



Pacific Bell Telephone Company v. Malcolm Drilling Company

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Pacific Bell v. Malcolm Drilling

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INTRODUCTION

Defendant and appellant Malcolm Drilling Company, Inc. appeals from a judgment entered in favor of plaintiff and respondent Pacific Bell Telephone Company following a bench trial for damage to plaintiff's underground installations in connection with defendant's drilling activities. Defendant contends that the trial court erred by entering judgment in favor of plaintiff and against defendant because plaintiff did not mark its subsurface cable ducts as required by Government Code section 4216.3, subdivision (a).¹ Defendant also contends that plaintiff forfeited its claim pursuant to section 4216.7, subdivision (c) because plaintiff's failure to mark adequately its subsurface cable ducts proximately caused the damages.

Plaintiff disputes defendant's contentions, and also contends that the judgment should be affirmed based upon plaintiff's negligence cause of action because defendant did not challenge the judgment on that basis. In response, defendant argues that liability based on common law negligence has been supplanted by section 4216 et seq.

The parties conceded at oral argument that section 4216.3, subdivision (a) requires plaintiff substantially--not strictly--to comply with it in marking its subsurface cable ducts. We hold that the trial court did not err in finding defendant liable under section 4216 et seq. because plaintiff substantially complied with section 4216.3, subdivision (a). We therefore do not reach defendant's contention that plaintiff forfeited its claim pursuant to section 4216.7, subsection (c), or plaintiff's contention that the judgment should be affirmed based upon its negligence cause of action.

FACTUAL BACKGROUND²



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A. The Incident

Dean Ogami testified that he had been employed by plaintiff as a maintenance splicing technician for 25 years. In November 2006, Underground Service Alert of Southern California, also known as DigAlert--a regional notification center under section 4216.1--issued a "ticket" reflecting that Tutor-Saliba, the general contractor for the construction of a Los Angeles Police Department station in downtown Los Angeles contacted DigAlert to request that plaintiff's subsurface installations in the proximity of First Street between Spring and Main streets be marked. The ticket indicated that the work to be performed was "Install Fence & Post/Piles," and the area to be excavated had not been "delineated." DigAlert presumably notified plaintiff of the work.

Ogami testified that on November 13, 2006, he responded to the ticket by going to the site, and he located plaintiff's subsurface installations--cable duct and conduit structures (subsurface cable ducts)--in the area to be excavated as described in the ticket, utilizing substructure maps, an electronic cable locator transmitter, and entering manholes. He marked the locations of subsurface cable ducts with a single line using orange spray paint, with an arrow at each end. Ogami marked two duct structures east of a manhole located just west of the area where one of plaintiff's subsurface cable ducts was ultimately damaged. He did not recall if he marked multiple subsurface cable ducts using parallel lines or staggered lines, but said he probably used staggered lines.

John Hauffen testified that he was employed by plaintiff as a maintenance splicing technician, and in late November 2006, DigAlert issued a ticket reflecting that defendant, an excavator, contacted it to request that the subsurface cable ducts be marked for the same construction project, in the same general area as Ogami's marks--on First Street between Spring and Main streets. The ticket indicated that the work to be performed was "Drill for shoring, Tiebacks & Beams." This is the work that is the subject of this appeal.

Hauffen testified that sometime before December 5, 2006, he responded to the ticket and located plaintiff's subsurface cable ducts in the area to be excavated as described in the ticket by driving the job site, utilizing substructure maps and an electronic cable locator transmitter, and entering manholes. He marked the locations of the subsurface cable ducts by marking the center of them with a single line with arrows at each end, using orange spray paint, as he had been trained. If, however, a subsurface cable duct was directly above another subsurface cable duct, Hauffen would mark them with a single line with arrows at each end, instead of separate marks representing each of the subsurface cable ducts. Hauffen did not mark subsurface cable ducts that had been abandoned--or "retired"--by plaintiff. He refreshed any pre-existing marks by painting over them.

Dave Moody, defendant's project manager, testified that from mid-November 2006 through December 23, 2006, he was at the construction site on a weekly basis. Defendant had not delineated the area to be excavated because Moody believed it would be dangerous to do so without blocking the traffic and the markings would confuse the driving public. Moody saw "old paint marks," but he did



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not see any "new fresh" paint markings on the ground in the vicinity of the site. To conduct the drilling Moody relied on plans that showed the manholes, but the plans did not show plaintiff's subsurface cable ducts. By looking in manhole 572, he knew that plaintiff had subsurface cable ducts that ran in an east-west direction of the site, and believed that they were only four to five feet deep. There were subsurface cable ducts that were accessible below manhole 571, and he attempted to look into manhole 571, but was not able to access it because a construction fence was on top of it and he thought it was locked. Moody testified that it is the duty of the excavator to determine the depth of the plaintiff's subsurface cable ducts. Moody was not at the construction site from December 24, 2006, through January 1, 2007, because he was on vacation.

Hector Miguel Flores testified that he was employed by defendant for 21 years, and had been a superintendent for 16 years. Flores was at the site commencing early December 2006, and he did not recall seeing any marks referencing plaintiff's subsurface cable ducts before they started drilling on December 27, 2006, but admitted that "they could have been there. . . ." Flores relied on the project manager and maps to identify where plaintiff's underground lines were located. Flores did not recall defendant performing any "potholing"--hand digging--of the area before drilling.

Flores testified that on December 27, 2006, defendant commenced horizontal drilling of the tiebacks. Tiebacks are steel bars, placed in horizontally drilled holes, to anchor existing shoring walls. Defendant began drilling its first hole on the northeast side of the project but encountered a considerable amount of rubble consisting of brick. Defendant's crew moved to another location about eight feet to the west--within approximately 30 feet west from Main Street--and again started drilling but encountered an obstruction consisting of different material than the first hole--this time consisting of grindings of corrugated black pipe and wire. Defendant stopped drilling, and Flores spoke with his office and the general contractor, but he did not contact plaintiff. Flores testified that defendant's crew moved another eight feet to the west, started drilling, again encountered an obstruction consisting of grindings of corrugated black pipe, and were forced to stop.³ Flores again spoke with his office, and defendant's crew moved about 16 to 24 feet to the west, started drilling at a steeper angle, and did not encounter an obstruction. Edward Jose Mendoza, defendant's project manager engineer, testified that on December 27, 2006, he visited the construction site and saw plaintiff's markings on the curb and gutter that pointed in the direction of plaintiff's subsurface cable duct that was ultimately determined to be damaged.

Michael Allen Skugrud, plaintiff's field manager for cable maintenance, testified that on December 28, 2006, he went to the site and determined that plaintiff's subsurface cable had been damaged in several places on the south side curb on First Street near Main Street. The damage was to plaintiff's subsurface cable duct designated as the "L line," which was vertically below two other subsurface cable ducts, one of which had been abandoned by plaintiff. Flores testified that there were manholes near the damage, and he understood that there were subsurface cable ducts that ran between the manholes. Moody testified that the subsurface cable that was damaged by the excavation was located directly underneath where he thought they were located when he looked in manhole 572.



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B. Expert Testimony

Marshall Johnson, plaintiff's expert, opined that defendant caused the damage to plaintiff's subsurface cable duct and that there was evidence of markings that adequately indicated the presence of plaintiff's subsurface cable ducts, and physical evidence of the existence of them. There are several ways to mark the subsurface cable ducts; each can be marked by a single line depicting the approximate center of the subsurface cable, or two lines can be drawn on either side of the exterior surface of the subsurface cable duct. If the ducts are "stacked" where one duct is directly above or below another, they can be marked as if there was one cable or they each can be marked. If an excavator is unclear about the significance of any of the markings, it is required to call the regional notification center to notify the operator of the subsurface installation to respond, and the excavator may request that the operator meet the excavator at the site. If the excavator plans to excavate near the location of a subsurface structure, the excavator is required to pothole down to the depth of the excavation. The purpose of potholing is to find the exact location of the subsurface structures. Despite the markings of plaintiff's subsurface cable ducts, and defendant's knowledge of the existence of them, defendant did not pothole as required. Looking in a manhole is not a substitute for potholing. Plastic grindings seen by defendant when defendant encountered a drilling obstruction indicated that a plastic conduit structure was underneath the excavation area, but defendant did not attempt to notify DigAlert or plaintiff. Johnson also opined, "I think some shortcuts were taken. [Defendant] took some risks."

Ronald Peterson, defendant's expert, testified that plaintiff's markings of its subsurface cable ducts were inadequate and not in accordance with industry standards. The markings gave an indication of the existence of subsurface cable ducts, but they were not good practice, and they did not comply with industry standards because plaintiff only made one mark to designate the subsurface cable ducts even if there were several subsurface cable ducts that were "stacked" on one another. If the excavator potholed to determine the exact location of a subsurface cable duct, expecting only one, the excavator would not pothole below the duct it discovered.

Peterson stated that an excavator has a duty to "pothole" (dig a hole) to determine the exact location of the subsurface cable ducts that cross the planned excavation. Peterson testified at trial that the excavator does not have a duty to pothole down to the depth of the excavation, but at his deposition, portions of which were referred to at trial, he testified that the excavator had such a duty. He said that plaintiff was not required to indicate the depth of its subsurface cable ducts with surface markings and that it would have been reasonable for defendant to have contacted plaintiff to request that defendant allow it access into a manhole that defendant claimed was locked--manhole 571 even though defendant did not do so. He added that when defendant began drilling and encountered obstructions and debris, had defendant contacted plaintiff, plaintiff likely would have responded within hours, or at most a day or two, to provide further information about the subsurface cable ducts to defendant.



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PROCEDURAL BACKGROUND

A. Complaint and Bench Trial

On February 14, 2008, plaintiff filed a complaint against defendant alleging causes of action for negligence, trespass, violation of Public Utilities Code section 7952, and section 4216 et seq. The matter proceeded to a bench trial, and plaintiff pursued only its causes of action for negligence and violation of section 4216 et seq. Following the bench trial, the trial court issued a 34 page statement of decision, and entered judgment in favor of plaintiff and against defendant in the principal sum of \$324,376.84

B. Statement of Decision

1. Plaintiff's Marks of its Subsurface Installations

The trial court stated in its statement of decision, "[Plaintiff] has shown, by a preponderance of the evidence, that there were sufficient surface markings to have alerted [defendant] to the presence of more than one subsurface [plaintiff] facility in the vicinity in which [defendant] drilled and intersected a structure. Ogami's testimony was extremely credible to the Court. . . . He was very convincing. [¶] . . . He testified that he ultimately found there were four duct structures involved in the area between [an] eastern manhole and Manhole 567. And, he marked all of them on the surface. He was extremely confident of that. He marked east of Manhole 567 and into the middle of the street at First and Main. He is confident he painted the marks for the four structures he found. He did not remember if he marked multiple structures by using parallel lines or staggered lines on the surface. He said he probably staggered the lines. [¶] . . . Ogami's testimony was itself sufficient to establish that there were sufficient markings on the surface to put [defendant] on notice of the presence of the [plaintiff's] facilities below, including in the areas in which the impacts occurred. [¶] . . . [¶] Ogami also testified that he may not have marked 24-inch wide markings in every instance above each facility. However, there is some evidence that certain markings of this type were made." The trial court's statement of decision also provided, "Hauffen's testimony is largely cumulative of that of Ogami. . . . [The trial court finds] that the evidence as a whole [establishes] that Hauffen marked and remarked facilities, including the markings that Ogami had made which, as stated earlier, were sufficient to provide the necessary statutory notice to [defendant] or a basis for [defendant] to have requested additional markings or information prior to drilling." The trial court concluded, "Proper markings were made as required by the statute."

2. Defendant's Failure to Hand Dig

The trial court's statement of decision provided, "Section 4216.4 obligated [defendant] to hand dig. It did not do so. Moody testified that he entered Manhole 572 on December 12, 2006. He testified that he did not enter Manhole 571. If it were too deep to hand dig to the structures, the statute



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contemplates that the excavator contact the operator to find out whether an alternative can be used, including mechanical digging or more analysis of the location of the underground facilities. [Defendant] failed to pursue either course."

3. Proximate Cause and Liability

The trial court in finding liability based upon section 4216 et seq., stated, "In this action, a preponderance of the evidence shows that the conduct of [defendant] was a substantial factor in causing the injury to the underground facilities, and the resulting damages, costs and expenses incurred by [plaintiff]." The trial court found the following: "the cause here was [defendant's] failure to: (i) excavate by hand or find an alternative; (ii) enter Manhole 571 and investigate the structures there; (iii) ask questions if there was uncertainty about the meaning of the surface markings; (iv) stop drilling after the first impact and the resulting debris at the surface; (v) ask [plaintiff] for more markings; (vi) mark the perimeter of the work area; and (vii) have had a better communication in Moody's absence about the work he had done previously."⁴

DISCUSSION

Defendant contends that as a matter of law it cannot be held liable for damaging plaintiff's subsurface cable ducts under section 4216 et seq. because plaintiff failed to mark them as required by those statutes. In particular, defendant contends that plaintiff did not properly mark the subsurface cable ducts because plaintiff did not mark: (i) the subsurface cable ducts with a "strip of land" as set forth in sections 4216, subdivision (a), and 4216.3, subdivision (a), and instead only used a single line with an arrow at each end; (ii) each of the stacked subsurface cable ducts; and (iii) subsurface cable ducts that plaintiff had abandoned. We disagree with defendant that it cannot be held liable under section 4216 et seq.

A. Section 4216 et seq.

1. Standard of Review

"In general, in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.] [Citation.] [¶] 'Questions of statutory interpretation and the applicability of a statutory standard to undisputed facts, present questions of law, which we review de novo. [Citation.]' [Citation.]" (Cuiellette v. City of Los Angeles,



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supra, 194 Cal.App.4th at p. 765.) Whether there has been substantial compliance with a statute appears to be an issue of law reviewed de novo. (Fonseca v. City of Gilroy (2007) 148 Cal.App.4th 1174, 1191; Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept. (1985) 175 Cal.App.3d 289, 298)

2. Relevant Statutes

"Every operator of a subsurface installation . . . shall become a member of, participate in, and share in the costs of, a regional notification center." (§ 4216.1.)⁵ Anyone planning to conduct excavation in an area where there are subsurface installations must contact the regional notification center prior to commencing excavation, and if practical, delineate the area to be excavated. (4216.2, subd. (a).) Section 4216.2, subdivision (a) provides, "Except in an emergency, any person planning to conduct any excavation shall contact the appropriate regional notification center, at least two working days, but not more than 14 calendar days, prior to commencing that excavation, if the excavation will be conducted in an area which is known, or reasonably should be known, to contain subsurface installations other than the underground facilities owned or operated by the excavator and, if practical, the excavator shall delineate with white paint or other suitable markings the area to be excavated."

Upon being contacted by the excavator who plans to conduct excavation in an area where there are subsurface installations, the regional notification center must "notify any member, if known, who has a subsurface installation in the area of the proposed excavation. . . ." (§ 4216.2, subd. (c).) "Any operator of a subsurface installation who receives timely notification of any proposed excavation work in accordance with Section 4216. 2 shall . . . locate and field mark the approximate location and, if known, the number of subsurface installations that may be affected by the excavation . . . , otherwise advise the person who contacted the center of the location of the operator's subsurface installations that may be affected by the excavation, or advise the person that the operator does not operate any subsurface installations that would be affected by the proposed excavation." (§ 4216.3, subd. (a).) "'Approximate location of subsurface installations' means a strip of land not more than 24 inches on either side of the exterior surface of the subsurface installation. 'Approximate location' does not mean depth." (§ 4216, subd. (a).) "The excavator shall notify the appropriate regional notification center of the failure of an operator to comply with [section 4216.3]." (§ 4216.3, subd. (d).)

"The excavator shall determine the exact location of subsurface installations in conflict with the excavation by excavating with hand tools within the area of the approximate location of subsurface installations as determined by the field marking provided in accordance with Section 4216.3 before using any power-operated or power-driven excavating or boring equipment within the approximate location of the subsurface installation, except that power-operated or power-driven excavating or boring equipment may be used for the removal of any existing pavement if there are no subsurface installations contained in the pavement. If documented notice of the intent to use vacuum excavation devices, or power-operated or power-driven excavating or boring equipment, has been provided to



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the subsurface installation operator or operators and it is mutually agreeable with the operator or operators and the excavator, the excavator may utilize vacuum excavation devices, or power-operated or power-driven excavating or boring equipment within the approximate location of a subsurface installation and to any depth." (§ 4216.4, subd. (a).) Section 4216.4, subdivision (b) provides, "If the exact location of the subsurface installation cannot be determined by hand excavating in accordance with subdivision (a), the excavator shall request the operator to provide additional information to the excavator, to the extent that information is available to the operator, to enable the excavator to determine the exact location of the installation."

Section 4216.7, subdivisions (a) and (c), set forth the circumstances under which an excavator is liable for damages to a subsurface installation, or when an operator forfeits its right to recover the damages. Section 4216.7, subdivision (a) provides in pertinent part, "In the case where an excavator has failed to comply with . . . the requirements of Section 4216.4, the excavator shall be liable for any claim for damages to the subsurface installation arising from the excavation, by an owner or operator who has complied with the requirements of Section 4216.1 and Section 4216.3, to the extent that the damage was proximately caused by the excavator's failure to comply." Section 4216.7, subdivision (c) provides, "In the case where an owner or operator of a subsurface installation receives timely notification of proposed excavation work pursuant to Section 4216.2 but fails to comply with subdivision (a) of Section 4216.3, that owner or operator shall forfeit his or her claim for damages to his or her subsurface installation arising from the excavation against an excavator who has complied with the notification requirements of Section 4216.2 to the extent damages were proximately caused by the owner or operator's failure to comply."

3. Liability and Proximate Cause

Section 4216.7, subdivision (a) provides that when an excavator, who has notice of a subsurface installation from the owner or operator of that installation, fails to pothole to determine the exact location of the subsurface installations in conflict with the excavation, it shall be liable for damages to the subsurface installation arising from the excavation. For the excavator to be liable, section 4216.7, subdivision (a) requires that the owner or operator of the subsurface installation comply with the requirements of section 4216.3 to locate and field mark the approximate location and, if known, the number of subsurface installations that may be affected by the excavation, and the excavator's failure to "pothole" must be the proximate cause of the damage. Defendant argues that because plaintiff did not comply with its obligation to mark the subsurface cable ducts in compliance with section 4216.3, subdivision (a), defendant was relieved of its obligation to pothole to determine the exact location of the subsurface cable ducts.

Defendant asserts that "[plaintiff's] own employee witnesses have provided undisputed evidence of their factual noncompliance with the statute in question," and therefore it is a matter of statutory interpretation, reviewed de novo. "Our fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.]" (Day v. City of



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Fontana (2001) 25 Cal.4th 268, 272.) Defendant contends, "This appeal is . . . about a clear and unambiguous statute." "'The best indicator of legislative intent is the plain meaning of the statutory language, when clear and unambiguous. [Citations.] [T]he statute should be interpreted consistently with its intended purpose, and harmonized within the statutory framework as a whole. (DuBois [v. Workers' Comp. Appeals Bd. (1993)] 5 Cal.4th [382,] 388.)' [Citations.]" (Alvarez v. Workers' Comp. Appeals Bd. (2010) 187 Cal.App.4th 575, 585.) "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.]" (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.) "[E]ach sentence must be read not in isolation but in the light of the statutory scheme [citation]." (Ibid.)

Section 4216 et seq., is contained in Chapter 3.1 of Title 1, Division 5 of the Government Code, entitled "Protection of Underground Infrastructure." In addition, section 4215.5,⁶ repealed in 1983 (stats. 1982, ch. 1507, § 1, pp. 5849-5851), related to subsurface installations, and following the expiration of section 4215.5, section 4216 et seq., set forth a more detailed set of laws concerning excavations near subsurface installations. Because the sections are closely related, we look to the Legislature's explicit purpose for enacting section 4215.5 to determine the Legislative purpose for enacting section 4216 et seq. Section 4215.5 was enacted "for the purpose of protecting [subsurface] installations from damage, removal, relocation, or repair." The obvious purpose of section 4216 et seq. is to protect underground infrastructure from damage. This can be served by requiring that an operator substantially comply with the marking requirements of section 4216 et seq. before it can sue an excavator for damage to the subsurface installations.

The parties agree that substantial compliance, rather than strict compliance, is the governing test for determining whether the requirements of section 4216 et seq. have been met. (See National Parks & Conservation Assn. v. County of Riverside (1996) 42 Cal.App.4th 1505, 1522.) "'Substantial compliance . . . means actual compliance in respect to the substance essential to every reasonable objective of the statute.' [Citations, italics omitted.]" (Ibid.) Defendant claims that plaintiff's failure to specifically mark each of the stacked subsurface cable ducts, and plaintiff's use of a single line with arrows to designate the location of the ducts, did not substantially comply with section 4216.3. We disagree.

Section 4216.3, subdivision (a), provides that an operator of a subsurface installation shall mark the approximate location and, if known, the number of subsurface installations that may be affected by the excavation." Section 4216, subdivision (a), provides that "'Approximate location of subsurface installations' means a strip of land not more than 24 inches on either side of the exterior surface of the subsurface installation. 'Approximate location' does not mean depth." The markings made by plaintiff of its subsurface cable ducts, although not in strict compliance with section 4216.3, substantially complies with it. They serve the purpose of section 4216 et seq.--to identify and therefore protect from damage underground infrastructures.

Mendoza, defendant's project engineer, testified that he visited the construction site on the day of



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the incident and saw plaintiff's markings on the curb and gutter that pointed in the direction of plaintiff's subsurface cable duct that was ultimately determined to be damaged. As found by the trial court, plaintiff's markings provided notice to defendant of the existence of the ducts. If defendant believed that plaintiff failed to mark properly the subsurface cable ducts in compliance with section 4216.3, subdivision (d) of that section required defendant to notify the regional notification center of a deficient marking ("failure of an operator to comply with this section")--presumably for the purpose of allowing plaintiff to address defendant's concerns with the adequacy of plaintiff's field markings. Defendant, however, did not notify DigAlert that plaintiff's markings did not comply with the statute.

Moreover, before commencing excavation, defendant was required to pothole to determine the exact location of the subsurface cable ducts. Experts testimony suggests that the excavator is required to pothole to the depth of the excavation. Defendant, however, did not pothole. But if it did, and the potholing ultimately proved to be unsuccessful, defendant was required to request plaintiff to provide additional information to enable defendant to determine the exact location of the subsurface cable ducts. (§ 4216.4, subd. (b)). "Under California law, the party that is planning to excavate, grade or scrape a piece of land . . . has the duty of determining the 'exact location' of the pipeline in the ground. (Cal. Gov. Code, § 4216.4)" (Unocal v. United States (9th Cir. 2000) 222 F.3d 528, 536.) Thus, plaintiff substantially complied with its obligation under section 4216.3, subdivision (a) to mark its subsurface cable ducts, and defendant did not comply with its obligations.

Defendant does not dispute the trial court's finding that it was the proximate cause of the damage, except to argue that the burden did not shift to it to pothole to determine the exact location of the subsurface cable ducts since section 4216.4, subdivision (a) required potholing only "as determined by the field marking provided in accordance with Section 4216.3" and plaintiff failed to do so. Defendant seems to contend that the statute's application and the corresponding duty arising from it affects the proximate cause determination.

We have concluded above, however, that plaintiff's marking of the ducts substantially complied with section 4216.3. Defendant, therefore, was required to notify the regional notification center if it believed plaintiff did not comply with its marking obligations, and in any event pothole before commencing excavation. Defendant did not notify DigAlert that plaintiff's markings did not comply with the requirements of the statute, and therefore defendant was not excused from potholing. Johnson, the expert, testified at trial, and Peterson, another expert, testified at his deposition, that an excavator is required to pothole to the depth of the excavation. Potholing to the depth of the excavation would have revealed the actual width of the subsurface cable ducts, and the number of ducts, including any that had been abandoned. We reject defendant's contention that it was not required to pothole to determine the exact location of the subsurface cable ducts.

To the extent defendant challenges that its failure to comply with statutory requirements was the proximate cause of the damage, substantial evidence supports the trial court's determination that it was. (See *Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 416 [proximate cause is determined by



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the trier of fact and is subject to the substantial evidence standard of review]. There is no question that defendant caused the damage. Moreover, even after defendant commenced drilling, it did not contact DigAlert or plaintiff between the first and second time defendant encountered an obstruction that consisted of grindings of corrugated black pipe. Peterson testified that had defendant contacted plaintiff, plaintiff likely would have responded within hours, or at most a day or two, to provide further information about the subsurface cable ducts to defendant.

B. Other Contentions

As we affirm the judgment based on section 4216 et seq. because plaintiff substantially complied with the statute in adequately marking its subsurface cable ducts, we do not reach defendant's contention that plaintiff forfeited its claim under section 4216 et seq., or plaintiff's contention that the judgment should be affirmed because defendant did not challenge it based upon plaintiff's negligence cause of action.

DISPOSITION

The judgment is affirmed. Plaintiff is awarded its costs on appeal.

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MOSK, J.

I concur:

KRIEGLER, J.

I concur in the judgment. I would affirm on negligence grounds and there is substantial evidence defendant, Malcolm Drilling Co., violated its obligations under Government Code section 4216.4, subdivisions (a) and (b).

First, defendant does not attack the trial court's negligence findings. Rather, defendant asserts that section 4216 et seq. impliedly repeals California's negligence jurisprudence. Implied repeals are disfavored. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 526; *Ste. Marie v. Riverside County Regional Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 296.) None of the iterations of section 4216 et seq. evinces any evidence of a legislative intention to preempt a negligence claim. (Legis. Counsel's Dig., Sen. Bill No. 1249 (1979-1980 Reg. Sess.) 4 Stats. 1980, Summary Dig., p. 411; Legis. Counsel's Dig., Assem. Bill No. 3019 (1981-1982 Reg. Sess.) 5 Stats. 1982, Summary Dig., p. 558; Legis. Counsel's Dig., Assem. Bill No. 1606 (1983-1984 Reg. Sess.) 4 Stats. 1983, Summary Dig., pp. 415-416; Legis. Counsel's Dig., Sen. Bill No. 2637 (1987-1988 Reg. Sess.) 4 Stats. 1988, Summary Dig., pp. 53-54; Legis. Counsel's Dig., Assem. Bill No. 73 (1989-1990 Reg. Sess.) 4



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Stats. 1989, Summary Dig., p. 334; Legis. Counsel's Dig., Assem. Bill No. 1264 (2003-2004 Reg. Sess.) 6 Stats. 2004, Summary Dig., pp. 36-37; Legis. Counsel's Dig., Sen. Bill No. 1359 (2005-2006 Reg. Sess.) 6 Stats. 2006, Summary Dig., pp. 362-363; Legis. Counsel's Dig., Sen. Bill No. 144 (2007-2008 Reg. Sess.) 5 Stats. 2007, Summary Dig., p. 171.) Further, section 4216.6, subdivision (a)(3), the civil penalties provision, states, "Except as otherwise specifically provided in this article, this section is not intended to affect any civil remedies otherwise provided by law for . . . property damage, including any damage to subsurface installations" And section 4216.7, subdivision (d)(3), the damages and liability provision, states: "Nothing in this section shall be construed to . . . : [¶] . . . (3) Exempt the excavator or the operator from liability to each other . . . based on . . . comparative or contributory negligence." Civil Code section 1714 negligence principles survived the adoption of section 4216 et seq. I would affirm the judgment on negligence grounds as defendant has not challenged the trial court's finding that defendant was negligent. (Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 216, fn. 4; Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 70, disapproved on a different point in Bailey v. County of Los Angeles (1956) 46 Cal.2d 132, 138-139.)

Second, there is substantial evidence to support the trial court's statutory findings: in violation of its duties under section 4216.2, subdivision (f), defendant failed to "identify the area to be excavated" and notify the regional center the location would be marked in a way sufficient to advise plaintiff, Pacific Bell Telephone Company, of the place where digging would occur; Dean Ogami and John Hauffen twice marked the areas where plaintiff's lines were located; according to Marshall Johnson, an experienced underground telecommunications professional, the markings by Mr. Ogami and Mr. Hauffen placed defendant on notice as to the location of the underground lines; being placed on notice, defendant's employees had an obligation to hand dig in the area as it is the excavator's duty to discover the underground facility; there should have been hand-digging or potholing in the area where the orange marks had been placed by Mr. Ogami and Mr. Hauffen; according to Ronald Peterson, who was called to offer opinion testimony by defendant, plaintiff had no obligation to note the depth of the underground lines; and Mr. Peterson believed the excavator has a duty to locate the underground lines. Section 4216.4, subdivision (a) required defendant to use hand tools before using power driven excavating equipment. If the underground installation could not be determined by hand, defendant was required by section 4216.4, subdivision (b) to contact plaintiff. Defendant did not comply with section 4216, subdivisions (a) and (b). Since there is substantial evidence defendant did not comply with section 4216, subdivisions (a) and (b), the judgment must be affirmed. On these grounds, I join in my colleagues' determination to affirm.

1. All statutory citations are to the Government Code unless otherwise noted.
2. We state the facts in the light most favorable to plaintiff as the prevailing party. (Cuiellette v. City of Los Angeles (2011) 194 Cal.App.4th 757, 765.) The facts are taken from the evidence adduced at the bench trial.
3. Flores later testified that he did not see that they struck corrugated black pipe, but at his deposition, portions of which were referenced at the trial, he testified that he saw that the obstruction consisted of corrugated black pipe and wire.



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4. Section 4216.2, subdivision (a) requires that the excavator delineate the area to be excavated if it is practical to do so, and the trial court found that delineation was practical.
5. All citations to section 4216, et seq., are as they appeared on the date of the incident, December 27, 2006.
6. Section 4215.5 read in part, "The legislative body of a city, city and county, or county may by ordinance require public utility companies owning or operating subsurface installations and all other owners or operators of subsurface installations within public streets, to become members, participate in the activities, and share in the costs of a regional notification center providing advance warning of excavations or other work close to existing installations, for the purpose of protecting such installations from damage, removal, relocation, or repair." (Stats. 1982, ch. 1507, § 1, p. 5850.)

