NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0186

JAMES H. WELSH AND
VERONICA WELSH

VERSUS

FRANK TIPPIT PACE AND
BETH BOURGEOIS PACE

Judgment rendered September 19, 2014.

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Appealed from the
20th Judicial District Court
in and for the Parish of West Feliciana, Louisiana
Trial Court No. 21620
Honorable George H. Ware, Jr., Judge

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

PETTIGREW, J.

In this appeal, plaintiffs, James H. Welsh and Veronica Welsh (the "Welshes"), challenge the trial court's judgment that dismissed defendants, Frank Tippit Pace and Beth Bourgeois Pace (the "Paces"), from this action with prejudice. For the reasons set forth below, we affirm the judgment of the trial court.

At all times pertinent hereto, the Welshes and the Paces owned neighboring tracts of residential land in West Feliciana Parish. The Paces acquired their 12.12 acre tract on May 31, 1995 (the "Pace tract"). The Welshes purchased their 7.97 acre tract on August 1, 1995 (the "Welsh tract"). Although the Pace tract and the Welsh tract were part of the Plantation Estates Subdivision, the rear of each tract was a wooded area with deep ravines and ridges. According to the record, the Paces' twin sons, Kaine and Kody, were 26 years of age at the time of the conduct that gives rise to the Welshes' complaint. Neither Kaine nor Kody resided at home with their parents at any time relevant hereto. In August 2011, Kaine asked his father if he could build a dirt track for his motorcycles in the front and side yard pastures of the Pace tract. After getting his father's permission, Kaine, his friend Ryan Alexander, and Kody, with the use of Ryan's bulldozer, began building the track.

When the dirt work began on the Pace tract in August 2011, Mr. Welsh noticed the work being done on the property and became concerned. He approached Mr. Pace at his office one day to discuss the matter and ensure that the dirt bike track was not going to become a nuisance because of the noise. Mr. Pace assured him it was "no big deal" and the boys "just want[ed] to have a little fun." According to Mr. Welsh, the bulldozer came and went for a number of months, but he had no idea they were tearing up and destroying the back of his property.

On November 5, 2011, Mr. Welsh heard motorcycles on the rear of his property and the Pace tract. Mr. Welsh walked down a ridge on his property and, for the first time, saw the damage that had been done to his property, including, but not limited to, erosion to the hillside, diversion of drainage onto the property, and damage to trees and landscaping on approximately 2 acres of property. The Welshes sent a demand letter to

the Paces in May 2012, advising them that unless they paid damages of $17,000.00, legal action would follow. The Paces did not attempt to respond to the Welshes or resolve the issue, thereby prompting the Welshes to file suit in June 2012. In said petition, the Welshes not only sought property damages, but also prayed for damages for mental anguish and inconvenience, attorney fees, and court costs.

The matter proceeded to a bench trial on April 23, 2013. Following post-trial briefing by both sides, the trial court issued written reasons for judgment on July 15, 2013, in favor of the Paces. A judgment[1] was signed by the trial court on July 29, 2013, providing, in pertinent part, as follows: "**IT IS ORDERED, ADJUDGED AND DECREED** that Judgment is rendered herein, dismissing **FRANK TIPPIT PACE** and **BETH BOURGEOIS PACE** from this action, with prejudice, with all costs assessed to plaintiffs." The Welshes timely filed a motion for new trial, which was denied by the trial court.

The Welshes now appeal, assigning the following specifications of error for our review:

> 1. The trial court committed manifest legal error in failing to find Mr. and Mrs. Pace, as property owners, liable for the damages incurred on the Welsh property as a result of activities that were authorized and emanated from Mr. and Mrs. Pace's property.
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> 2. The trial court committed manifest legal error in failing to recognize and applying the doctrine of *res ispa [sic] loquitur* against Mr. and Mrs. Pace for damages caused on the property of Mr. and Mrs. Welsh.
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> 3. The trial court committed manifest legal error in failing to properly assess damages against Mr. and Mrs. Pace.

The Welshes contend that they are entitled to a *de novo* review of the trial court ruling based on the trial court's legal error in failing to apply the provisions of La. Civ.

[1] There was a prior judgment signed in this matter on July 24, 2013, that was later vacated and set aside in the October 8, 2013 judgment denying the Welshes' motion for new trial. The July 24, 2013 judgment was identical to the July 29, 2013 judgment except that the dismissal in the prior judgment was without prejudice.

Code arts. 667[2] and 2315[3] and the doctrine of *res ipsa loquitur* to the facts of this case. Moreover, the Welshes maintain that they are entitled to treble damages and attorney fees as provided for in La. R.S. 3:4278.1,[4] in addition to the actual damages proven at trial. We find no merit to the Welshes' arguments on appeal.

During the trial on April 23, 2013, the trial court heard testimony concerning the work done to build the dirt track by Kaine, Kody, and Ryan and the alleged damage done to the Welsh tract by the bulldozer being operated, without the permission of the Welshes, on the property. After considering all of the evidence before it, the trial court found that although it was clear that Kaine, Ryan, and perhaps Kody had "encroached on a portion of the [Welshes'] land, causing fairly extensive damage through unauthorized bulldozer work," there was "no legal theory under which [the Paces] can be held legally accountable for a trespass and damage caused by others." In dismissing the Welshes' cause of action, the trial court offered the following written reasons for judgment:

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[2] Louisiana Civil Code article 667 provides as follows:

> Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

[3] Louisiana Civil Code article 2315(A) provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

[4] Louisiana Revised Statutes 3:4278.1 provides, in pertinent part, as follows:

> A. (1) It shall be unlawful for any person to cut, fell, destroy, remove, or to divert for sale or use, any trees, or to authorize or direct his agent or employee to cut, fell, destroy, remove, or to divert for sale or use, any trees, growing or lying on the land of another, without the consent of, or in accordance with the direction of, the owner or legal possessor, or in accordance with specific terms of a legal contract or agreement.
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> . . . .
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> B. Whoever willfully and intentionally violates the provisions of Subsection A of this Section shall be liable to the owner, co-owner, co-heir, or legal possessor of the trees for civil damages in the amount of three times the fair market value of the trees cut, felled, destroyed, removed, or diverted, plus reasonable attorney fees and costs.

This matter was before the Court for trial on April 23, 2013. Plaintiffs, Mr. and Mrs. Welsh, filed suit against a neighboring landowner to recover for damages sustained to their property. Plaintiffs allege that defendants, either individually or through their agents, intentionally trespassed onto Plaintiffs' property with a bulldozer and/or other heavy equipment, thereby causing extensive damage to their property. The issue for the Court's consideration is whether the defendants, Mr. and Mrs. Pace, can be held liable for the acts of another in clearing an area of land beyond the permission granted by Mr. Pace.

During a trial on the merits, it was established that Mr. Pace gave permission to his son, Kaine Pace, and a friend of his son, Ryan Alexander, to build a track for motorcycles and/or all-terrain vehicles on the front of his property. The motorcycle track was being built for the pleasure and enjoyment of Kaine Pace and his friends. The track was constructed without any oversight by Mr. Pace other than the initial permission to build the [track] on the front of his property. The defendant did not design plans for the [track], perform any of the work involved, or supervise construction of the track in any way. Further, the defendant never authorized or directed construction of the track on the property of another. In the course of construction of the track, it was clear from the testimony that Kaine Pace, Ryan Alexander, and perhaps Kaine Pace's brother encroached on a portion of the Plaintiffs' land, causing fairly extensive damage through unauthorized bulldozer work.

The Court can find no legal theory under which Mr. Pace and/or Mrs. Pace can be held legally accountable for a trespass and damage caused by others. Unaccountably, Kaine Pace, Ryan Alexander, and Kaine Pace's brother were not sued for the damages which, according to the testimony, they caused to the Plaintiffs' property. This Court does not have the authority to render judgment against individuals who are not parties to this suit.

Therefore,

IT IS ORDERED that this cause be Dismissed.

It is well settled that a reviewing court may not disturb the factual findings of the trier of fact in the absence of manifest error. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989); **Arceneaux v. Domingue**, 365 So.2d 1330, 1333 (La. 1978). In **Arceneaux**, the Louisiana Supreme Court set forth a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trial court, and (2) the appellate court must further determine that the record establishes the finding is not clearly wrong or manifestly erroneous. **Arceneaux**, 365 So.2d at 1333. Under the manifest error-clearly wrong standard, the reviewing court does not decide whether the trier of fact was right or wrong, but

whether the fact finder's conclusion was a reasonable one. **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993).

In reviewing this matter, we find the trial court very closely and carefully considered all of the evidence presented. Likewise, we have thoroughly reviewed the documentary evidence and applicable law and find that the record does not demonstrate that the decision of the trial court was manifestly erroneous. We conclude that the evidence in the record reasonably supports a finding that the Welshes failed in their burden of proving liability on the part of the Paces for the actions of Kaine, Kody, and Ryan. It is clear from the record that Mr. Pace never gave the young men permission to perform any work or construction on the Welsh tract. Not only is the evidence overwhelmingly in support of the trial court's conclusion, but also the trial court's reasonable evaluations of credibility and reasonable inferences of fact must be afforded great deference. The trial court did not err in dismissing the Paces from this action with prejudice. The Welshes' arguments on appeal to the contrary are without merit. The July 29, 2013 judgment of the trial court is affirmed. All costs associated with this appeal are assessed against plaintiffs-appellants, James H. Welsh and Veronica Welsh.

AFFIRMED.