (Civ. Code, § 1714, subd. (a) ["Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself"]; see *Poulsen v. Charlton* (1964) 224 Cal.App.2d 262, 269 [Even where owners had a nondelegable duty and remained liable for their contractor's negligence, "[c]ontractors, of course, are responsible for their *own* negligence which causes injury to an occupant of a building upon which they are working," italics added]; *Gibbons v. City of San Bernardino*, *supra*, 108 Cal.App.2d at p. 35 [defendant performing construction work "[u]ndoubtedly . . . was under a duty to use reasonable care to see that the portion of the street under its control

and upon which it had worked was reasonably safe . . . ."];[9] *Thirion v. Fredrikson & Watson Constr. Co.*, *supra*, 193 Cal.App.2d at pp. 304-305 [highway contractor working on public highway or street owes to the travelling public the duty of protecting it from injury that may result from his negligence in creating dangerous conditions where the public might encounter such conditions]; *Ray v. Silverado Constructors*, *supra*, 98 Cal.App.4th at p. 1134 [same; finding triable issue as to whether general contractor working on road project owed duty to public to protect it from injury from construction debris falling on a street below].) These cases, on which Martini relies, do not involve nondelegable duties, but merely contractors' duties to avoid ordinary negligence in conducting their work.

Here, Martini's burden at trial was to prove duty, breach, causation and damages. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1145.) But the jury rendered a verdict in City Service's favor on the question of negligence, and substantial evidence supports the jury's verdict that City Service exercised reasonable

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9 In *Gibbons v. City of San Bernardino*, *supra*, 108 Cal.App.2d 33, the contractor's contract required it to " 'furnish, erect, and maintain such fences, barriers, lights, and signs as are necessary to give adequate warning to the public at all times that the road or street is under construction and of any dangerous conditions to be encountered as a result thereof and he shall also erect and maintain such warning and directional signs as may be furnished by the City.' " (*Gibbons v. City of San Bernardino*, at p. 35.) The *Gibbons* court thus held the clause required "that defendant give adequate warning to the public of any dangerous condition to be encountered as a result of *such construction.*" (*Id.* at p. 36.) No such provision appears in City Service's contract in this case. Indeed, as stated, its contract required that Association or Morning View provide it a clear job site: " 'City Service Paving, Inc.' shall be given the job site free of vehicles or objects that would interfere with the scope of work to be executed the day of commencement . . . ."

care under the circumstances. The evidence showed City Service advised Morning View that no persons were to be on the job site during the work, and that it knew Morning View had agreed to take on the responsibility to warn homeowners, as provided in City Service's contract. Evidence showed City Service had done such work before at the property without accidents or any incidents, thus it had no knowledge of the likelihood of any specific type of injury of the sort Martini suffered. The jury plainly believed Morning View's owner's testimony that there was no practical way City Service could provide a means of alternate or temporary access through the construction site, despite Martini's counsel's efforts to attack her credibility on the issue. There was no evidence City Service failed to take steps to guard against any danger of which it had actual knowledge, or that it should have known that injuries were highly probable if it did not take reasonable security precautions. (*Alcaraz v. Vece*, *supra*, 14 Cal.4th at pp. 1156, 1157 [possessor of land *who knows of a hazard* has a duty to warn of it]; *Laico v. Chevron U.S.A., Inc.* (2004) 123 Cal.App.4th 649, 661 [before liability may be imposed for a third party's injury due to a dangerous condition on the land, plaintiff must show actual knowledge of the dangerous condition in question].) Nevertheless, City Service's project manager did take precautions by telling people who he saw not to walk through, and contacting Morning View to tell it homeowners were travelling through the construction site. And, the jury could reasonably conclude either that the construction site where hot tar was being poured was so obviously and intrinsically dangerous that no warning was required, or that the visible, one-foot square and two- to three-inch pile of gravel in an active construction site did not constitute negligence, or even the negligent

creation of a dangerous condition, so as to impose liability on City Service. (Accord, *Bisetti v. United Refrigeration Corp.* (1985) 174 Cal.App.3d 643, 650 [presence of acid vats on property on which a metal stripping operation was occurring was not dangerous to the public at large or to persons safely comporting themselves on the premises; the vats "were no more dangerous than any normal mechanical equipment in industry, when used in the proper and cautious manner for which it is intended"].) At the same time, the jury could conclude that Association and Morning View were negligent in failing to adequately warn homeowners that they were not to walk through the construction zone during active repaving, which caused Martini to walk through the swale and trip over normal and expected construction debris.

B. *Claim of Inconsistent Verdict*

Martini contends it was "patently inconsistent" for the jury to find Association and Morning View liable for her injuries, and not City Service. Asserting City Service's duties were identical to that of the Association and Morning View and nondelegable, she maintains the jury was required to decide whether a dangerous condition was created, and "[t]here could be no finding in favor of [Martini] 'on any theory' of liability unless the jury first found a dangerous condition was created and there was a failure to maintain the property in a safe condition by the party who controlled the property." She argues the evidence at trial established that the jury's determination of liability against Association and Morning View "was premised on the identical evidence and legal theories upon which any liability of City [Service] would be necessarily predicated" and thus the verdict exonerating City Service is "fatally inconsistent with the finding of liability as

against [Association] and Morning View." She maintains there is substantial evidence that the "loose asphalt dumped by City [Service] which migrated to the adjacent swale was the proximate cause of [her] injury and such injury would not have occurred absent City [Service's] negligence to secure and contain the gravel and provide pedestrians with a way to navigate through the work site during the course of the repaving."

To the extent Martini's contention of inconsistent verdicts is premised on her claim that City Service owed the same nondelegable duty as Association and Morning View, we have rejected that premise, and her claim as to identical legal theories fails. Further, we see nothing logically or legally inconsistent or contradictory in the jury's negligence verdicts as to Association and Morning View on the one hand, and City Service on the other.

" 'A special verdict is inconsistent if there is no possibility of reconciling its findings with each other.' " (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 585, quoting *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.) " 'Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law.' [Citations.] 'The appellate court is not permitted to choose between inconsistent answers.' " (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092; see also *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682.) " 'On appeal, we review a special verdict de novo to determine whether its findings are inconsistent.' " (*David v. Hernandez* at p. 585.) " ' " 'Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment,

the inconsistency is reversible error.' " ' "  (*Ibid.*)  A new trial is the proper remedy for an inconsistent special verdict.  (*Ibid.*)

" ' "Where, as here, there is no special finding on what negligence is found by the jury, the jury's finding is tantamount to a general verdict." ' "  (*Toste v. Calportland Construction*, *supra*, 245 Cal.App.4th at p. 368; *David v. Hernandez*, *supra*, 226 Cal.App.4th at pp. 585-586.)  A general verdict " ' "imports findings in favor of the prevailing party on all material issues; and if the evidence supports implied findings on any set of issues which will sustain the verdict, it will be assumed that the jury so found. The court on appeal does not have to speculate on what particular ground the jury may have found in favor of the prevailing party." ' "  (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193.)

This is not a situation where the jury made " 'inconsistent determinations of fact based on the same evidence . . . .' "  (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*, *supra*, 126 Cal.App.4th at p. 682; see also *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344 [verdict inconsistent where jury found that defendant breached implied covenant of good faith and fair dealing, but did not breach the contract].)  As we have explained, on this record, it was not legally or factually inconsistent for the jury to find that Association and Morning View were negligent in that they did not adequately warn homeowners to not enter or walk through the complex during active construction with its inherent dangers (including hot tar and heavy equipment), but that City Service did not negligently create, or fail to warn of, a dangerous condition.  That is, the jury could reasonably conclude the presence of a

visible pile of gravel or asphalt in a site where repaving was occurring was not the result of City Service's failure to use ordinary care, nor did it present an *unreasonable* risk of harm in the context of normal paving activities. On the other hand, it could conclude that a reasonable homeowner's association would warn residents not to traverse through an active construction site with its inherent dangers. In sum, the special verdict findings are consistent.

C. *Claim of Instructional Error*

Martini contends the trial court prejudicially erred by striking references to City Service when it instructed the jury with CACI Nos. 1001 and 1003, specifically relating to premises liability: the basic duty of care and unsafe property conditions respectively. City Service initially responds that based on the appellate record and the presumption in favor of the court's orders, Martini has forfeited the argument on appeal.

In general, if a party requests a proper jury instruction and the court refuses to give the instruction, the party is deemed to have objected. (Code Civ. Proc., § 647; *Green v. State of California* (2007) 42 Cal.4th 254, 266; *Manguso v. Oceanside Unified School Dist.* (1984) 153 Cal.App.3d 574, 581-582.) But if a party invites the error by requesting or acquiescing in a particular instruction, that party cannot appeal the giving of that instruction. (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000; see also *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1090 [" 'It is an elementary principle of appellate law that "[a] party may not complain of the giving of instructions which he has requested" ' "]; (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 984.) Martini bears the "burden of presenting a sufficient record to establish that the

claimed error was *not* invited . . . or be barred from complaining about it on appeal." (*Mayes v. Bryan*, at p. 1091.)

Here, the record shows that some party proposed a version of the same modified CACI Nos. 1001 and 1003 instructions that named City Service in addition to Association and Morning View, but the court marked those instructions "withdrawn." The court marked one other jury instruction "refused" as "inapplicable," indicating it did not use the words "withdrawn" and "refused" synonymously. We are without a transcript of the parties' jury instruction conference, and do not know which party proposed the instructions or the court's reasoning behind the giving or withdrawal of any instructions, including the versions of CACI Nos. 1001 and 1003 that it actually read to the jury. Martini also states the court acted "[o]ver appellant's objection . . . ." Martini's record citations however, point only to the transcript of the court's reading of CACI Nos. 1001 and 1003, arguments made in her new trial motion points and authorities, the withdrawn instructions, and the copies of CACI Nos. 1001 and 1003 that the court in fact read to the jury. In reply, Martini cites to her attorney's declaration in support of the new trial motion in which he states: "Over my objection, the trial court would not instruct the jury on Premises Liability as to Defendant City Paving. Specifically, the court would not allow CACI instructions 1001 Basic Duty of Care and 1003 Unsafe Conditions include Defendant City Paving as having the duties identified therein, allowing only instructions as to Negligence against Defendant City Paving." Counsel does not state that he proposed the instructions or specify the nature of his objection. The court nevertheless marked the instruction withdrawn, which is not inconsistent with counsel asserting an

objection but thereafter withdrawing the proposed instruction. We indulge all inferences to support the court's withdrawal of the instruction. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Stevens v. Stevens* (1954) 129 Cal.App.2d 19, 20 [absent a reporter's transcript, we must presume "the trial court acted duly and regularly . . . ."]; see *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.)

Under the circumstances, Martini has failed to provide a record sufficient to establish that she did not invite error with respect to these instructions; that she neither proposed the instructions, or affirmatively withdrew them. (See *Mayes v. Bryan*, *supra*, 139 Cal.App.4th at p. 1091.) She is barred from complaining about them on appeal.

Were we to consider Martini's contention and presume (without deciding) the court erred by failing to include City Service in the premises liability instructions, we would conclude she cannot establish prejudice. Instructional error in a civil case is not ground for reversal unless it is probable the error prejudicially affected the verdict. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 (*Soule*); *Morales v. 22nd District Agricultural Association* (2016) 1 Cal.App.5th 504, 525, 529.) In determining whether instructional error was prejudicial, a reviewing court "should consider not only the nature of the error, 'including its natural and probable effect on a party's ability to place his full case before the jury,' but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Rutherford v. Owens-Illinois, Inc.*, *supra*, 16 Cal.4th at p. 983.)

Here, Martini has not demonstrated that there is a reasonable probability that in the absence of any presumed error—that is, had the jury been instructed with CACI Nos. 1001 and 1003 as to City Service—it would have reached a decision more favorable to her. Considering the first *Soule* prejudice factor, Martini's counsel was not prevented from explaining his theory of City Service's negligence to the jury, including that Brown should have given warnings when he saw people walking through the job site, that is, he should have immediately "correct[ed]" Morning View's failure to "give proper notice."[10] As for the trial evidence, it was undisputed that Morning View undertook responsibility for giving homeowners notice. Nor was there conflict as to how the accident occurred: what prompted Martini and her daughter to leave their house, that they travelled through an active construction site with at least one worker and heavy equipment visible and

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10 Martini's counsel argued: "So, let me go onto City Service Paving. We know from . . . Brown that his testimony was this is dangerous. Nobody should be in or out. But . . . Brown also saw people walking through the complex. And he knew. He told us. Those people shouldn't be there. Those people essentially told him, no one told us that. But he doesn't do anything. [¶] He just says, oh, you shouldn't be walking in here and goes on about his merry way. Well, is that a responsible thing to do? No. Something has gone wrong. And . . . Brown knew something had gone wrong because he was very clear in his testimony, explicit. Nobody is allowed in. [¶] And that's the notice that should go out. This is dangerous. Nobody should be allowed in. That's what he testified to. Yet when he sees that first person walking in and telling him nobody gave us notice, a light bulb should have been going off in his head. Something failed here. Somebody did not give proper notice and we should correct that immediately. [¶] Either post people or keep a lookout for people or make a path, if at all possible. Get [Morning View's owner] down there right away . . . . She should be down there right away because she didn't give notice. Something should have been done instead of like just, oh, another guy walking through the project again. I told them, but that's all I can do. [¶] No, that isn't all you can do. It's your project. You have control or supposed to have control. It's negligence. As a result of the negligence of these three parties, my client fell and injured herself."

present, and the fact Martini saw the open pile of gravel or asphalt before she tripped on it. The court gave general negligence instructions applicable to City Service, which set out the legal principles allowing Martini's counsel to make his arguments about City Service's various asserted failures to exercise due care. In closing arguments, Association and Morning View agreed they had accepted responsibility for giving notice, but argued there was no need to warn homeowners that they should not walk through streets undergoing repaving or an active construction site with heavy equipment and hot asphalt. City Service did not take a position that it should be absolved from liability because it did not own or possess the property, and in view of its contract, it reasonably expected Association and Morning View to provide it a clear worksite. As stated, the jury could reasonably conclude an obvious pile of gravel in an active repaving site did not constitute an *unreasonable* risk of harm of which City Service had an obligation to warn. We cannot say counsel's argument to the jury contributed to any misleading effect of the instructions given. The record contains no indication that the jury requested a rereading of any instructions. There is nothing in the record suggesting the jury was confused about whether City Service could be held liable for negligence in the conduct of its work. The jurors "collectively" stated that the verdict was what it reached, giving no indication of any split or uncertainty. In sum, no prejudice would result from Martini's claimed instructional error.

II. *Admission of Dr. Loren's Testimony*

At trial, Dr. Loren testified he had reached opinions about the accident and what injuries Martini had sustained, and was asked to relate them. He responded in the following colloquy:

"[Dr. Loren:] Based on my review of the records, my interview and examination of Ms. Martini, as well as my personal review of the X-rays, I believe that as far as her wrists and hands were concerned, she did sustain contusions to her wrists and her hands. Her X-rays actually showed that she had arthritis in her wrist and hands as well that was preexisting to this incident, but had no residual complaints. So those contusions had resolved really without any further problems and no need for further treatment.

"With regard to the right knee, again, I believe she sustained a contusion to her right knee. I think the medical evidence is very strong that she had preexisting arthritis in her knee that was symptomatic prior to this incident. She was sent to physical therapy following the incident and the physical therapy discharge summary was very promising that she had significant response to the physical therapy and so I believe following that physical therapy, she had returned to her usual baseline level of pain and may have had some residual symptoms related to her previous arthritis."

"[City Service's counsel:] What day was that discharge from the physical therapy that you're referring to?

"[Dr. Loren:] October 11, 2012.

"[City Service's counsel:] Okay. Go on.

"[Dr. Loren:] And my opinion with the left knee is quite similar. Based on the records, the left knee had always seemed to be a bit more symptomatic than the right. It's

very clear that she had severe arthritis in the left knee that preexisted this fall. But I do believe she sustained a contusion to her knee that was treated appropriately with physical therapy. And the physical therapy was very promising that she showed significant improvement with initial pain levels recorded between eight-to-ten over ten. And discharge pain levels reported at zero-to-four out of ten, and that was October 11. [¶] So my opinion is, she returned to her normal baseline level of pain following the physical therapy and the subsequent complaints and treatment she has had for her knee are really related to her preexisting arthritis that she had been complaining of.

"[Martini's counsel]: Move to strike portions of reading of the physical therapy notes.

"[The court]: That motion to strike is denied. He was giving his opinion and the bases for them . . . ."

Relying on *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *People v. Roa* (2017) 11 Cal.App.5th 428, Martini contends that Dr. Loren's opinion that her injuries were fully resolved as a result of physical therapy was based solely on hearsay—the physical therapist's notes and discharge summary—and thus admitting it was reversible error.[11] She maintains that because Dr. Loren relayed the contents of those items as fact, the jury was precluded from deciding whether he relied on true and accurate information.

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11 " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (*Id*., subd. (b).) The "improper admission of hearsay . . . constitute[s] statutory error under the Evidence Code." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

She further argues the court's admission of this testimony was prejudicial: without testimony about the contents of these writings, she asserts, there was no evidence to support Dr. Loren's conclusion that her injuries had fully resolved and that any later pain, limitations or treatment was solely due to her preexisting arthritis.

A. Sanchez

At the time of trial, the controlling authority on an expert's reliance on hearsay was *People v. Gardeley* (1997) 14 Cal.4th 605, disapproved by *Sanchez*, *supra*, 63 Cal.4th at page 686, footnote 13. (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1281.) *Gardeley* "permitted a qualified expert witness to testify on direct examination to any sufficiently reliable hearsay sources used in formulation of the expert's opinion." (*K.W.*, 13 Cal.App.5th at p. 1281.) " '*Sanchez* announced a "paradigm shift" regarding how out-of-court statements used as expert testimony basis are treated under California hearsay law.' " (*K.W.*, p. 1281.) It rejected prior paradigms set out in *Gardeley* and other cases as " 'no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury.' [Citation.] . . . 'If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the

traditional manner.' [Citation.] 'Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.' " (*Id*. at pp. 1281-1282.)

*Sanchez* explained: "When *any* expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Sanchez*, *supra*, 63 Cal.4th at p. 686; see *Conservatorship of K.W.*, *supra*, 13 Cal.App.5th at p. 1282.) However, the court made clear an expert "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so . . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Sanchez*, at pp. 685-686; *K.W.*, at p. 1283.)

B. *Forfeiture*

Association maintains Martini's hearsay challenge is not cognizable on appeal. It points out Dr. Loren's foregoing testimony was given without a *timely or specific* objection by counsel, and as a result, Martini forfeited her appellate challenge. (Evid. Code, § 353, subd. (a) [judgment will not be reversed by reason of erroneous admission of evidence unless counsel makes a timely objection and states the specific ground for the objection, or moves to strike the objectionable testimony]; *Marmion v. Mercy Hosp. and Medical Center* (1983) 145 Cal.App.3d 72, 98-99.) It concedes *Sanchez* was not decided by the time of trial, but points out it has been long held an expert witness may not on

direct examination reveal the content of reports prepared or opinions expressed by nontestifying experts. (*People v. Campos* (1995) 32 Cal.App.4th 304, 308; see also *People v. Leon* (2015) 61 Cal.4th 569, 603 ["hearsay problem arises when an expert simply recites portions of a report prepared by someone else"]; *Whitfield v. Roth* (1974) 10 Cal.3d 874, 895 ["It is clear that doctors can testify as to the basis of their opinion [citation], but this is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-court doctors before the jury"].) It suggests after each opinion counsel was required to assert a meaningful objection with a specific legal ground and call for a ruling, or else forfeit the challenge.

In reply, Martini maintains she did not forfeit her objections because *Sanchez* was not decided at the time of trial, and that opinion "dramatically altered the state of the law on the issue of expert reliance on case specific hearsay." We agree any hearsay issue based on *Sanchez* was not forfeited; a party's "failure to raise an issue at trial is generally excused where an objection would have been futile or wholly unsupported by existing substantive law." (*Conservatorship of K.W.*, *supra*, 13 Cal.App.5th at p. 1283, citing *People v. Welch* (1993) 5 Cal.4th 228, 237-238.) Here, Martini's counsel was not required to assert hearsay objections that would have been overruled at the time they were made.

C. *There Was No* Sanchez *Error as to the Majority of Dr. Loren's Opinions, and as to Those Opinions That Related Case-Specific Information, Any Error Was Harmless*

Proceeding to the merits of Martini's challenge, we discern no prejudicial error. Except to the extent an evidentiary ruling is based on a conclusion of law, we review the

trial court's admission of Dr. Loren's expert opinion, and whether it violated the hearsay rule, for abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773; see also *People v. Clark* (2016) 63 Cal.4th 522, 573; *People v. Stamps* (2016) 3 Cal.App.5th 988, 992.)

Here, Dr. Loren made clear he had personally interviewed and examined Martini, and reviewed her medical records and X-rays, which, as he stated, *generally* provided the basis for his opinions. The majority of Dr. Loren's testimony as recited above—as to Martini's contusions and their resolution, the presence of preexisting symptomatic arthritis in her knees, the contusions that she treated with physical therapy, and his opinion that her post-physical therapy complaints and treatment related to her preexisting arthritis—did not relate case-specific information for its truth and accuracy. Dr. Loren was entitled to explain to the jury the "matter" upon which he relied, even if that matter would ordinarily be inadmissible. (Evid. Code, § 801; *Sanchez*, *supra*, 63 Cal.4th at p. 679.) Expert testimony may be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (*Sanchez*, at p. 685.) The materials mentioned by Dr. Loren are those sorts of materials.

However, Dr. Loren did testify that after her physical therapy, Martini had returned to her baseline level of pain, and he related pre- and post-physical therapy numerical pain levels as documented in the physical therapy discharge summary. Under *Sanchez*, this portion of Dr. Loren's testimony seemed to recite an out-of-court statement (the physical therapist's recording, set forth in a discharge summary, of Martini's stated

pain level) to establish a case specific fact, as opposed to "generally accepted background information . . . ." (*Sanchez, supra*, 63 Cal.4th at p. 676.) We agree with Martini that the discharge summary is hearsay, making Martini's statements recorded in it double hearsay. If no hearsay exception applies to each level, the testimony was erroneously admitted. (*People v. Stamps*, *supra*, 3 Cal.App.5th at p. 996, citing *Sanchez*, *supra*, 63 Cal.4th at pp. 684-686; *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 680.)

Association maintains the evidence falls within the Evidence Code section 1250 hearsay exception for state of mind; that Martini's statements to the physical therapist concerning her then-existing pain and bodily health, including her pre- and post-treatment pain levels, were independently admissible under the "physical sensation component of the state-of-mind exception under [Evidence Code] section 1250." (*People v. Nelson* (2012) 209 Cal.App.4th 698, 709. We agree. *Nelson* holds that "[a] declaration of then existing pain is admissible under [Evidence Code] section 1250 [citation], because it has essentially the same indicia of reliability as a spontaneous statement." (*Ibid*.) Association further argues that it was not required to make an additional showing that the physical therapy discharge summary or notes qualified as business records because Martini's statements were admissible in their own right and not dependent on the business record exception, and further, she proffered those documents at trial without challenging their authentication. We agree that Martini's offering these documents as exhibits forfeited any additional hearsay objection to their admission or invited any error.

Even if we did not reach the foregoing conclusions, Martini cannot show that Dr. Loren's testimony concerning her baseline levels of pain resulted in prejudice. That is, we conclude it is not reasonably probable the jury would have reached a different conclusion if his testimony relating Martini's baseline pain levels had been excluded. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685, 698 [improper admission of hearsay may constitute state law statutory error]; *People v. Watson* (1956) 46 Cal.2d 818, 836; *Conservatorship of K.W.*, *supra*, 13 Cal.App.5th at p. 1286 [applying *Watson* standard of prejudice]; *People ex re. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 29, 36 [addressing *Sanchez* error].) Dr. Loren testified without objection that Martini had preexisting symptomatic arthritis, and his opinion was that Martini's complaints and treatment for her knee after she received physical therapy were related to that arthritis that she had already been complaining about. Dr. Loren did not recite hearsay in expressing those opinions. Further, the jury could reasonably discount Martini's claims about her knee problems, as well as Dr. Kane's testimony about her arthritic knees becoming symptomatic only after the accident, as his testimony was contradicted by her prior medical records, and it was based on Martini's statements to him and other doctors that she did not experience appreciable pain in her knees before the incident. Any error under state hearsay law as interpreted by *Sanchez* was harmless.

III. *Adequacy of Jury's Damages Award*

Martini contends the jury's damages award is inadequate and contrary to undisputed evidence presented at trial. As to past medical expenses, she points out the parties had stipulated that her medical expenses amounted to approximately $16,500, but

the jury deducted more than $11,000 from that amount and awarded her $5,000 for past economic loss, even though the defendant's expert testified that her past medical treatment was reasonable. As to future medical expenses, she argues the jury's conclusion she was not entitled to recover the costs of future knee replacement surgery and related future pain and suffering is not supported by substantial evidence. Martini asserts Dr. Kane's testimony that the accident made her left knee "far more symptomatic," as well as the evidence of her post-accident limitations, was unrebutted, and supported by Dr. Loren's concession that trauma could exacerbate preexisting arthritis. Finally, she argues there is no evidence that any future knee replacement surgery is related solely to her preexisting condition and not due in part to the exacerbation of her arthritis as a result of her fall.

"A new trial shall not be granted upon the ground of . . . inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657; see *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) The trial court has broad discretion in ruling on a new trial motion, and the court's exercise of that discretion is accorded great deference on appeal. (*Decker*, at pp. 871-872; see *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61 ["reviewing court must uphold an award of damages whenever possible [citation] and all presumptions are in favor of the judgment"].) We will reverse the denial of a new trial motion for insufficient evidence of inadequate damages " 'only if there is no substantial conflict in the evidence and the evidence

compels the conclusion that the motion should have been granted.' ' (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1416; accord, *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.)

A. *The $5,000 Past Economic Damages Award*

We disagree that the jury was compelled to award Martini $16,510 in past economic damages, the stipulated sum of her past medical bills, or that the trial court erred by not granting her a new trial for the jury's failure to do so. The parties merely stipulated to the amount of Martini's past medical expenses, not that those medical costs were caused by any of the defendants or the result of Martini's accident. The stipulation therefore did not eliminate the contested issue of liability: causation. (See, e.g., *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632 [a stipulation like a contract, must be interpreted so as to give effect to the mutual intent of the parties]; *Leonard v. City of Los Angeles* (1973) 31 Cal.App.3d 473, 476 [stipulation does not bind court on questions of law and legal conclusions to be drawn from stipulated facts].) Had the parties stipulated to causation, it would have been, in effect, an admission of liability and the court would not have instructed the jury that Martini had to prove defendants' negligence was a substantial factor in causing the harm she suffered.

Nor do we construe Dr. Loren's testimony about the reasonableness of Martini's past medical treatment as conclusive proof that all of her past medical treatment was necessitated by injuries stemming from her fall. Dr. Loren observed that Martini had significant preexisting arthritis, and his testimony was merely that he could not fault Dr. Kane for performing the arthroscopic surgery, even though in Dr. Loren's opinion it did

not work for Martini and was unlikely to work for a patient with arthritis. Dr. Loren's testimony was not a concession that Martini's need for surgery stemmed from the accident. We therefore disagree with Martini's contention that the stipulation and Dr. Loren's testimony "alone are a sufficient basis to find that the jury's award for past medical expenses, in an amount less than the amount stipulated, was unsupported by substantial evidence."

Rather, as defendants point out, the jury was not required to accept any particular formula in calculating Martini's past medical expenses. (Accord, *Abbott v. Taz Exp.* (1998) 67 Cal.App.4th 853, 855, 857 ["What constitutes fair and reasonable compensation in a particular case is a question of fact, and no precise mathematical formula exists. We refuse to transform the jury's inherently subjective task of calculating damages into a mechanical exercise of voting to accept or reject the testimony of any witness in toto"].) We may not "question the discretionary determinations of jury and judge, so long as they fall within a reasonable range permitted by the evidence." (*Ibid.*) As we have summarized above, Dr. Loren did not agree that Martini's fall was a substantial factor in her need for arthroplasty, and he testified Martini had recovered from the injuries she sustained from the fall, rendering her current complaints solely the result of her preexisting arthritic condition.[12] Dr. Loren also testified that Martini's meniscus

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12 Martini points out that Dr. Loren agreed to a somewhat confusing question that arthritis generally can be exacerbated: "Q. Would you agree, doctor, that somebody that's suffering from arthritis trauma can start pain in that arthritis from somebody that has not had pain before; correct? [¶] [Dr. Loren:] It can exacerbate symptoms, yes." But his testimony was not that Martini's fall exacerbated her condition.

tears were degenerative from her bone-on-bone arthritis, and felt they preexisted her fall. The jury was entitled to accept his opinions. Though there was no evidence breaking down Martini's medical expenses, Dr. Kane explained that for a knee replacement, Medicare would cover about $9,200 to $9,400, as well as $2,000 in physical therapy. The jury reasonably could have estimated that the arthroscopic surgery cost somewhat less, deducted that expense from Martini's total medical expenses, and limited any damages to those other medical expenses (doctor visits, injections, etc.) that it deemed were caused by the fall. "Even where there is undisputed evidence regarding a specific component of damages, a lesser award is not necessarily inadequate as a matter of law where it may be justified on an alternative basis." (*Abbott v. Taz Exp.*, at p. 857.) But we are not required to "precisely recreate the jury's reasoning." (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 532.) Deferring to the trial court's discretion as we must, considering the evidence in the light most favorable to the jury's award, and resolving conflicts in support of the judgment (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630), we conclude the jury's award was not inadequate as a matter of law, and it is "well within the range of possibilities supported by the testimony." (*Pellegrini*, at p. 532; see *Abbott*, at p. 857.)

B. *The $6,000 Past Noneconomic Damages Award*

Contrary to the authorities on which Martini relies (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931 and *Miller v. San Diego Gas & Electric Co.* (1963) 212 Cal.App.2d 555) in which the juries did not give the plaintiff any award for past pain and suffering

(*Capelouto*, at p. 892; *Dodson*, at p. 933; *Miller*, at p. 557), the jury here rendered an award for past noneconomic damages to Martini of $6,000. She nevertheless argues that under these cases, the jury's award is inadequate as a matter of law. In part, she argues, citing *Dodson*, at page 938 that " '[a] plaintiff who is subjected to a serious surgical procedure must necessarily have endured at least some pain and suffering in connection with the surgery' " and though it is for the jury to decide that amount, " 'common experience tells us it cannot be zero.' "

"There is no fixed standard to determine the amount of noneconomic damages. Instead, the determination is committed to the discretion of the trier of fact." (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1332; see *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1213.) A jury has "relatively unfettered authority and responsibility to calculate damages for pain and suffering." (*Garfoot v. Avila* (1989) 213 Cal.App.3d 1205, 1210, citing *Beagle v. Vasold* (1966) 65 Cal.2d 166, 172.) Every case depends upon its facts. (*Dodson v. J. Pacific, Inc.*, *supra*, 154 Cal.App.4th at p. 936; *Miller v. San Diego Gas & Electric Co.*, *supra*, 212 Cal.App.2d at p. 558.) Again, we review the jury's award for substantial evidence, giving due deference to its verdict and the trial court's denial of Martini's new trial motion. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300.) If there is substantial evidence to support the award, "the appellate court must affirm, even if the reviewing court would have ruled differently had it presided over the proceedings below, and even if other substantial evidence would have supported a different result." (*Major v. Western Home Ins. Co.*, at p. 1208.) "The 'focus

is on the quality, not the quantity, of the evidence.' " (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 396.)

We conclude substantial evidence supports the jury's fairly generous pain and suffering award here. Martini's challenge is premised on her claim that there is "no evidence that the recommended knee replacement surgery is not due to exacerbation of [her] arthritis from the trauma of the fall." But that is a mischaracterization of the record: Dr. Loren opined Martini's present condition was due to the "natural progression of arthritis" that had "gotten worse over the years" from which the jury could conclude her condition was not the result of any exacerbation from her fall. Further, the jury here reasonably could decide that Martini's arthroscopy was not occasioned by the fault of defendants, unlike in *Dodson*, *supra*, 154 Cal.App.4th at page 938 where the jury concluded the plaintiff's damages were "caused by the accident" at issue. Thus, the jury was within its right to award only pain and suffering related to Martini's contusions and medical treatment apart from that surgery. In short, the record does not support Martini's characterization of the evidence, and we cannot conclude the jury's award is inadequate as a matter of law.

C. *Future Damages*

For similar reasons, we uphold the jury's decision not to award Martini any amount for future medical expenses or pain and suffering. Again, the jury was entitled to conclude based on Dr. Loren's testimony that the injuries Martini suffered from her fall had fully resolved; they did not cause, contribute to, or worsen her preexisting arthritis; and any future knee replacement surgery would be a procedure to resolve the significant

arthritis preexisting the accident, not any of the contusions caused by the accident that had resolved by the time of trial.

IV. *Evidence of Martini's Comparative Negligence*

Martini challenges the sufficiency of the evidence to support the jury's finding she was negligent: she contends there is no evidence that her conduct in walking along the concrete swale was inherently dangerous, created an undue risk of harm, or was a substantial factor in causing her injuries, which she suggests was required for the jury to make its comparative negligence finding. She argues: "To the contrary, had City [Service] put up barriers to prevent the loose gravel from migrating or provided residents with an alternative route to exit the complex, the accident would not have occurred notwithstanding [her] 'decision' to walk along the swale." Martini cites authorities for the general propositions that a factor that only plays an "infinitesimal or theoretical role" in causing harm, or a " 'mere possibility' of causation," does not suffice to show her conduct was a legally contributing cause to her injuries.

In resolving this challenge, we are without power to substitute our own deductions for those of the trier of fact. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) " '[W]e are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment. . . . "In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*." [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.' " (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.)

Applying these standards compels us to conclude that Martini's sufficiency of the evidence challenge borders on the frivolous. As stated, the jury was instructed with CACI No. 401 that "[n]egligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation." It was instructed as to comparative fault with CACI No. 405 that if the defendants proved that Martini was negligent, and her "negligence was a substantial factor in causing her harm," then her damages would be reduced by the jury's determination of the percentage of her responsibility.

Brown testified that it was dangerous to be walking through the jobsite, and construction sites generally can be dangerous places. (*Toste v. Calportland Construction*, *supra*, 245 Cal.App.4th at p. 370.) City Service was obligated only to take reasonable safety precautions; its duty was to avoid creating dangerous conditions on its construction site, meaning conditions that might pose an *unreasonable risk* of harm to persons who might encounter them. The jury could reasonably conclude that open and obvious piles of gravel on streets undergoing repaving presented a normal and expected, not *unreasonable*, risk under the circumstances. Martini and her daughter made a conscious decision to traverse through an active construction zone, despite seeing at least one worker and heavy equipment visible and present. The jury could conclude on this record that a reasonably careful person would appreciate the inherent dangers in walking through streets actively undergoing repaving and would not have done so, and that

Martini bore some responsibility for her negligent decision to go ahead, which contributed to her tripping on the open gravel pile. We cannot say the evidence is insufficient as a matter of law to support the jury's finding of comparative negligence.

## V. *Denial of Martini's New Trial Motion*

Martini contends that based on all of the foregoing claimed errors, the trial court erred by denying her motion for new trial. We have upheld the jury's verdict in all respects, and thus do not disturb the court's order denying her a new trial.

## DISPOSITION

The judgment and postjudgment order are affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

**04/11/2018**

KEVIN J. LANE, CLERK

By Deputy Clerk