

NOT DESIGNATED FOR PUBLICATION

JODIE LEE TEUTON

NO. 02-CA-575

VERSUS

**COURT OF APPEAL;
FIFTH CIRCUIT**

FIFTH CIRCUIT

NORMA M. HELMKE

FILED NOV 26 2002

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 49,163 - DIVISION "E"
HONORABLE ROBERT A. CHAISSON, JUDGE

NOVEMBER 26, 2002

**THOMAS F. DALEY
JUDGE**

Panel composed of Judges Edward A. Dufresne, Jr.,
Sol Gothard, and Thomas F. Daley

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**AFFIRMED IN PART;
AMENDED IN PART; AND REMANDED**

T.D.
EAW
Sg

The plaintiff, Jodie Lee Teuton, purchased a house from the defendant, Norma Helmke on January 31, 1997. During the summer of 1997, water was found leaking into the house. She filed suit against the defendant in January 1998 seeking a reduction in purchase price, damages, and attorneys fees. The trial court found in plaintiff's favor, however, plaintiff has appealed claiming the court awarded insufficient damages. For the reasons that follow, we amend the judgment, affirm as amended, and remand.

FACTS:

The home in question is located at 26 West Levert Drive in Luling, Louisiana. It was originally built in 1970 and a large addition was designed and constructed in 1983 through 1985. The house was initially listed for sale in 1996 for \$179,500.00 with Gertrude Gardner Realty. The house was later listed with Remax at \$160,000.00. The

asking price was then lowered to \$150,000.00. The plaintiff purchased the home for \$135,000.00.

The plaintiff testified that she purchased the house knowing that the original portion of the house needed to be renovated and updated. She and her husband hired a contractor, Timothy Kramer, to renovate the house. Ms. Teuton testified that the addition of the house had a large room with a wall of windows on one side and a one foot by five foot window on an adjacent wall. During the renovations to the original portion of the house, Mr. Kramer contacted Jodie Teuton and informed her that during a rain fall water had puddled on the floor at the base of the wall of windows. She asked Mr. Kramer to see if he could determine how the water was entering the house. Mr. Kramer applied silicone corking to several areas around these windows and roof in an effort to stop the leaks. He also removed and replaced damaged sheetrock. Ms. Teuton testified that Mr. Kramer's attempts to stop the water leaks were unsuccessful and it was necessary to keep large towels on the sills and at the bottom of these windows at all times to absorb the water during rainfalls. She then sought the services of Tom Whitney, an architect, to identify the source of the leaks and develop a plan to alleviate the leaks. Ms. Teuton hired another contractor, Kirk Gros, to carry out Mr. Whitney's plan for alleviating the leaks. The plan involved rebuilding the entire wall of windows, including replacing all of the windows and the exterior siding on the house, and modifying a portion of the roof. Ms. Teuton testified that she spent approximately \$41,000.00 in repairs, in addition to \$6,448.00 for Mr. Whitney's services, and some \$17,000.00 in legal fees because of the water leaks.

Ms. Teuton testified that she visited the house three times prior to the purchase and did not notice any problems. She explained that she reviewed the disclosure statement submitted by Ms. Helmke to the real estate company and that because the

statement did not reveal any prior problems with the house, she felt she could go forward and negotiate to buy the house. Ms. Teuton testified that had she been informed prior to the sale that the defendant had to make repairs to the house on three different occasions to repair water damage, she would have paid less for the house. She explained that had she been given this information, she could have investigated to make an intelligent decision as to the cost to repair it.

Scott Oliphant, Ms. Teuton's husband, testified that he visited the house five times prior to the act of sale and did not notice any water damage. He testified that Mr. Kramer came out to the house to estimate how much it would cost to update the kitchen and bathrooms. He further testified that the house was inspected by a structural engineer prior to the closing and that this inspection did not reveal any structural damage to the house. During Mr. Oliphant's testimony, numerous pictures were introduced into evidence showing rotten wood in the interior of the wall of windows. These pictures depicted some areas where it was evident that portions of the frames around the windows, studs, plywood, and felt sheathing had been repaired previously.

Mr. Kramer testified that he did a visual inspection prior to the act of sale that included going into the attic and did not notice anything that would lead him to believe that there was leaking or water damage in the house. He explained that while working on the renovations in the old part of the house, he noticed a puddle of water at the base of the wall of windows. It appeared that the water was coming in between the wall and the window. He reported this to the plaintiff who asked him to fix it. He explained that he sealed all the joints at the top of the windows then pulled off the interior sheetrock. He left the wall open for a few days during which rain fell, but there were no further leaks. He replaced the sheetrock. He further testified that there was

a leak in the cricket - the area where the roof of the addition was joined to the roof of the existing house. He removed the sheetrock, sealed the area then replaced the sheetrock. He also repaired sheetrock that was water damaged under the one by five window. Mr. Kramer testified that the siding on the addition was V-cut tongue and groove redwood siding. He explained that the siding had separated leaving a crack big enough for water to enter. Mr. Kramer testified that the only way to remedy this situation was to replace the siding.

Thomas Whitney, who was accepted by the court as an expert architect, testified that he was contacted by the plaintiffs to investigate a leak. He first went out to the house in March 1998. He noted that there was a deterioration of the dry wall around the windows and a deterioration of the windows themselves. He explained that the interior wood of the windows was damaged from water and the aluminum clad on the exterior of the windows had separated from the wood allowing water to enter, rotting the wood portion of the windows. Mr. Whitney explained that water was coming in at the base and head of the windows due to the wall leaking. Water was entering the wall between the boards of redwood siding and the only way to correct the problem was to replace the vertical siding with horizontal lap siding. He explained that he recommended lap siding because there were no eaves on this portion of the house, so rain water was hitting the entire wall of siding.

Mr. Whitney stated that the window flashing was not able to divert moisture out of the wall, so that water collected at the window, deteriorating the window and saturating the interior of the house. He testified that all of the windows were replaced with one unit of windows that was mulled together to eliminate the multiple surfaces that needed to be flashed with separate windows. Mr. Whitney testified that the

roofing was changed at the cricket to increase the scupper size so the water run off would be quicker and to alleviate the build up of leaves.

Mr. Whitney examined invoices from repairs made in 1988 and 1991 and opined that these were for repairs related to water infiltration. He further testified that when the walls were opened some of the two by six wall studs were completely consumed and had no structural capacity. He opined that this damage predated the act of sale and had taken over five years to develop.

Kirk Gros was accepted by the court as an expert in the field of residential construction. He testified that the repairs were done in accordance with Mr. Whitney's drawings and specifications. His proposal, contract, and addendum to the contract were admitted into evidence. Mr. Gros explained that when he drew up the contract to perform the repairs, he did not know the extent of damage to the interior of the walls. For this reason the contract provides that any rotten wood will be replaced on a time and materials cost basis. Mr. Gros went over each area of his contract and explained the charges for repairs to the roof, windows, and siding. His cost included \$12,217.00 to replace the windows, \$7,972.00 to replace the siding, \$978.00 for gutters and down spouts, \$2,896.00 for repairs to the curved pylon area, and \$2,200.00 to take down and replace the screened porch. He explained that the screened porch had to be taken down and replaced to replace the siding. Mr. Gros stated that the cost of the lap siding was less than that of redwood siding. The cost to repair the roof was \$8,874.00, but this amount was reduced by 40% because this amount included repairs to areas not involved with the leaks and water damage. In the cricket area, copper flashing and gutters were added to speed up the flow of water on the roof. He explained that copper is stronger than both aluminum and galvanize and the stronger material was needed in this area due to the slope of the roof.

Mr. Gros testified that when they removed the siding, there was severe rotting with some of the studs completely rotted out. He stated that when the windows were removed there was extensive rotting of the wood from water that entered the walls. He opined that this damage had been there a minimum of five years and that had he performed repairs in 1995 in this area, he would have seen it. He testified that the existing windows were nonfunctional because water leaking from the wall went into the frame of the windows. His charges for repairs necessary due to rotten wood in the walls totaled \$4,169.00.

Ernest Dorphi testified that he designed and supervised the construction of the addition. He testified that there were pieces of the redwood siding that had to be replaced or re-nailed after the addition was completed. He testified that he was called out to the house in 1987 to address leaking in the cricket area, as well as two other areas. He testified that he was called back in 1991 to address leaking in the cricket area. He had no knowledge of repairs done in 1995.

Norma Helmke testified that in 1988 there was leaking in the roof in the cricket area and it was necessary to replace the redwood siding by the windows. She further testified that in 1991 there was more leaking in the cricket area and repairs to the siding. In 1995, four windows were removed and there was water damage to the frame around the windows. She testified that the damaged wood was replaced. In addition, water damage next to the one by five window was repaired. Ms. Helmke testified that she did not find it necessary to disclose the problems with the roof, windows, and water damage because she had them repaired. She explained that she answered the questions on the disclosure form in good faith and that she thought the 1995 repairs would last for years to come. She further testified that there was no leaking when she

sold the house and that there was no leaking or puddles on the floor from the time of the 1995 repairs until the sale in January 1997.

The trial court rendered judgment in the plaintiff's favor, awarding damages in the amount of \$23,801.25. In his reasons for judgment, the trial court acknowledged that the plaintiff sought a reduction equivalent to the cost of her repairs, \$37,754.34, plus the cost of her architect's fee, \$6,448.00. The trial court awarded a \$15,000.00 reduction in purchase price, attorneys fees of \$5,801.25, and an award of \$3,000.00 for mental anguish and inconvenience. On appeal, plaintiff seeks to increase the diminution damages and attorney fees, in addition to an award for the services of her architect.

LAW AND DISCUSSION:

In her first Assignment of Error, the plaintiff claims the trial court committed legal error by taking judicial notice of and relying on his own personal knowledge of property values in determining plaintiff's damages for diminution in value. In its Reasons for Judgment explaining the award of \$15,000.00 reduction of the purchase price, the trial court stated:

I have personal knowledge, which is supported by the official conveyance records of the clerk of court's office (of which I take judicial notice), that Lot 126 of West Levert Drive sold in May 1996 for \$56,000.00. This lot is just down the street from the subject property, is on the golf course, and is a slightly smaller lot. I also have personal knowledge, supported by the official clerk's records, that 1200 to 1400 square foot condominiums built in the late 1970s in Ormond Subdivision sold during the late 1990s in the range of \$75,000 and that 1400 to 1600 square foot "tract homes" built on 60 x 100 foot lots throughout the parish in the early 1980s sold in the late 1990s in the range of \$100,000 . . . This evidence, along with common knowledge of real estate values in the neighborhood, led me to conclude that, giving plaintiff every benefit of the doubt, a reasonable buyer would have paid at least \$105,000 for the lot and original structure alone.

We agree with appellant that the trial court improperly relied on personal knowledge of real estate values in the area in awarding the reduction in purchase price, however, we note the well-settle rule of law that a judgment and its reasons are two separate and distinct legal documents. Schulinkamp v. Ochsner Clinic, 99-558 (La. App. 1/25/00), 752 so.2d 275. An appeal does not lie from the reasons for judgment, rather an appeal lies from the judgment itself. Kirkham v. Pumphrey 34,349 (La. App. 2 Cir. 12/20/00), 775 So.2d 634, writ denied 200-201 (La. 3/30/01), 788 So.2d 1191. Thus, the issue before us is whether the trial court erred in awarding \$15,000.00 reduction in purchase price.

In an action for reduction of purchase price, the proper measure of damages is the difference between the actual sales price and the price a reasonable buyer would have paid had they known of the defect. Kent v. Cobb, 35,663 (La. App. 2 Cir. 3/8/01), 811 So.2d 1206. A primary factor to be taken into consideration is the cost of repairing the redhibitory defect. Id. Much discretion is vested in the trier of fact in assessing the amount of recovery in a reduction case and this award will not be disturbed absent an abuse of that discretion. Id.

The trial court heard extensive testimony as to the modifications and repairs necessary to correct the redhibitory defect in this house. Mr. Whitney and Mr. Gros explained that the siding had to be replaced with horizontal lap siding due to the design of the house. They explained that the roof had to be modified and fitted with copper scupper and gutters to adequately handle the amount of water that would drain to the cricket area during rain fall. They further explained that the existing windows had to be replaced because they were damaged by water entering the wall and rotting the wood as well as water entering the aluminum clad on the outside of the windows. However, Mr. Whitney testified that the damage to the aluminum clad could have

occurred in one day and he did not state that this particular damage existed at the time of the sale. Further, there was testimony that varnish on the surface inside of these windows was partially worn off. This testimony established that the windows were worn and not in perfect condition at the time of the sale. Plaintiff replaced these 15 year old windows with high quality Anderson windows. The cost of the Anderson windows was \$12,217.00. As to the siding, this too was 15 years old and there was testimony that through the years, the siding had separated, so the siding was weathered and not in perfect condition at the time of the sale. Plaintiff introduced numerous pictures depicting various areas of the addition, including the condition of the wall of windows and the siding at various times from the act of sale to the completion of the repairs. These pictures indicate that the condition of the addition, specifically the windows and siding, was far superior at the completion of the repairs than at the time of sale. Additionally, there was testimony that some of the work performed on the roof was unrelated to the repairs for the water damage.

Plaintiff seeks the total cost of repairs, which she states is \$37,745.34. The trial court reduced this by over \$22,000.00 finding that some of the repairs went beyond what was necessary to simply cure the defect. For example, plaintiff knew she was not purchasing a house with copper gutters and flashing, yet this is what was used during repairs. Additionally, although the testimony states that it was necessary to remove the screened porch to replace the siding, the plaintiff ended up with an entirely new screen porch when the testimony indicated that there were no defects in the screen porch. Given all of this testimony and the vast discretion vested in the trial court, we cannot say the trial court erred in awarding a \$15,000.00 reduction in the purchase price since defendant was liable for the cost of repairs, but not the cost of improvements.

In her second Assignment of Error, the plaintiff argues that the trial court erred in failing to award \$6,448.00 for the services of the architectural services. We agree that it was error not to award some reimbursement for the architects fee. The testimony established that the problems with water leaking in the cricket area existed shortly after the addition was completed. Ms. Helmke acknowledged that she had repairs to the roof in this area on three occasions because it leaked. Mr. Dorphi, the original architect, testified that he was called out on two occasions due to leaks in the cricket area. Mr. Whitney visited the house on several occasions before finally being able to develop a plan to alleviate the leaks. He explained all the reasons why water was entering this house. There was a problem in the cricket area, there was improper flashing on the windows, and the redwood siding separated allowing water to enter the interior of the wall. Mr. Whitney testified that his bill for services rendered was directly related to the remedial action taken to correct the water leaks. On cross-examination, he was questioned as to the roof layouts. Mr. Whitney testified that time spent on skylight replacement, shingle roof replacement, and front and flat roof replacement amounted to \$570.00 of his bill. The plaintiff testified that since these repairs were completed there was no further leaking. We find that Mr. Whitney's services were necessary to correct the defect and eliminate the leaking. A fee for architectural services is an appropriate element of damages in a redhibition suit. A. Copeland Enterprises, Inc. v. Harimaw, 528 So.2d 707, (La. App. 5 Cir. 1988). Plaintiff testified she paid architectural fees of \$6,448.00; Mr. Whitney testified that \$570.00 of his architectural fee can be attributed to non-remedial work; according, the judgment is amended to include an award of \$5,878.00 (\$6,448.00 - \$570.00) for architectural fees.

In her third Assignment of Error, the plaintiff contends the trial court erred in reducing the attorneys' fee award based on the parties refusal to settle the case prior to trial. In his Reasons for Judgment, the trial court acknowledged that plaintiff seeks recovery of \$17,222.77 in attorneys' fees, but explained that because at a pretrial conference he told both parties that their refusal to make an offer of settlement was unreasonable, he did not award plaintiff attorney fees for work performed after the pretrial conference. In doing so, the trial court erred.

Having found the defendant to be in bad faith, plaintiff is clearly entitled to recover attorneys' fees. The amount of attorney fees to be awarded depends on the facts of the individual case. Richardson v. Parish of Jefferson, 98-625 (La. App. 5 Cir. 2/10/99), 727 So.2d 705. Factors to be considered in determining the amount of attorney fees include: (1) The ultimate result obtained, (2) the responsibility incurred, (3) the importance of the litigation, (4) the amount of money involved, (5) the extent and character of the work performed, (6) the legal knowledge, attainment, and skill of the attorneys, (7) the number of appearances involved, (8) the intricacies of the facts involved, (9) the diligence and skill of counsel, and (10) the court's own knowledge. State v. Dept. of Transportation and Development v. Williamson, 597 So.2d 439 (La. 1992).

Although the statute provides for "reasonable attorney fees" and the trial court has discretion in setting the amount, we find that the trial court abused its discretion when it refused to award any attorney fees for legal work performed after the pretrial conference. In fact, during oral argument counsel for the defendant admitted that at or prior to the pretrial the defendant withdrew any offer of settlement because defendant considered plaintiff's demands outrageous. Plaintiff cannot be penalized for not settling a case where defendant had no firm offer of settlement offered. The

trial court ruled in plaintiff's favor indicating that plaintiff's position had legal value, therefore, plaintiff should not be penalized for pursuing her right to trial. While the trial court is not obligated to award all of the attorney fees requested, we find that cutting off attorney fees at the pretrial stage, absent a formal Offer of Judgment by defendant, is an abuse of discretion.

We are unable to determine an appropriate award of attorney fees from the record before us, therefore, this matter is remanded to the trial court with instructions to award reasonable attorney fees in accordance with the principles set forth in Richardson v. Parish of Terrebonne, Id.

For the foregoing reasons, the judgment is amended to include an award for architectural services in the amount of \$5,878.00. This matter is remanded to the trial court for an assessment and award of attorney fees. In all other respects, the judgment of the trial court is affirmed.

**AFFIRMED IN PART;
AMENDED IN PART; AND REMANDED**



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD

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Court of Appeal

FIFTH CIRCUIT
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CLERK OF COURT

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GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY NOVEMBER 26, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR.
CLERK OF COURT

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