NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1076

GREG MITCHELL, CLODINE M. GORDON, LINDA BROWN, BERTHA OXLY, JANICE BELL, ET AL.

VERSUS

EAST BATON ROUGE PARISH, ET AL.

Judgment Rendered: JUL 16 2010

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
DOCKET NUMBER 432,169, DIVISION M, SECTION 26
STATE OF LOUISIANA

THE HONORABLE KAY BATES, JUDGE

* * * * * * *

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Parro, J., Concurs.
Kuhn, J. concurs in part and dissents in part and assigns reasons

BEFORE: CARTER, C.J., PARRO, KUHN, GUIDRY, AND McDONALD, JJ.

Carter, C.J. concurs in part and dissents in part and assigns reasons.

Guidry, J. dissents and assigns reasons.

McDONALD, J.

The City of Baton Rouge/Parish of East Baton Rouge appeals a judgment from the Nineteenth Judicial District Court awarding damages to residents living near the North Wastewater Treatment Facility.

In October 1996, a petition for damages was filed by Greg Mitchell, et al. against East Baton Rouge Parish, naming approximately 360 plaintiffs, and alleging that the operation and maintenance of the waste treatment facility caused petitioners personal inconvenience, mental suffering, embarrassment, and personal injuries. Plaintiffs also alleged a grave threat to health and safety by exposure to contaminated air and increased risk of serious diseases to themselves, their family, and their progeny. A supplemental pleading filed May 17, 1997 added claims for damages for permanent injury to land and decrease in the market value of property, among other named damages, to plaintiffs and those similarly situated. A later amending petition named additional plaintiffs and sought relocation costs.

Plaintiffs' testimony in the trial of this matter was heard on November 28, 29, and 30, 2000, December 4, 5, 6, 7, 8, 11, and 12, 2000, May 7, and 8, 2000, and August 24, 2001, at the conclusion of which the trial court issued written reasons for judgment finding:

> [T]he testimony given by the 148 petitioners who appeared in court has been carefully reviewed and taken into consideration. It is apparent to this Court that many of the plaintiffs gave conflicting testimony or testified that the expansion produced little or no change in the prior circumstances. ... The Court finds, in light of this testimony and other evidence presented, that most of the plaintiffs have failed to establish that the action taken by the City-Parish in so far as expansion of the treatment plant has caused them to be subjected to odors or problems that they were not subjected to before the expansion took place.
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> * * *
>
> The expert testimony further substantiates the Court's conclusion that these plaintiffs have not proven by a preponderance of the evidence that they have suffered any legal damage caused by the sewer treatment plant at issue. Dr. Robert Flournoy admitted that it was hard to have a sewer treatment plant without an odor. And, Mr. Kermit Williams testified that stigma damage due to the location of the

plaintiffs' properties may have been present when the plaintiffs moved into or built their homes as the treatment plant was already constructed.

The reasons also indicated that 209 plaintiffs were to be dismissed for failure to appear at trial. The court further noted dismissal of 38 plaintiffs because they were renters who knew or should have known that a waste treatment facility was situated in close proximity to the apartments they chose to rent and that problems such as odor could be associated with this type of plant. Also, finding that some plaintiffs resided on streets too far removed from the treatment plant for an award of damages to be appropriate, nine plaintiffs on Avenue L, eleven plaintiffs on Avenue K, seven plaintiffs on Avenue J, and nine plaintiffs even further removed were to be dismissed. The trial court also found that certain named plaintiffs residing on Avenue M and Avenue L had a valid claim for damages. In concluding, the trial court ordered the defendants to put on their case in chief.

The defendants presented their case on April 26, 27, and 28, 2005. Written reasons for judgment were issued January 10, 200[7], and judgment was rendered and signed on January 18, 2007. Both the plaintiffs and the defendants filed motions for new trial, which were granted.

After a hearing on the motions, judgment was rendered on November 7, 2008. This judgment dismissed 209 plaintiffs for failure to appear at trial and offer any evidence in support of their respective claims; two plaintiffs were dismissed because they were not named plaintiffs. Monetary damages were awarded to nineteen plaintiffs for stigma damage to their residences. The judgment also added back as plaintiffs those who had been dismissed because they had no property interests, and awarded damages for discomfort and inconvenience of one hundred dollars per month for a period of twenty-nine months (the entire year of 1995 and the seventeen months in 1997 and 1998 that the treatment plant expansion was being constructed) to approximately 125 plaintiffs, and fifty dollars a month for

twenty-nine months to approximately 34 plaintiffs. The plaintiffs living on Avenue M and Avenue L who were awarded stigma damages were also awarded attorney fees of thirty-three and one-third percent of the amount of the damages awarded. All damages awarded included legal interest from the date of judicial demand until paid, and the defendants were cast for all costs.

It is this judgment that is before us on appeal. The defendants raise three assignments of error: (1) the trial court erred because plaintiffs claims are prescribed in their entirety pursuant to La. R.S. 9:5624; (2) the trial court erred in awarding damages arising out of the 1997 expansion; and (3) the trial court erred in calculating the amount of damages in various particulars.

The law governing the prescriptive period in this matter is La. R. S. 9:5624, which provides: "When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after the completion and acceptance of the public works." The subject waste treatment plant began operation in 1960 and was expanded several times. The last expansion was begun in 1997 and completed in 1998. The trial court correctly noted that La. R. S. 9:5624 does not support the continuing tort doctrine. However, the court found that the latest expansion of the sewerage plant must be viewed as a new public work event for purposes of La. R. S. 9:5624, stating, "After all, it would neither be equitable nor just to hold parties responsible for filing a suit within two years of the plant's original completion date (i. e. 1960) when their property was not damaged" until the plant was expanded in 1998. We agree that any damages attributable to the plant expansion had not prescribed when suit was filed[1] and that the plant expansion should be considered a new public work for purposes of La. R.S. 9:5624.

[1] Since suit was filed in 1996, any damages attributable to the expansion had not even accrued.

We note that appellate review of this matter is conducted under the manifest error/clearly wrong standard for factual issues and mixed questions of law and fact. *Brasseaux v. Town of Mamou,* 99-1584 (La. 1/19/00), 752 So. 2d 815. Appellate review of questions of law is simply to discern whether the trial court's interpretive decision is legally correct. If legal error is found, an appellate court is to make a *de novo* review. *Hogan v. Morgan,* 06-0808 (La. App. 1st Cir. 4/26/07), 960 So.2d 1024, 1027, writ denied, 07-1122 (La. 9/14/07), 963 So.2d 1000.

The trial court awarded damages in this case for diminution of property value and for discomfort and inconvenience. Under Article 1, Section 4 of the Louisiana Constitution of 1974, "property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner." The Louisiana Supreme Court has addressed the issue of this damage outside an expropriation proceeding, an inverse condemnation,[2] noting that "[D]espite the legislative failure to provide a procedure to seek redress when property is damaged or taken without the proper exercise of eminent domain, this Court has held that a cause of action must arise out of the self-executing nature of the constitutional command to pay just compensation." *Constance v. State, through DOTD,* 626 So.2d 1151, 1156 (La. 1993), *cert. denied,* 512 U.S. 1219, 114 S.Ct. 2706, 129 L.Ed.2d 834 (1994).

The supreme court has also provided guidelines for determining when such damages have occurred. "In *Constance,* the Louisiana Supreme Court held that plaintiffs must prove five elements in an inverse condemnation case: (1) that property rights are at issue; (2) that the act alleged to have caused damage was undertaken for public purposes; (3) that the acts of the government violate Civil Code articles 667 through 669; (4) that the government has engaged in excessive or

[2] The City-Parish did not institute expropriation proceedings in this matter. The physical site of the plaintiff's homes was not required for the expansion. However, an offer was made to buy the homes of persons living on Ave M and Ave L that would be affected by the expansion. Many persons accepted the City's offer, their homes were purchased, and they were assisted in relocating.

abusive conduct; and (5) that their property has either been physically damaged or has suffered '"special damage peculiar to the particular property."' *Arnold v. Town of Ball*, 94-972 (La. App. 3rd Cir. 2/1/95), 651 So. 2d 313, 318.

The supreme court in *Constance* also noted that "[a]lthough our state constitution recognizes that every person has the right to acquire, use, and dispose of private property, this right is subject to reasonable statutory restrictions and the reasonable exercise of police power." *Constance,* 626 So.2d at 1155. In fact, general public interest takes precedence over that of individuals, and any individual must yield any particular property to the community, should it become necessary for the general use. *Id.* A landowner's right of ownership is also limited by Civil Code articles 667 and 668, which require that he tolerate some inconvenience from the lawful use of a neighbor's land. *Id.*

The Louisiana Supreme Court has further provided an excellent discussion of the principles and history of eminent domain that should assist courts in a just determination of when property rights have been damaged by a political body such that compensation is required in *State through Dept. of Trans. & Dev. v. Chambers Inv. Co.,* 595 So.2d 598 (La. 1992). In analyzing the statutory restrictions provided in civil code articles 667 and 668, the *Chambers* court noted, as long as the activities on the State's land do not exceed the level of causing the claimant some inconvenience there can be no taking or damaging of the claimant's property right. Further, a finding of liability under Article 667 requires either proof of personal injury or physical damage to property, or proof of the presence of some type of excessive or abusive conduct. *Lodestro Co. v. City of Shreveport,* 33,901 (La. App. 2nd Cir. 9/27/00), 768 So.2d 724, 727.

Applying these legal principles to the matter before us, we find it difficult to determine whether the trial court used the correct legal criteria or whether legal error was made that interdicted the fact-finding process. The plaintiffs' pre-trial

memorandum asserts that they will have no problem proving that the plaintiffs have been "inconvenienced." The judgment itself asserts that damages were awarded for discomfort and inconvenience. However, the jurisprudence cited above establishes that damages for mere inconvenience are not compensable.

We have carefully examined the entire record, with an advantage provided by the ability to consider the matter as if it were presented in weeks, instead of over 10 years. Regardless of whether our review is conducted under the manifest error standard or *de novo* we reach the same result.

As the trial court found, these plaintiffs can only be compensated for any damages sustained by the expansion of the treatment plant that commenced in 1997 and was completed in 1998. The plaintiffs' earlier claims have prescribed. Therefore, it was legal error to award damages for odors that existed in 1995.

Similarly, any stigma damages awarded are only permissible if they resulted from the expansion. The plaintiffs' expert in real estate appraisal concluded that the proximity to the treatment plant of the twenty-one homes appraised resulted in damages to each property ranging from $13,000 to $30,000. However, as the court noted in its original reasons for judgment, the expert did not consider the effect of the 1997 expansion on the property, but the total effect of the sewerage treatment plant, which has existed since 1960. When testifying in the plaintiffs' case in chief, the expert described the parameters of his report:

> "[W]hat did you understand the task that we asked you to perform in this case?"
>
> "You asked me to evaluate and put a numeric value on the effects that the north sewerage treatment plant had on some 21 homes in the area adjoining the treatment plant, sir."

Any effect that the treatment plant had on the homes that experienced stigma damage could only be legally relevant if the damage resulted from the 1997 expansion. The defendants' expert in real estate valuation acknowledged that the

Mitchell home had been damaged by the expansion of the treatment plant because prior to 1997, his residence was directly across the street from a BREC park, whereas after the expansion, there were trickling filters (large tank structures) facing the home. It was his opinion that only the Mitchell home had been damaged by the expansion.

The rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. *Hanks v. Entergy Corp.*, 06-477 (La. 12/18/06), 944 So.2d 564, 580-81. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Hanks,* 944 So.2d at 580; *Rosell v. ESCO,* 549 So.2d 840, 844 (La. 1989). The opinion of plaintiffs' expert in this case was not patently unsound. He was well-qualified, and his opinion was well-documented and credible. It is not, however, a "permissible" view upon which to rely, because the task he was instructed to perform, and did perform, was to put a numeric value on the total effect of the sewerage treatment plant on the homes that he appraised, and the law prohibits compensating plaintiffs for the effect of the sewerage treatment plant. As noted, only the effect of the expansion could be considered. Also, the costs of many of the plaintiffs' homes reflected a decreased value due to the plant at the time of the purchase. The testimony established, for example, that one plaintiff, who had purchased the home in 1995, had paid only $15,000 for her home.

The only expert evidence of the effect of the expansion on the plaintiffs is that of the defendant's expert. His opinion was that the Mitchell home was damaged because of the loss of the park and the nearer proximity of the plant. His assessment of the monetary value of the damage was $20,000.

The trial court did not award any damages to the plaintiffs on Avenue M and Avenue L, other than the loss of value to their homes reflected by the stigma

damage. However, an award was made to a number of plaintiffs for discomfort and inconvenience during the 17-month period that the expansion was under construction. The evidence did not reasonably support a conclusion that the conduct of the defendants was abusive or excessive. Neither was there evidence of any physical damage to property or personal injury. Therefore, these damages are not legally compensable. Generally, ill effects of construction are unavoidable, and, particularly when the construction is to benefit the public good, are not compensable. See *Chambers,* supra, *Constance,* supra, and *Lodestro*, supra. In this case, not only did the construction benefit the public good, but it was mandated by the EPA. We find that the awards of $100 per month and $50 per month for the 17-month construction period under the facts of this case were erroneous, and the portion of the judgment awarding these damages is reversed.

CONCLUSION

Based on our review of the entire record, we conclude that, with the exception of the award to Mamie Mitchell, the portion of $439,000 awarded for stigma damage to the other eighteen plaintiffs on Avenue M and Avenue L must be reversed; also, the $2,900 awarded for discomfort and inconvenience to each of the approximately 125 named plaintiffs (beginning with David Allen and ending with Samuel Youngblood), as well as the $1,450 awarded for discomfort and inconvenience to each of the 34 plaintiffs, totaling $49,300, must be reversed. Judgment for damages in the amount of $20,000 is hereby awarded to Mamie Mitchell, plus attorney fees in the amount of thirty-three and one-third percent of the damage award. In all other respects, the judgment is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND RENDERED.

GREG MITCHELL, CLODINE M. GORDON, LINDA BROWN, BERTHA OXLY, JANICE BELL, ET AL.	**FIRST CIRCUIT**
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CARTER, C.J.

In my opinion, the plaintiffs' claims are prescribed and should be reversed *in toto*. I therefore concur with that portion of the opinion reversing the damages awards and dissent from that portion of the opinion rendering judgment and awarding damages and attorneys' fees.

GREG MITCHELL, CLODINE M. GORDON, LINDA BROWN, BERTHA OXLY, JANICE BELL, ET. AL	**FIRST CIRCUIT**
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KUHN, J.

I disagree with that portion of the plurality opinion that reverses the awards of "stigma" damages to the residents living on Aves. M and L. As the expert explained, "stigma" damages are those for diminution of property value. General damages are those which may not be measured with any degree of pecuniary exactitude, ***McGee v. A C and S, Inc.***, 05-1036 (La. 7/10/06), 933 So.2d 770, 774, are inherently speculative in nature, and cannot be fixed with mathematical certainty. ***Bouquet v. Wal-Mart Stores, Inc.***, 08-0309, p. 4 (La. 4/4/09), 979 So.2d 456, 458-59. Thus, because diminution of property valuations cannot be measured with any degree of pecuniary exactitude, they are general damages and must be reviewed accordingly.[1]

I believe the record nevertheless supports the trial court's awards of stigma damages. The 1997 expansion significantly changed the size and, with it the imposition of, the effects of the sewerage plant on the surrounding community. A fair reading of Williams' testimony establishes that the facility was "much smaller" in 1996, and that he did not smell any odors; but when he returned in June or July of 2000—subsequent to the expansion—it was terrible, "very objectionable." The record also shows that a park had been located in the vicinity, which was lost with the expansion, and trees in close proximity were eliminated with the expansion. I believe the trial court was surely within its province to conclude that the plaintiffs,

[1] At oral arguments, the parties conceded stigma damages are correctly reviewed as general damages.

whose homes are located on Aves. M and L, were entitled to stigma damages as a result of the expansion.

The initial inquiry in reviewing an award of general damages is whether the trier of fact abused its vast discretion in assessing the amount of damages for the particular injuries and their effects under the particular circumstances on the particular injured person. ***Youn v. Maritime Overseas Corp.***, 623 So.2d 1257, 1260 (La. 1993); ***Reck v. Stevens***, 373 So.2d 498, 501 (La. 1979). Only after a determination that the trier of fact has abused its much discretion is a resort to prior awards appropriate and then only for the purpose of determining the highest or lowest point which is reasonably within that discretion. ***Youn***, 623 So.2d at 1260; ***Coco v. Winston Industries, Inc.***, 341 So.2d 332, 335 (La. 1976).

As the plurality opinion has pointed out, the expert testimony establishing the value of the affected properties considered the total effect of the sewerage treatment plant. By awarding the amount plaintiffs' expert determined each property was diminished as a result of the existence of the facility since 1960, the trial court necessarily abused its discretion in fashioning an award for diminution of the affected property as a result of the 1997 expansion. Accordingly, I would reduce the stigma damages awarded to each of the residents living on Aves. M and L to the highest amount reasonably within the trial court's discretion.

I concur with the results reached in the remainder of the plurality opinion.

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EAST BATON ROUGE PARISH, ET AL

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I respectfully disagree with the plurality opinion reversing damage awards to nineteen named plaintiffs for stigma damages to their residential property, and reversing damage awards to 159 named plaintiffs for discomfort and inconvenience as a result of the sewer construction expansion in 1997 and 1998.

In State, Department of Transportation and Development v. Chambers, 595 So. 2d 598, 603 (La. 1992), the Louisiana Supreme Court adopted a three-pronged analysis for determining whether a claimant is entitled to compensation for an unconstitutional taking. Under this analysis, the court must: (1) determine if a right with respect to a thing or object has been affected; (2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for a public purpose under Article I, § 4. Chambers, 595 So. 2d at 603.

In deciding whether the claimant's right was taken or damaged, La. C.C. arts. 667 and 668, which impose legal limitations on a landowner's right of ownership, must be considered. Constance v. State, Department of Transportation and Development, 626 So. 2d 1151, 1157 (La. 1993). While Article 667 prohibits

the landowner from exercising his right of ownership in such a way as to cause damage to his neighbors, Article 668 requires that he tolerate certain inconveniences which result from the lawful use of a neighbor's property. Constance, 626 So. 2d at 1157. The supreme court in Chambers concluded that where there is no allegation or evidence of personal injury or physical damage to property, a finding of liability under Article 667 "require[s] proof of the presence of some type of excessive or abusive conduct." Chambers, 595 So. 2d at 605. The court went on to state that "as long as the activities on the State's land do not exceed the level of causing the claimant 'some inconvenience,' there can be no taking or damaging of the claimant's property right." Chambers, 595 So. 2d at 605.

In finding that the nineteen named plaintiffs failed to establish "stigma" damages resulting from the expansion of the waste treatment facility, the plurality relies on the fact that these plaintiffs failed to present expert testimony specifically quantifying the amount of diminution resulting solely from the expansion. At trial, Kermit Williams, plaintiffs' expert in the field of real estate appraisal, testified as to the amount of diminution for each affected property. In arriving at these figures, Mr. Williams found the single largest element contributing to the stigma is the foul odor emanating from the facility, which he found to be worse in 2000 than when he previously evaluated the property in 1996.

Additionally, the record demonstrates that what was once a small primary treatment plant that treated only approximately eighty million gallons of water per day has grown and expanded over the years, the last expansion having been completed in 1998, and now currently operates twenty-four hours a day, three hundred sixty-five days a year and is capable of treating one hundred thirty million gallons of waste per day. As reflected by the record and as articulated in the trial court's reasons for judgment, this same growth has encroached upon nearby

neighborhoods, even eliminating a BREC neighborhood park, and has resulted in noxious odors from raw human sewage and chemicals, sewer flies, and loud noises and harsh industrial lighting from the plant's non-stop operation. The plaintiffs testified that now they are forced to stay indoors due to the odor, rendering their yards useless for social gatherings and outdoor activities, and some have even had to leave their homes on several occasions. Additionally, where a neighborhood park once stood is now replaced by large concrete sewage tanks.

Therefore, based on my review of the record, I find that the plaintiffs presented considerable evidence from which the trial court could reasonably determine that the plaintiffs were entitled to stigma damages based on the 1997 expansion. Additionally, I find no abuse of discretion in the amounts of each damage award. The trial court was presented with testimony from Mr. Williams as to the amounts of stigma damages incurred by each property, and the trial court ultimately determined based on the totality of the evidence before it what it considered to be an appropriate award. See Mitter v. St. John the Baptish Parish, 05-375, pp. 7-8 (La. App. 5th Cir. 12/27/05), 920 So. 2d 263, 267-268. Accordingly, I would affirm the trial court's award of stigma damages to the nineteen named plaintiffs.

Further, while the plurality is correct in stating that damages for "mere inconvenience" are not compensable, I find the discomfort and inconvenience suffered by the other 159 named plaintiffs during the expansion construction in 1997 and 1998 amounts to be more than "mere inconvenience." According to the record, the construction of the expansion generated additional noise due to trucks, jackhammers and pile driving, in addition to the increased dust, odor, and sewer flies. The plaintiffs even complained to the building contractor during the construction regarding the increase in sewer flies and dust. Further, at times, the construction took place twenty-four hours a day, affording the plaintiffs no escape

from its effects. The unsanitary and ultrahazardous activities surrounding the construction expansion far exceed what are normal "ill effects of construction," and therefore are legally compensable damages. See Chambers, 595 So. 2d 605-606. Therefore, I find no manifest error in the trial court's determination that the 159 named plaintiffs are entitled to damages for discomfort and inconvenience. Likewise, I find no abuse of discretion in the trial court's awards to these 159 named plaintiffs based on their proximity to the waste treatment facility.

Accordingly, for the foregoing reasons, I respectfully dissent from the plurality's opinion.