COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE CITY OF EL PASO,	§	
		No. 08-18-00216-CV
Appellant,	§	
		Appeal from the
v.	§	
		County Court at Law No. 5
GUADALUPE RAMIREZ, NORMA RAMIREZ, RAMIREZ PECAN FARMS, LLC, WILLIAM H. BOUTWELL, JACKIE BOUTWELL, RAUL ZAMORANO, JR., AMY K. ZAMORANO, PATRICIA WYNN, INDIVIDUALLY AND AS TRUSTEE OF THE WYNN FAMILY LIVING TRUST, LARRY R. WEBB, MARIA L. WEBB, JAMES R. RALEY, YARIELA G. RALEY, KERRY L. STURGEON, KENNETH A. JOHNSON, AND JULIE R. JOHNSON,	§	of El Paso County, Texas
		(TC# 2007-2568)
Appellees.	§	

O P I N I O N[1]

[1] This is the third appeal coming before this Court following two prior interlocutory appeals involving the denial of the City's plea to the jurisdiction. *See City of El Paso v. Ramirez*, 349 S.W.3d 181 (Tex. App.—El Paso 2011, no pet.) (*Ramirez I*) (reversing the trial court's order denying the City's plea to the jurisdiction and remanding the case giving Appellees the opportunity to amend their pleadings); *City of El Paso v. Ramirez*, 431 S.W.3d 630 (Tex. App.—El Paso 2014, pet. denied) (*Ramirez II*) (affirming the trial court's order denying the City's plea to the jurisdiction to the plaintiff's amended petition and holding pleadings were sufficient to allege the intent and public use elements, and a fact issue existed as to whether the city knew its operation and maintenance was substantially certain to damage the properties).

This case involves an inverse condemnation action in which multiple property owners (Appellees)[2] sued the City of El Paso (the City), alleging the City had committed a compensable taking of their properties under Article I, Section 17 of the Texas Constitution. By their suit, Appellees claimed the City's continued operation and maintenance of the Clint Landfill (the Landfill) caused exacerbated flood damage to their properties following a two-day rainfall in July 2006. Following a bifurcated bench trial on the issue of liability, the trial court found the City knew, after 2002, that specific property damage was substantially certain to result from its continued operation and maintenance of the Landfill given its history of wash out, runoff and drainage problems. On appeal, the City asserts no evidence supports the trial court's findings as to the required elements of proximate cause and intent. Finding the record contains legally sufficient evidence to support the trial court's ruling, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the early 1980's, the City purchased a pre-existing dump, which was loosely operated by the County, and converted it into a solid waste disposal site.[3] The facility became known as the Clint Landfill. The City operated and maintained the Landfill from 1983 to 2002 without any complaints filed against it regarding downstream runoff or flooding. The surrounding area of the Landfill consists of open desert with natural arroyos. Appellees' properties are located approximately one mile south or southwest of the facility. During its operation of the Landfill, the

[2] Appellees are residential and agriculture business owners whose properties are located southwest of the Landfill approximately within one mile.

[3] The site began as an unregulated open dump where people would throw unwanted trash. Over time, certain trash was burned to allow for more space. At some point, El Paso County took over the operation of the dump without obtaining a permit. The City later obtained a permit to operate the site as a landfill and to dispose of waste. The site had no history of flooding from 1983 to 2002.

City would bury 400,000 tons of trash a year—1,100 tons of trash a day—atop the Landfill. The City continued depositing waste on the Landfill even as the site reached capacity and was slated for closure in 2004.

Following two continuous rainfall events[4] in July 2006, Appellees filed suit alleging the City[5] inversely condemned their properties and thereby committed a taking under the Texas Constitution and the Fifth Amendment to the United States Constitution. Appellees alleged that, absent the City's continued operation of the Landfill—including the continued deposit of solid waste and other refuse—the damages would not have occurred. Appellees further alleged the City knew its construction, operation, and maintenance of the Landfill was substantially certain to damage Appellees' properties by continuing to flood them during heavy rain events.

Appellees alleged the rainstorm at issue occurred over their properties, the site of the Landfill, and the surrounding area of Clint, Texas. Appellees alleged one or more of the Landfill's water-retention ponds, which had gathered and stored large quantities of surface rainwater, mud, and trash-laden debris during the storm, suddenly failed causing an enormous surge of water, silt, trash and toxic waste to rush down arroyos below the landfill, to then flow onto or very near Appellees' properties. Appellees further alleged their properties were inundated with a resulting mixture of dirt, toxic water, and trash that caused extensive damage to their properties, their animals, and to certain owners themselves.

Appellees further described that access roads leading to their properties were destroyed by

[4] The first event began at 8 p.m. on July 27 and ended at 6:40 a.m. on July 28. The second event started at 10:30 p.m. on July 28 and ended at 3:20 a.m. on July 29.

[5] Appellees' original petition included the State of Texas as a defendant in the lawsuit. Appellees later nonsuited their causes of action without prejudice as to defendant, the State of Texas.

the "waste-laden sludge." The pecan orchard business owned by one Appellee was harmed when the owner was unable to harvest its normal pecan crop due to the trees being surrounded with six-feet deep trash infused dirt walls. Animals belonging to the Appellees either drowned or became ill and died, including cattle, fowl, baby sheep, and a house cat. Multiple Appellees contracted a "severe red rash," and one alleged the waters that flowed onto his property swept him up causing him to break his left wrist. Appellees also alleged they endured other damages to their properties including the loss of a pump and motor, lost access to their homes, the toxic water mixture getting into their homes, and more permanently wiping out their road and driveway. Due to the character and nature of the flood damage, all Appellees had extensive clean up to do following the event.

Following resolution of two previous appeals, the City filed a motion for a bifurcated trial, which was granted. Accordingly, the trial court ordered a bifurcated bench trial with the first phase being limited to liability and the sole question of whether a taking occurred.[6] During a three-day trial, the trial court heard testimony from eleven witnesses—three employees with the City, six Appellees, and an expert witness from each side. Appellees introduced 49 exhibits consisting of photographs and videos of their properties, the Landfill, and surrounding areas; various reports by the City and experts, including Appellees' expert; and multiple google images and maps of the surrounding area. The City introduced 128 exhibits[7] consisting of photos and maps of the area; different website data of rainfall; letters between the Texas Commission on Environmental Quality (TCEQ) and the City involving certain investigations; investigation reports by the TCEQ; additional reports including the City's expert report; and various modification, remedial measures,

[6] If necessary, Appellees' damages would be tried in a second phase of trial and be decided before a jury.

[7] The City's exhibits are numbered through 129 but they made clear they inadvertently skipped 91.

and closure plans. All exhibits were admitted without objection.

At trial, certain Appellees testified to the trash left on their properties, up to six feet of sand in certain areas, and the toxic water that caused rashes, killed their livestock and animals, and smelled "like death . . . ." Appellees described similar damage to their properties following storms in 2002 and 2004, and further testified they believed the 2006 rainfall was not more severe than two previous storms, but the damage the floods left behind grew progressively worse. One Appellee testified the flooding damage was three times worse than the damage from either of the two previous floods. Eleanor Ann Smyth—director of Environmental Services in charge of making sure the Landfill operated in compliance with laws and regulations—testified to notices, reports, remedial measures, and other details relating to the operation of the Landfill and the rain events. Appellees' expert, Dr. John Walton, Ph.D., P.E., testified to the type of rainstorm that occurred and his impressions that the Landfill was the cause of Appellees' damages. The City relied heavily on an engineering report, referred to as the Halff Report, which was produced by previous consulting experts who did not testify at trial. The City also presented evidence of remedial efforts it implemented at the Landfill, and the reliance it placed on engineers that gave assurances that those measures were sufficient. The City's expert, Mr. Lawrence Gregory Dunbar, P.E., testified that from his review of the documents—the Halff report, Dr. Walton's report, TCEQ documents, and pleadings in the case—it was "[his] belief that the City believed" its drainage retention system "was in compliance with TCEQ rules and the City of El Paso criteria for retention ponds."

At the close of liability evidence, the trial court found Appellees had established all required elements of a taking under the Texas Constitution ruling the evidence sufficiently established the City's continued operation and maintenance of the Landfill after 2002—while

knowing its history of wash out, runoff and drainage problems—established the City knew that specific property damage was substantially certain to result from such action. The trial court further found the remedial measures taken by the City were inadequate since problems occurred in July 2002, September 2004, and again in July 2006. Along with issuing findings of fact and conclusions of law, the trial court entered an interlocutory judgment on liability for Appellees.

This appeal followed.

II. DISCUSSION

The City brings two issues on appeal as to two essential elements of a taking-by-flood case. First, the City claims Appellees did not prove the City knew its continued operation and maintenance of the Landfill was substantially certain to flood Appellees' properties. Second, the City argues Appellees failed to establish the City's operation and maintenance of the Landfill proximately caused damage to Appellees' properties. Essentially, the City asserts Appellees failed to meet their evidentiary burden to establish the elements of intent and proximate causation.

We begin with the well-established evidentiary standard of review and the required elements to establish liability in a taking by flood case.

Standard of Review

"Whether particular facts are sufficient to establish a taking presents a question of law that we review *de novo*, but we rely on the factfinder to resolve disputed facts underlying that determination." *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546, 552 (Tex. 2004). In *Gragg*, the Supreme Court analyzed the trial court's resolution of disputed facts concerning flooding and the construction and operation of a reservoir under the legal sufficiency standard of review. *Id*. at 552. A challenge to the legal sufficiency of the evidence is essentially a no-evidence

point, and will be sustained, only when the record discloses: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005); *Sanders Oil & Gas, Ltd. v. Big Lake Kay Construction, Inc*., 554 S.W.3d 79, 90 (Tex. App.—El Paso 2018, no pet.).

In determining whether a finding is supported by legally sufficient evidence, we consider the evidence in the most favorable light, and indulge every inference in its favor. *City of Keller*, 168 S.W.3d at 822. The trial court may draw whatever inferences it wishes if more than one inference is possible. *Id*. at 821. However, if the evidence only supports one inference, neither the trial court nor the reviewing court may disregard the inference. *Id*. Furthermore, the trier of fact is the sole judge of credibility and determines the weight to be given to witnesses' testimony. *Id.* at 819. The trial court may resolve conflicting evidence and we must presume it did so in favor of the prevailing party and disregard any conflicting evidence. *Id*. at 820. If the record contains more than a scintilla of evidence rising to a level enabling reasonable and fair-minded people to differ in their conclusions, we must sustain it. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Gragg*, 151 S.W.3d at 552. So long as the evidence falls within the zone of reasonable disagreement, a reviewing court may not substitute its judgment for the trier of fact. *City of Keller*, 168 S.W.3d at 822. The ultimate test in determining whether the evidence is legally sufficient is whether it would enable a reasonable and fair-minded fact finder to reach the verdict under review. *Id.* at 827.

Applicable Law

Article 1, Section 17 of the Texas Constitution provides: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." TEX. CONST. art. I, § 17. Sovereign immunity does not shield the government from liability for compensation under the takings clause. *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016). "At the heart of the takings clause lies the premise that the government should not force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Gragg*, 151 S.W.3d at 554 [internal quotations omitted].

Generally, a takings claim consists of three elements: "(1) an intentional act by the government under its lawful authority, (2) resulting in a taking, damaging, or destruction of the plaintiff's property, (3) for public use." *City of Socorro v. Campos*, 510 S.W.3d 121, 126 (Tex. App.—El Paso 2016, pet. denied); *see also Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 483-84 (Tex. 2012); *Kerr*, 499 S.W.3d at 799-801. To prevail, plaintiffs must prove there was an affirmative act intentionally committed by the entity that causes identifiable harm, or that the government knows that specific harm is substantially certain to occur to specific property and the taking, damage, or destruction was for public use.[8] *City of Dallas v. Jennings*, 142 S.W.3d 310, 313-14 (Tex. 2004); *Kerr*, 499 S.W.3d at 799-801; *Campos*, 510 S.W.3d at 126. This affirmative conduct encompasses the element of causation because, without causation, there can be no takings claim. *Hearts Bluff*, 381 S.W.3d at 483-84 ("Causation is intrinsic to a takings claim.").

[8] The public-use element is not at issue in this appeal.

We address the City's second issue first in which it complains that the proximate cause element was not met.

A. Proximate Cause

The City's second issue asserts Appellees failed to meet their burden to demonstrate the City's continued operation and maintenance of the Landfill was both the cause in fact of their damages and that the property damage was the foreseeable result of the City's actions. The City attacks the trial court's finding on causation and asserts there was no evidence to establish causation. Specifically, the City asserts the opinion of Appellees' expert is unreliable and Appellees otherwise failed to prove causation.

The two elements of proximate cause are cause in fact and foreseeability. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *Brandywood Housing, Ltd. v. Tex. Department of Transp.*, 74 S.W.3d 421, 426-27 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). For a case involving floodwater effects, the cause in fact prong can be established by evidence that a governmental entity's affirmative act changed the character of the floodwater. *See Gragg*, 151 S.W.3d at 555; *Ramirez II*, 431 S.W.3d at 643; *Brandywood*, 74 S.W.3d at 426. And the specific affirmative act alleged must be the cause of such changes. *See AN Collision Center of Addision, Inc. v. Town of Addison*, 310 S.W.3d 191, 195 (Tex. App.—Dallas 2010, no pet.). Under a but-for causation standard, a plaintiff must offer evidence allowing a fact finder to exclude alternative causes of the alleged injury or condition if such plausible causes exist. *See Gragg*, 151 S.W.3d at 554.

Expert Testimony Evidence

The City challenges Appellees' expert witness and asserts the evidence failed to show the

Landfill was the cause in fact of their damages when they did no quantitative analysis to show what amount of water from the Landfill flowed onto their properties and such damage was not foreseeable when the 2006 rain event was an extraordinary sequence of events. The City asserts that what occurred was a "25-year [rainfall] event" that was immediately followed by "another significant rain event" and produced a "100-year flood."[9] The Halff report concluded that the combined rainfall during the 48-hour period was greater than a 50-year (2 percent annual chance) event but that "much of the 48[-]hour rainfall depths over [the Landfill] exceeded a 100[-]year (1% annual chance) event." The City relied on data obtained from the National Oceanic and Atmospheric Administration (NOAA) and the Halff report to show that the Landfill experienced two periods of "intense and highly erosive downpours" that "reached historic levels" and noted a radar estimated 6.05 inches over portions of the Landfill. However, Appellees assert the NOAA data is simply an estimate and does not specifically reflect what fell over the Landfill. Additionally, Director Smyth testified the rain gauge at the Landfill measured the inches of rain to be .88 inches on July 27, 1.01 inches on July 28, and 1.08 inches on July 29. Smyth testified the City did not use the rain gauge data in its analysis because they simply believed they "got more than that." Contradicting that testimony, Johanes Makahaube, a city employee and professional engineer who performed an investigation of the Landfill after the 2002 event, testified he believed the rain gauge at the Landfill was reliable at that time.

Appellees' expert, Dr. Walton, testified the rainfall experienced in 2006 was a 10-year

[9] The City's engineering report included a description of rainfall events. In measuring rainfall events, the report indicated the data is described in terms of depth in inches, duration in hours, and frequency of occurrence in years. Accordingly, a "100-year" rainfall event has a 1 percent chance of occurring in any given year, a "25-year" rainfall event has a 4 percent chance of occurring in any given year, and a "10-year" rainfall event has a 10 percent chance of occurring in any given year.

storm, meaning 10 percent annual chance, which he stated was not as severe as the City attempted to portray. Noting table of data contained in the Halff report, Dr. Walton testified he would more specifically classify the rain event as a 10-year storm one day followed by a 10-year storm the next day. Dr. Walton testified the City attempts to combine the two events together by looking at the rainfall as a 48-hour storm to conclude the rainfall was higher than a 25-year event. However, Dr. Walton testified doing so would not be statistically valid. Dr. Walton stated that engaging in such effort is to "probability shop," taking different durations of rainfall from different locations around the Landfill simply to produce other data. Supplementing the experts' testimony, Appellees also testified about the rain events. The rainfall was the same in all three events, they claimed, with the only difference being the severity of the resulting damage. One Appellee testified that dirt and trash came onto his property from at least the first day, but everywhere he dug when he tried to clean it up, he found more trash throughout the damage to his property and at the bottom. Given this controverting evidence, the trial court found the type of rain was disputed and further stated, "no doubt it was a heavy rainfall."

In addition to giving his impression of the type of rainfall, Dr. Walton also testified the Landfill had no flood control structure. He identified the trash on Appellees' properties as originating from the Landfill asserting there is a "huge difference" between municipal trash and other dumped trash found in the desert. He also stated the white foam Appellees had described was an indication of toxic water from the Landfill. It is undisputed that Dr. Walton did not perform any quantitative analysis as to how much water flowed downstream from the Landfill versus other areas, however, he did not render a conclusion on said quantity.

The City argues that Dr. Walton's conclusions were irrelevant, speculative, and conclusory.

In a multi-part complaint about his testimony, the City argues Dr. Walton conceded the Appellees' properties were already subject to flooding due to their location, he performed no quantitative analysis to determine how much water from the Landfill reached the properties, and he had acknowledged he had no previous experience with landfill operations or flood control. The City argues that because Dr. Walton's conclusions do not connect with the pleaded affirmative act of "operation and maintenance," his conclusions are incompetent evidence. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). We disagree.

Simply because Dr. Walton did not perform any quantitative analysis to determine the amount of water released from the Landfill and other sources, it does not necessarily follow that his testimony is conclusory or without basis. *Cf. Pollock*, 284 S.W.3d at 816 (holding experts' testimony was conclusory without any basis for the conclusions when experts had no data to back up the conclusion that plaintiff was exposed to a certain amount of toxic chemicals and the conclusion that exposure occurred over a long period of time).[10] Dr. Walton testified the continued operation of the Landfill increased damage to Appellees' properties over what would be anticipated in the absence of the Landfill. He also concluded "the presence" of the Landfill was the primary causative factor in the erosion, sediment transport, and deposition of waste onto their

[10] The City also points to a recent decision issued by the United States Court of Federal Claims and attempts to assert that such case held expert-testimony "must" compare the flooding that would have occurred without the maintenance and operation of the relevant facility with the flooding that actually occurred in order to prove causation. *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 146 Fed. Cl. 219, 250 (2019). In *Upstream*, the reviewing court criticized one expert's modeling and projections and found the other expert's conclusions based on a study and analysis of data were "more reliable." *Id.* at 258. Nonetheless, on causation, *Upstream* held the relevant question is "whether the flooding on plaintiffs' properties would have occurred but for the government's actions . . . ." *Id.* at 257. We view *Upstream* as being consistent with *Gragg* and other precedents cited in our discussion; but otherwise, we do not read it so broadly as requiring quantitative analysis of a certain type in all cases even where liability is based on an exacerbation of flooding or change in the nature and character of the flooding.

properties. On cross-examination, Dr. Walton clarified that the "operation and maintenance" of the Landfill was implied by his use of the word "presence." Based on his experience and education, Dr. Walton indicated he had based his conclusions on his observations after physically walking the grounds of the Landfill and his analysis of all the data. He asserted that any reasonable and prudent engineer who observed the site would reach the same conclusions.

Alternatively, the City did not present any conclusive evidence to establish the amount of water, trash, and sand originated from elsewhere and not from the Landfill. *Waller v. Sabine River Authority of Texas*, No. 09-18-00040-CV, 2018 WL 6378510, at *5 (Tex. App.—Beaumont Dec. 6, 2018, no pet.) (mem. op.) (finding the government entity "produced conclusive evidence establishing that it 'never released more water than was entering the reservoir via rainfall'"). The City's expert, Mr. Dunbar, did not conduct a quantitative analysis either. Mr. Dunbar testified that modeling and quantitative analysis is a "common way" for hydrologists to make but-for causation determinations but he neither conducted one himself. Mr. Dunbar simply testified that it was reasonable for the City to rely on its engineers' belief that the runoff retention system was sufficient. Mr. Dunbar merely confirmed work not done by Appellees' expert, criticizing Dr. Walton for not performing any quantitative analysis.

The City presented no contrary evidence to show that the conclusions Dr. Walton did reach had no scientific basis. *City of Keller*, 168 S.W.3d at 813. As the "gate-keeper," the trial court was able to look at the testimony of both experts and determine that no such contrary evidence showed Dr. Walton's conclusions to have no scientific basis. *Id*. The record established there was sufficient evidence to support the trial court's conclusion that Dr. Walton's opinions were reliable in determining the Landfill's release of waste water was foreseeable and the sole causative factor of

Appellees' damages. *Id*. Moreover, because there is evidence of causation proven by other sources, the City's reliability challenge against Dr. Walton's testimony is immaterial. *Gragg*, 151 S.W.3d at 551.

Lay Testimony Evidence

Appellees presented additional evidence that the City's continued operation of the Landfill changed the nature and character of the floodwater given Appellees' properties contained heavy amounts of Landfill trash and up to six feet of sand. Appellees showed the floodwaters caused rashes, killed livestock and other animals, destroyed crops, and smelled "like death . . . ." Appellees described that the toxic water on their property had a white foam substance; some also testified the water left behind a yellow stain when it dried. Appellees also described the type of trash they viewed in the floodwater to include diapers, Styrofoam, syringes, and plastic and glass bottles with a "knob impression" similar to that made by landfill tools when trash is flattened. Furthermore, Director Smyth and the City's expert Dunbar conceded that the Landfill changed the nature and composition of the floodwater by infusing those waters with trash and waste.

To show cause in fact, Appellees needed to present evidence that the same damaging floods to their properties would not have occurred under the same rainfall conditions if the Landfill ceased operation and maintenance, specifically continuing to pile waste on the Landfill. *Gragg*, 151 S.W.3d at 554. The City asserts Appellees did not rule out other sources or causes of the flooding on their properties, therefore, making this case distinguishable from *Gragg*. In *Gragg*, the Supreme Court found there was evidence of the amount of water released from the dam at issue the evidence presented distinguished the amount in excess, showing that the dam's release intensified the flooding. *Id.* at 552.

Distinguishing from *Gragg*, the City attempts to align this case with our sister court's decision in *Waller*. In *Waller*, the landowners failed to present evidence that distinguished whether the water flooding their properties came from the dam release or whether it came from other sources downstream from the dam. *Waller*, 2018 WL 6378510, at *5. On the other hand, the governmental entity produced conclusive evidence that established the water released from the dam did not flow directly onto the properties but into the river, mixing with other sources and rainwater, before it overflowed and flooded the properties at issue. *Id*. From this, the Beaumont court of appeals found the trial court could have reasonably concluded that the landowners failed to show that releasing water from the dam was the proximate cause of the landowners flooding. *Id*. Here, relying on *Waller*, the City argues Appellees produced no evidence distinguishing whether the water that flooded their properties came from the Landfill or from other sources. The City asserts Appellees' evidence only establishes the operation and maintenance of the Landfill was a "contributing factor" to the flooding that Appellees' properties endured, rather than the "natural and probable consequence," and warns against extending liability through a takings claim such that a governmental unit becomes an insurer for all manners of natural disasters. *Kerr*, 499 S.W.3d at 810; *In re Upstream Addicks and Barker*, 146 Fed. Cl. at 250.

We do not agree.

Here, Appellees presented evidence that no waste infused floods occurred on their properties for 20 years prior to when the Landfill remained under capacity, but then three damaging floods occurred within four years as the Landfill reached capacity, and afterwards, no damaging

floods occurred to their properties once the City stopped contributing trash to the landfill.[11] The City relies on the investigation report by Karl C. Rimkus, a former investigator for TCEQ who investigated the Landfill following the 2004 and 2006 flood event,[12] that stated he did not see any evidence that waste had left the site. However, even with Rimkus' report, the City was put on notice to the potential risk of flood and waste leaving the site where the report stated, "if it had rained again the following day, the pond would have overflowed and waste could have left the site . . . ." The City asserts the trial court exercised hindsight in finding the Landfill was a "ticking time bomb" because the storm was unforeseeable, and closure of the Landfill would not have been a proper remedial measure after the first flood in 2002 given the closure process takes five years to complete. Even if closure requires some time, the evidence showed the City continued to deposit waste on the Landfill and did not begin that closure process until 2007.[13] Additionally, Appellees' contention was not that the City failed to close the Landfill but that they continued to pile mounds of trash onto the Landfill beyond capacity with knowledge that such extra-capacity would leave the Landfill. The City also showed they relied on its hired engineers' conclusion that the Landfill's retention basins had sufficient capacity to retain runoff and there was no need to add more storage capacity. Again, this evidence does not negate the evidence establishing the City's substantial

[11] Appellee Boutwell alluded to a recurrent flood at her property after 2006 but stated "you get old, and you don't remember things like you used to." Viewing the record as a whole, the trial court could have discredited this recognition of events as Boutwell did not describe similar damage and there was a consensus that no other similar event occurred following 2006. *City of Keller,* 168 S.W.3d at 816-17.

[12] At the time of trial, Rimkus was working for the City as an operations manager overseeing the City's air quality program and environmental engineering team.

[13] Director Smyth described that the Landfill was "headed for closure" in 2004, which meant it was full, but the deposition of waste onto the Landfill continued until 2007. The City began the process to close the Landfill in 2007 and the process was completed in 2010.

certainty given Appellees' claim rested on continued operation of the Landfill—meaning, the City continued to pile trash on the Landfill as it reached closer and closer to capacity—not on the City's failure to implement remediation efforts. *Cf. Kerr*, 499 S.W.3d at 810. Moreover, evidence showed Appellees' properties were flooded with trash, toxic water, and sediment not for the first time in 2006, but even twice before. Furthermore, Director Smyth admitted to knowing the landfill could not contain its waste in such a storm.

Even with the controverting evidence describing the level of rainfall received at the Landfill, nonetheless, Appellees presented some evidence that the discharge from the Landfill changed the characteristics of the water, and such changes caused damages to Appellees' properties. Viewing the record as a whole, and including all reasonable inferences, the trial court could reasonably find Appellees' testimony credible and likewise discredit the evidence presented by the City. *City of Keller*, 168 S.W.3d at 816-17; *Brandywood*, 74 S.W.3d at 428 (finding there was more than one interpretation of all the evidence presented and therefore the trial court could reasonably find the government's actions did not cause increase flooding to plaintiff). We may not substitute our opinions for that of the fact finder. *City of Keller*, 168 S.W.3d at 816-17.

Legally Sufficient to Support Finding

Crediting all favorable evidence that reasonable jurors could believe and disregarding all contrary evidence except that which they could not ignore, we hold the evidence presented to establish causation amounts to more than a mere scintilla. *Id*. at 810. We need not decide whether the expert testimony or the lay testimony were legally sufficient on their own to support the causation finding. *Id*. When the record is reviewed as a whole, there is legally sufficient evidence to support the finding that Appellees' property damage was proximately caused by the City's

continued operation and maintenance of the Landfill. *See Gragg*, 151 S.W.3d at 554.

The City's second issue is overruled.

B. Intent

We next address the City's first issue in which it argues there was no evidence to show the City intended to cause runoff onto Appellees' properties; and further, the trial court erred in finding the City operated and maintained the Landfill having substantial certainty that certain flooding would occur to Appellees' properties. Because the City argues no evidence supports the trial court's findings, we again determine whether the evidence presented was legally sufficient.

The requisite intent to establish a taking exists with proof that "a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." *Gragg*, 151 S.W.3d at 555; *Jennings*, 142 S.W.3d at 314. A governmental entity is substantially certain that its actions will damage property when the damage is necessarily an incident to or a consequential result of the governmental entity's action. *Jennings*, 142 S.W.3d at 314; *Pollock*, 284 S.W.3d at 821. A takings claim must be based on some affirmative "act" or "action" of the government and it must be that specific act that causes identifiable harm. *Kerr*, 499 S.W.3d at 799-800. Thus, a taking cannot be established by proof of mere negligent conduct by the government. *Id*. at 799. Awareness of the possibility of damage is no evidence of intent. *Pollock*, 284 S.W.3d at 821; *Kerr*, 499 S.W.3d at 799. Lastly, the government's knowledge must be determined as of the time it acted and not with the benefit of hindsight. *Pollock*, 284 S.W.3d at 821.

The Evidence

The affirmative conduct asserted by Appellees as a basis for its complaint was the City's

continuous operation of the Landfill—that is, the continuous depositing of solid waste and other refuse on the site—even as it grew closer to capacity, thereby causing escalated damage to Appellees' properties following a series of three floods over four years. Appellees presented ample evidence at trial to establish the City continued to pile trash on the Landfill with the knowledge runoff containing Landfill trash, polluted water, and sediment would leave the Landfill to the Appellees' properties during a flood. Dr. Walton identified the intentional act committed by the City was its building of ponds on the Landfill that were not within proper standards and stated he believed his conclusions encompassed the intentional act of operation and maintenance. Furthermore, Mr. Dunbar conceded that he understood Dr. Walton's report concluded the Appellees' damages were caused by the City's specific conduct of failing to adequately "design, construct, operate and/or maintain" the Landfill. Appellees also showed there was flooding with similar damage that occurred in 2002 and 2004, which the City had knowledge of, yet continued to operate the landfill. Appellees had notified the City of the damage and trash on their properties following the 2002 and 2004 event.[14]

The City presented evidence at trial to support its contention that it took significant remedial measures to prevent the outcome, including constructing berms and drainage pipes, adding capacity, repairing erosion, and adding chemicals to stabilize waste. To show it lacked the requisite intent, the City exhibited it relied on its hired engineers' assurances that the Landfill's drainage and runoff retention was proper and continuing to operate and maintain the Landfill did

[14] The City requested access to Appellee Wynn's property in 2002 for the purpose of "cleaning and other required work . . . ." Rimkus directed the City to clean up the debris that left the Landfill in 2006. One Appellee testified that in 2006, two men came to that Appellees' property to clean up with only "rakes and a shovel." After the men arrived and Appellee showed them around the property, the men left and never returned.

not create a material risk of causing downstream flooding. Specifically, the City claims the engineers assured it the Landfill's water-retention system was designed to capture 50 percent more runoff than would occur during a 24-hour, 25-year storm and that there was a less than 4 percent chance of a flood occurring in a given year. The City asserts the 2006 flood was highly improbable "by plain mathematical probability . . . ." The City complains the trial court's findings essentially hold that the City did not do enough to prevent flooding to Appellees' properties and argue such cannot form a basis for a taking. Further, that the "ticking time bomb" finding was unsupported by the record and contradicted by the remedial efforts.

However, the trial court found the City had acted intentionally for taking purposes in its continued operation and maintenance of the Landfill. Additionally, the City's remedial measures do not negate the finding of substantial certainty when Appellees alleged and showed the intentional conduct of piling mounds of waste and refuse on the Landfill caused their property damage. *Gragg*, 151 S.W.3d at 555; *but cf. Kerr*, 499 S.W.3d at 799 (holding the plaintiffs attempted to bundle the county's inaction of failing to fully implement their flood control plan with the affirmative conduct of approving development for the flood control plan and therefore, did not assert an affirmative action). Also, the TCEQ rejected two remedial preventative measures put in place by the City following the 2004 storm. The City had to remove the drainage pipe that was meant to channel water away from the slopes, as well as tractor tires placed as velocity inhibitors, after the TCEQ rejected the modifications and disallowed the use of the tires. The City claimed its runoff-retention system was modified to the extent it used a different design after 2002, yet it did not make this same assertion after the 2004 storm. Also, the City was notified that the Landfill would have released waste if one more day of rainfall had occurred during the 2004 storm;

and Director Smyth testified she knew the Landfill would not be able to handle the intensity of a rainstorm like one that occurred in 2006. Furthermore, the City's reliance on engineers is overstated when the engineers only assured the City it remained in compliance with state regulations but made no findings asserting there was no longer a material risk arising from the Landfill. Additionally, the City never contended remedial measures were taken to prevent repeat damage to Appellees' downstream properties, but instead, that such measures were taken to remedy citation violations by TCEQ.

The City also asserts it presented evidence that the investigation following the 2004 storm event did not find that waste had left the Landfill and did not find stormwater from the retention ponds had left the site while it was full. Still, Appellees testified that similar waste appeared on their properties following each storm, including the 2004 storm. As the trier of fact, the trial court found "similar problems occurred in July 2002, again in September 2004[,] and again in July, 2006." Because there was controverting evidence of the waste leaving the Landfill before 2006, the trial court was able to resolve the conflicting evidence and we must disregard an alternative resolution. *City of Keller*, 168 S.W.3d at 821. The showing of recurrence of flooding can be a probative factor in determining the extent of the taking and a further showing of the element of substantial certainty. *Gragg*, 151 S.W.3d at 555; *Kopplow Development, Inc. v. City of San Antonio*, 399 S.W.3d 532, 537 (Tex. 2013).

The City also asserts that intentional conduct is lacking when two properties were not impacted during the 2002 and 2004 storms but only during the 2006 storm. In total, the record established the trial court heard testimony showing Appellees all lived in the same vicinity below the Landfill, that the City had knowledge of downstream flooding affecting the same

neighborhoods in 2002 and 2004, that government officials acknowledged flooding to properties below the Landfill was inevitable due to natural geography, and that recurrent, exacerbated flooding grew progressively worse with each storm. A single flood event typically does not rise to the level of a taking but is not automatically foreclosed based on an inability to show multiple flooding events. *Gragg*, 151 S.W.3d at 555; *see Campos*, 510 S.W.3d at 130; *City of El Paso v. Mazie's L.P.*, 408 S.W.3d 13, 25 (Tex. App.—El Paso 2012, pet. denied). Although a showing of recurrence can be a probative factor, it is not an absolute requirement in these types of cases. *Mazie's*, 408 S.W.3d at 24-25. Based on the evidence as a whole, the trial court could reasonably infer the City continued operating the Landfill having substantial certainty that exacerbated flooding would occur to Appellees' properties during a rainfall event.

The Evidence was Legally Sufficient to Support the Findings

Viewing all disputed facts and reasonable inferences in favor of the trial court's finding, we conclude there was sufficient evidence the City continued to operate and maintain the Landfill knowing with substantial certainty that such activity would damage Appellees' properties. *See Gragg*, 151 S.W.3d at 555 (finding the evidence supported the trial court's findings that damage to plaintiff's ranch was the inevitable result of the reservoir's operation as intended); *but cf. Jennings*, 142 S.W.3d at 315 (holding unclogging sewage backups was not substantially certain to lead to flood damage when there was no evidence that such result was an ordinary result); *Sloan Creek II, L.L.C. v. North Texas Tollway Authority*, 472 S.W.3d 906, 916 (Tex. App.—Dallas 2015, pet. denied) (holding evidence that erosion necessarily resulted from government's intended design was not enough to meet the knowledge component of the intent standard).

The City's first issue is overruled.

C. Legal Standard

Having found sufficient evidence to support the trial court's findings on causation and intent, we further conclude the trial court's findings support the legal conclusion that a constitutional taking occurred. The City argues we must follow *Kerr* and find there was no taking. In *Kerr*, the Texas Supreme Court found the plaintiffs did not present a cognizable taking claim and would not recognize such a claim under attenuated circumstances. *Kerr*, 499 S.W.3d at 807. The Supreme Court noted:

> (1) the County never desired to cause flooding, but desired only the opposite, (2) it undertook significant efforts to prevent flooding, spending tens of millions of dollars over many years, (3) the County never intended, as part of a flood-control plan, to use the homeowners' particular properties for detention ponds, drainage easements, or the like, (4) the only affirmative conduct allegedly causing the flooding was approval of private development, (5) the homeowners offered no proof that the County was substantially certain its approval of development would result in the flooding of the homeowners' particular lots, and (6) even by the homeowners' reckoning the flooding resulted from multiple causes—Acts of God, the activities of other defendants, the alleged failure to complete the Pate Plan, and the approval of private development.

Id. Distinguishable from *Kerr*, the facts before us are not so weak as the City holds them out to be. Although the City had no intent to specifically flood Appellees' properties, and it did undertake remedial measures to prevent runoff, nonetheless, the evidence established the City continued to pile mounds of waste onto the Landfill with knowledge of past runoff events resulting in exacerbated damages for Appellees. The evidence shows the City had such knowledge of waste from the Landfill flowing downstream to Appellees' properties in instances of heavy rain. Lastly, but for the Landfill's mounds of trash, the Appellees' properties would not be damaged with trash, six-foot walls of sand, and toxic water harming Appellees as well as their properties.

We acknowledge the Supreme Court's call of caution against finding a taking where the

government "only knows that somewhere, someday, its routine governmental operations will likely cause damage to some as yet unidentified private property." *Kerr*, 499 S.W.3d at 807-08. Also, the amicus brief filed by the Texas Lone Star Chapter of the Solid Waste Association of North America, Inc. (TXSWANA) urges an affirmative decision by this Court "will have detrimental effects on municipalities' ability to plan for, budget, and operate landfills in Texas, and by extension, could set a precedent that would impact municipal governments' ability to design any public work facility in areas that are regulated by the state." Nonetheless, we find the specific and unlikely circumstances presented in this case narrow the reach of our ruling today. Here, our record includes evidence of two prior exacerbated flooding events with damage consisting of polluted water, trash, foam substances, and horrid smells. The record also includes evidence indicating the City's representative acknowledged the Landfill could not hold its waste if a heavy storm were to occur and evidence that the City continued to operate and further pile trash on the Landfill despite it having reached capacity. We not only strive to avoid results where an entity that is otherwise generally entitled to immunity for negligence is subject to liability for less than intentional behavior but also seek to ensure the public does not bear the burden of paying for property damage for which it received no benefit. *Gragg*, 151 S.W.3d at 554.

With these specific and unique facts supported by this record, we make a confined holding that there was evidence to support the trial court's findings that the damage Appellees endured was the inevitable result of the City's continued operation and maintenance of the Landfill. With these facts, the trial court had sufficient evidence to support the conclusion that the City's actions resulted in a taking under the Texas Constitution.

III. CONCLUSION

We affirm.

GINA M. PALAFOX, Justice

August 27, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.